



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

**Appeal Number:** 3—08—044

**Applicant:** *withheld*

**Assessment Manager:** Toowoomba Regional Council

**Concurrence Agency:** n/a  
(if applicable)

**Site Address:** *withheld*—the subject site

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### Appeal

Appeal against an Enforcement Notice dated 17 June 2008 (Ref No 888784; BRP1) issued by Toowoomba Regional Council under the *Integrated Planning Act 1997* (IPA) which relates to the removal of a class 1a building within the prescribed minimum street setback at “the subject site”.

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**Date of hearing:** 11am – Wednesday, 9 July 2008

**Place of hearing:** The subject site

**Tribunal:** Dr Peter Matthews - Chair

**Present:** Applicant & Owner  
Owner  
Mr Robert Orr - Toowoomba Regional Council Representative  
Mr Ross Ford - Toowoomba Regional Council Representative

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### Decision:

The Tribunal, in accordance with Section 4.2.34 2(c) of the IPA, **sets aside** the Enforcement Notice issued by Toowoomba Regional Council to remove the Class 1a building from the required minimum street setback, as contained in its written notice No. 888784; BRP1 dated 17 June 2008. The Applicant is directed to make application for a development approval via a Private Certifier for the approval of these building works within 90 days of receiving this decision.

### Background

The property is a 700m<sup>2</sup> residential block, and is located within a Mixed Housing Precinct as per the Toowoomba Planning Scheme 2003.

The site is located on the corner of a small cul-de-sac four lots back from the corner of Luck Street. The existing single storey, slab on ground house was built in approximately 1996 and was purchased by the current owners in late 1997.

A Council officer was visiting a neighbouring property and noticed a flashing over the fence which appeared to be a pergola within the minimum boundary setback. Upon returning to Council's offices mapping was checked to confirm the existence of a structure roof on the mapping without a development approval.

Council made contact with the current owners and conducted an interview with an inspection of the property to find a class 1a structure had been erected within the minimum street setback without approval. Council then issued an Enforcement Notice to remove the building by 4pm on Friday 18 July 2008.

The Applicant lodged an appeal with the Registrar on 24 June 2008.

The Applicant noted that the building is wholly a recreational area separate from the main residence and is below the existing fence line and does not interfere with the neighbours rights or vision.

### **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' lodged with the Registrar on 24 June 2008 including grounds for appeal and correspondence accompanying the appeal.
2. Photographs of the subject property and existing neighbourhood streetscape.
3. Verbal submissions from the Applicant and his wife.
4. Verbal submissions from Council's representative.
5. Toowoomba Regional Council Enforcement Notice No. 888784; BRP1 dated 17 June 2008.
6. The *Building Act 1975*.
7. The Building Regulation 2006.
8. The Queensland Development Code Part MP 1.2.
9. The *Integrated Planning Act 1997*.
10. The Toowoomba Planning Scheme 2003.

### **Findings of Fact**

The Tribunal makes the following findings of fact:

The building in question is a Class 1a enclosed entertainment area comprising slab on ground, brick veneer construction with metal skillion roof located only approximately 200 mm from the south eastern front corner of the back yard. It is not visible from the road as it has been excavated out approximately 600 mm deep and set into the ground approximately level with the existing home, set in front of a brick retaining wall. The entire building facing the house is surrounded by timber decking.

The Applicant advised this building had slowly over a period of years developed from an outdoor uncovered entertainment area; then four columns were erected, then roofed at a later stage, then fully enclosed with a deck surrounding the building. The Applicant advised although he was aware of the requirements for building approval, as it developed slowly and was purely entertainment and not living space; he believed there was no need for a building approval.

The presentation and finish of the building was impeccable as if a builder had built the building. The Applicant advised he was a qualified Painter and his son is a Bricklayer and together they built the structure. Although not approved, the Applicant stated that he went to great lengths to ensure the structural adequacy of the building and his son installed termite barriers, therefore it appears to be constructed by competent persons and professionally done. This structure was completed approximately four years ago.

There have been no complaints or submissions by neighbours, therefore we must assume after being constructed for four years, the neighbours are not limited or concerned by this structure. Council confirmed no complaints by neighbours had been received.

### **Reasons for the Decision**

Council in its reasons for the Enforcement Notice state:

1. that building work being a class 1a building which is assessable development under Schedule 8, Part 1, item 1 of the IPA has been constructed without a development permit for the building work; and
2. within the prescribed minimum road boundary setbacks under the provisions of Part MP1.2 A1 of the Queensland Development Code.

#### Item 1

The Applicant has confirmed in his submission that “no approvals have been applied for” as he believed it was not necessary as mentioned above. The Tribunal believes that this was not an intentional disregard for the legislation, but a misinformed view of the situation.

#### Item 2

The **Performance Criteria** of buildings and structures under the QDC Part MP 1.2 P1 is as follows:

“The location of a building or *structure* facilitates an acceptable streetscape, appropriate for –

- the bulk of the building or *structure*; and
- the road boundary setbacks of neighbouring buildings or *structure*; and
- the outlook and views of neighbouring residents; and
- nuisance and safety to the public.”

(QDC, Part MP 1.2-Design & Siting Standard for Single Detached Housing, P1, p6)

The location of this structure on site is the only location available to the rear of the property due to a garage to the rear of the property and the lot being on a corner of a cul-de-sac. There are no areas remaining on the lot where this structure could have been erected within the building envelope and maintain boundary clearances.

**Dr Peter Matthews**  
**Building and Development Tribunal Chair**  
**22 July 2008**

## **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:

The Registrar of Building and Development Tribunals  
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