



**Building and Development Tribunals**

**Queensland Government**

Department of **Local Government and Planning**

**APPEAL**  
*Integrated Planning Act 1997*

**File No. 03-05-003**

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**BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Assessment Manager:** Maroochy Shire Council

**Site Address:** *withheld* – “the subject site”

**Applicant:** *withheld*

**Nature of Appeal**

Appeal under Section 21 of the Standard Building Regulation 1993 against the decision of the Maroochy Shire Council to refuse an application for relaxation of siting requirements on land described as *withheld* and situated at “the subject site”.

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**Date and Place of Hearing:** 10:00am on Tuesday 1<sup>st</sup> February 2005  
at “the subject site”

**Tribunal:** Mr Chris Schomburgk

**Present:** Mr Grant Walters – Maroochy Shire Council Representative;  
*withheld* – applicant  
*withheld* – building certifier  
*withheld* – draftsman for the applicant  
*withheld* – architect for the neighbour at *withheld*

**Decision:**

The decision of the Maroochy Shire Council as contained in its written Decision Notice dated 16<sup>th</sup> December 2004, to refuse an application for relaxation of the side boundary setback is **upheld and the application is refused.**

**Material Considered**

The material considered in arriving at this decision comprises:

- The application and supporting plans and documentation;
- Additional material provided to the Council during its assessment;
- The relevant provisions of the Town Planning Scheme for Maroochy Shire Council;
- The Queensland Development Code;

- Verbal submissions from the Applicants and Council's Representative;
- Additional plans provided at the hearing by the applicant and his draftsman;
- Council's Decision by its letter dated 16<sup>th</sup> December 2004;
- My own site inspections and observations; and
- The Integrated Planning Act 1997.

### **Findings of Fact**

I make the following findings of fact:

- The site comprises Lot 3 and 4 on *withheld*, with frontage to *withheld* at Buderim.
- The locality comprises single detached homes, many of which enjoy spectacular views northwards across the Maroochy River and up to Mt Coolum.
- The subject site is the amalgamation of two large allotments. A large home was recently built on "the subject site" and the subject of this appeal is the extensions to that home onto Lot 3.
- The subject site is steep, sloping downwards away from the road to the north. Dispute has arisen about the definition of "natural ground level" as the base for calculating building height in this case, with both parties (the applicant and the neighbour) providing survey plans to show the natural ground level prior to construction.
- The subject building is partly completed and will comprise two levels above ground, with a basement level mostly below ground.
- The building has a large, relatively blank wall along its western boundary, which abuts the home of *withheld*, represented at this appeal by *withheld*, an architect.
- The history of this application is that a Preliminary Approval for boundary siting and relaxation was granted by the Council in November 2003. That approval included a condition that the design of the western wall be modified "*to reduce the extent of the encroachment*".
- A private certifier acting for the applicant has sought approval of amended plans that show a proposed modification of the design of this western wall. Council, in its letter of 16<sup>th</sup> December 2004 has advised that the proposed modification is not acceptable in satisfying the condition of the Preliminary Approval. That decision by Council to not accept the modifications is the subject of this appeal.
- The western wall is long and high relative to other buildings in the locality. Council, in its Preliminary Approval, has agreed to relax parts of the wall that do not comply with the relevant Code in Maroochy Plan 2000 (the Council's Planning Scheme) but not all of that wall. This appeal relates only to that part of the wall that Council has not approved for relaxation.
- The neighbour, through its architect, has had a long involvement in this matter and has sought legal advice as to Council's conduct of the matter to date. I have been provided with some of that advice. A significant issue for the neighbour is whether the application should have required impact assessment, rather than code assessment, because of the height of the building.
- There is debate among the parties as to the actual height of the western wall because of the ambiguity of the natural ground level as defined in the Planning Scheme.
- This appeal is, however, against the decision of the Council in its letter of 16<sup>th</sup> December 2004. I do not believe that I have jurisdiction to consider the wider matter of the type of assessment that the original application required. Recourse in that regard is open to the neighbour (or any other third party) through the declaratory provisions in the Integrated Planning Act 1997 ("IPA") and I note that the legal advice provide by the neighbour's architect shows an intention to pursue that avenue.
- The relevant Code for assessment of this application is the *Code for Development on Steep or Unstable Land* in Maroochy Plan 2000. To the extent that certain provisions of this Code may differ from the Queensland Development Code, the Planning Scheme Code is given precedent.

- The Planning Scheme has a diagrammatic formula for the height of buildings relative to the setback from side boundaries (Figure 2.1.4(a) of the Code). The proposed building does not comply with that formula except in one or two points, whereas the formula is to apply for the entire length of any side wall. Council has granted a relaxation of this formula for most of the western wall.
- The formula in this Figure is part of the Acceptable Solution A1.6.1 for Performance Criteria P1 and P2. The Performance Criteria are:
  - P1 – development must be designed, sited and erected to respect and be visually integrated into the streetscape and the natural surroundings whilst ensuring ... development occurs on less steep parts of the site that do not unacceptably increase the visibility of the buildings from adjacent areas...*
  - P2 – Buildings ... must be designed and sited to minimise adverse impacts on amenity of neighbouring sites with regard to ensuring acceptable:*
    - *natural light and ventilation*
    - *views and outlook*
    - *privacy*
- In essence, Council has already allowed considerable relaxation of the western wall, but has “drawn the line” at the north western corner, requiring a view line from the neighbour’s house to remain unhindered. The proposed modification plans still intrude into that view line, chosen by the Council (albeit arbitrarily, but reasonably) as a line of horizontal angle of 45<sup>0</sup> from the north eastern corner of the neighbour’s house.
- Some discussion occurred on site about possible compromises, but I am not satisfied that both parties (the applicant or the neighbour) will fully accept any of the compromises offered by the Council.
- The standing of the neighbour in this appeal is a matter for legal decision but, in my opinion, many (but not all) of the concerns expressed by the neighbour’s architect are relevant in the assessment of the relaxation of the side boundary.

Based on my assessment of these facts, it is my decision that **the appeal is dismissed**.

**Council’s decision** to refuse the siting application for a structure within the side setback area **is upheld** and the **application is refused**:

### **Reasons for the Decision**

- The proposed western wall is a long, high, relatively blank wall that will doubtless have some degree of impact on the privacy, views and breezes for the neighbour to the west.
- Council has agreed to some degree of relaxation of the setback of this wall, but has required modification of the north western corner of the wall to minimise these impacts.
- The proposed modifications do not minimise those impacts to an acceptable degree.
- The proposed modifications to the western wall do not comply with the Acceptable Solutions in the relevant Planning Scheme Code.
- The propose modifications to the western wall do not satisfy the Performance Criteria in the Planning Scheme Code with respect to views and outlook, and privacy.
- The 45<sup>0</sup> degree line from the north eastern corner of the house to the immediate west, as proposed by the Council, is a reasonable compromise in the circumstances and no part of the

building, walls, roof, balcony or balustrade should intrude into that view line.

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**Chris Schomburgk**  
**Building and Development Tribunal General Referee**  
**Date: 4<sup>th</sup> February 2005**

## **Appeal Rights**

Section 4.1.37. of the Integrated Planning Act 1997 provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Tribunal's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

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