



APPEAL
Integrated Planning Act 1997

File No. 3/07/037

BUILDING AND DEVELOPMENT TRIBUNAL – DECISION

Assessment Manager: Cairns City Council
Site Address: *withheld*-“the subject site”
Appellant: *withheld*

Nature of Appeal:

Appeal under Chapter 4 of the *Integrated Planning Act 1997* against a decision of the Cairns City Council to refuse a Development Application (No: 2007/1802) requesting siting dispensation for a dwelling on “the subject site”.

Date and Place of Hearing: Tuesday 3rd July 2007 at 9.00 am
Tribunal: Nigel Daniels
Present: Applicants
Reuben Thomas - All Construction Approvals – Certifier;
Jayne Formby - Cairns City Council representative;
Laurie Phipps - Cairns City Council representative;
Steve Sargent - Cairns City Council representative; and
John Evans - Cairns City Council representative.

Decision:

Under the provisions of the *Integrated Planning Act 1997*, section 4.2.34, the Tribunal **confirms the decision appealed against**, as made by the Cairns City Council

Background:

The applicant is in the process of constructing a dwelling at *withheld* under a development permit for building work (building permit) issued by private building certifier All Construction Approvals.

As a result of an incorrect set-out, construction had commenced and advanced at distances from the side boundary less than those prescribed as alternative provisions under the Cairns Plan House Code, applicable under the provisions of the *Building Act 1975*, Section 33.

Subsequently, an application was made to the Cairns City Council for approval to construct the dwelling at the distances from the side boundary as already established by the construction completed so far.

The application to the Council was made under the provisions of the *Integrated Planning Regulation 1998*, Schedule 2, which provides that the Council is a concurrence referral agency for such approvals. Council refused the application.

Material Considered:

The material considered in arriving at this decision include:

- Form 10 – Building and Development Tribunals Appeal Notice from the applicant and material attached to the Notice;
- Verbal submissions made at the hearing by the applicant and attendees on behalf of the applicant;
- Verbal submissions by the Council representatives at the hearing;
- The *Building Act 1975*;
- The *Building Regulation 2006*;
- The *Cairns Plan House Code*, alternative provisions;
- The *Integrated Planning Act 1997*; and
- The *Integrated Planning Regulation 1998*.

Reasons for the Decision:

Compliance with the performance criteria of the SBR Alternative Provisions as contained in the Cairns Plan 4.7.12 House Code, P1, P2 and P4, has not been demonstrated.

The first four of Council's reasons for refusal are reasonable and relevant (with the exception that the text in the fourth reason should read "boundary clearance" in lieu of "boundary setback"). The fifth reason is Council's conclusion rather than a reason. .

The requested approval for siting, if approved, would result in conditions on the subject allotment and potentially on the neighbouring allotment, which are inconsistent with the purpose and performance criteria of the Cairns Plan House code, and would result in amenity standards less than those anticipated by those performance criteria.

The standards appropriate to small lots and/or appropriate to lots on which a building envelope applies can not be assumed as appropriate or relevant to lots to which the Cairns Plan House Code applies.

Findings of Fact

1. **Site conditions:** Evidence given at the hearing indicated that the site is reasonably level sufficiently not to influence the siting of the dwelling.

2. **Applicable code:** The *Building Act 1975* in Section 33 provides that a planning scheme may include alternative provisions that are alternative or different to the Queensland Development Code (QDC) boundary clearance and site cover provisions. The alternative provisions take precedence over the QDC provisions. The QDC boundary and site cover provisions only apply to the extent the alternative provisions do not apply to the work. The Cairns Plan, in its House Code does contain such alternative provisions.
3. **Relevance of provisions for other types of developments:** Developments on small lots and lots on which building envelopes apply must comply with standards which permit lesser boundary clearance distances than are acceptable under the Cairns Plan House Code (CPHC) alternative provisions. It can not be assumed that those standards will achieve the performance criteria required by the CPHC alternative provisions. The different standards eventually require different performance outcomes and serve to indicate to designers and to owners, levels of amenity that they can expect from their own and neighbouring development.
4. **Terms "setback" and "boundary clearance":** The definition of "setback" in the Cairns Planning Scheme does not apply in this case. Consequently, boundary clearance distances to side and rear boundaries are measured to the outermost projection (in this case the eaves) and not to the walls. The Cairns Planning Scheme defines "setback" which does not appear in QDC Part 12. This makes a difference for measurements:
 - to the wall where the Cairns Planning Scheme uses the term "setback;" as for road boundary setback; compared with
 - the term "boundary clearance," also used in the Cairns Planning Scheme, but defined in Part 12 of the QDC, where measurements must be made to the outermost projection.

For distances from side and rear boundaries, the Cairns Planning Scheme uses the term "boundary clearances".

5. **Boundary re-alignment:** Although this Tribunal can not order that a boundary re-alignment must be made, the Tribunal does strongly recommend that consideration be given to a boundary re-alignment which will allow the dwelling, when completed, to be at complying distances from the boundary. The neighbouring dwelling (not commenced at the time of the hearing) may be sited to achieve complying distances from the new boundary.

Nigel Daniels
Building and Development Tribunal General Referee
Date: 12 July 2007

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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