



Building and Development Tribunals

Queensland Government

Department of Local Government and Planning

APPEAL
Integrated Planning Act 1997

File No. 03-07-035

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Appellant: *withheld*

Assessment Manager: **Brisbane City Council**

Subject Site: *withheld*-“the subject site”

Nature of Appeal

Appeal under the *Integrated Planning Act 1997* (IPA) Chapter 4 section 4.2.9 (1) (a) against the decision of the Assessment Manager to refuse a development application to vary the Acceptable Solution boundary clearance and site cover provisions of Part 12 of the Queensland Development Code (QDC) for building work at the subject site, namely-

- 800mm road boundary clearance to a roof over garage in lieu of 6000mm;
- 1000mm road boundary clearance to balustrade and deck in lieu of 6000mm;
- Zero road boundary clearance to garage and bin storage in lieu of 6000mm;
- 2200mm fence height in lieu of 2000mm;
- 1000mm side boundary clearance to balconies and windows in lieu of 2000mm.

Date and Place of Hearing: 9:00 am Wednesday 27th June at
“the subject site”

Tribunal: Warren Bolton – Chairperson
John Panaretos – Member

Present: Applicant / Owner;
Owner;
Greg Kranz – Brisbane City Council representative;
Hugh Wiseman – Brisbane City Council representative.

Decision:

The decision of the Assessment Manager of the 25 May 2007 is **set aside** and replaced with the following-

The boundary clearance and site cover provisions of the development as reflected in development permit No. 20051569 issued by Caboolture Building Approvals namely-

- 1000mm road boundary clearance to balustrade and deck in lieu of 6000mm;
- Zero road boundary clearance to garage and bin storage in lieu of 6000mm;
- 1000mm side boundary clearance to balconies and windows in lieu of 2000mm;
- 2200mm fence height in lieu of 2000mm

are approved; and the

- 800mm road boundary clearance to a roof over garage in lieu of 6000mm **is refused.**

Material Considered

The material considered in arriving at this decision comprises:

- ‘Form 10’ – Building and Development Tribunals Appeal Notice and supporting documents;
- Submission from applicant and owner;
- Submission from Brisbane City Council;
- The *Building Act 1975*;
- The *Building Regulation 2006*;
- The *Integrated Planning Act 1997*;
- The Building Code of Australia;
- Part 12 of the Queensland Development Code; and
- The Development permit - No. 20051569.

Background

On or about July 2005 the Appellant undertook consultation with their neighbours regarding a proposal to undertake development for building work on the subject site. The consultation was in the format prescribed at that time by the Assessment Manager’s Siting Variation (Relaxation) Application process.

Subsequent to the consultation, the Appellant lodged on or about 8 August 2005 an application for a development permit with Caboolture Building Approvals to obtain a development permit to undertake building work on the subject site. The development was for renovations and extensions to the existing dwelling (Class 1a) and car garage (Class 10) plus adding a swimming pool (Class 10) (the subject development).

The development application was subsequently approved.

At the time the approval was issued, the plans that formed part of the common materials of the approval indicated siting for building work that was not in accordance with the Acceptable Solution provisions of Part 12 of the QDC. In such circumstances advice was required from the relevant local government as to whether or not the building work could be approved under the Performance Criteria of the QDC. The law at the time provided that a private building certifier could not issue a development permit for the building work until such advice was received.

The development application was approved in the absence of such advice.

An officer of the local council subsequently visited the subject site sometime after the issues of the development permit and held discussions with the Appellant’s, bringing to the Appellant’s attention, concerns held by the Council as to compliance of the subject development with development law and in particular compliance with the QDC.

As a consequence of that visit the Appellant lodged on or about the 29 March 2007 an application to the Assessment Manager for siting relaxation for building work for the building work that was the subject of the earlier approval.

At the time of making the subsequent application the regulations that existed in August 2005 had been repealed and the administrative law in relation to operation of the QDC had been amended by the introduction of the *Building Regulation 2006* (the new legislation). The new legislation changed local government from advice agencies to concurrence agencies and removed appeal rights that existed under the earlier legislation against the advice of the local government, as under the new legislation these appeal rights would exist upon the issue of a decision notice by an assessment manager.

Findings of Fact

- There is no evidence that in 2005 an *Application for Siting Variation (Relaxation)* was lodged with the Assessment Manager.
- On the 8 August 2005 Caboolture Building Approvals was engaged as a private building certification entity and under the authority of Trevor McLean issued on the 23 September 2005 Development Permit No. 20051569 (the approval) for the subject development.
- Trevor McLean (the certifier) is a building certifier licensed by the Queensland Building Services Authority and holds license No. A3669 as Assistant Building Certifier and is endorsed to perform private building certifier functions.
- There is no evidence that advice, required by building law at the time the approval was issued, had been provided by the relevant local government.
- On the 29 March 2007 (the date of application) the Appellant lodged with the Assessment Manager a development application for building work for assessment of the boundary clearance and site cover provisions of the QDC. (the subsequent application)
- On 25 May 2007 the Assessment Manager provided the Appellant with a decision on the subsequent application. That decision refused the application.

In the decision the Assessment Manager made observations about the siting distances in the subsequent application in relation to those required by the Acceptable Solutions provisions of the QDC and cited failure to satisfy the Performance Criteria P1 of the QDC as the reason for refusal.

The Assessment Manager at the hearing also raised issues of compliance with privacy requirements of the QDC.

- The buildings and structure, inspected at the hearing, reflect the extent of the *building work* approved under the approval.
- The development, at the time of issue of the approval on the subject site was self assessable development under the Assessment Manager's planning scheme (the scheme).

Reasons for the Decision

- While the Tribunal is not required to understand the reasoning behind the subsequent application, the Tribunal makes the observation that at the 23 September 2005 (the relevant time), the approval issued certified compliance with the relevant legislation.

At the time of the hearing that approval remains in place.

The subsequent application by the Appellant appears to seek this same outcome.

- The subsequent application made to the Assessment Manager was not properly made under the relevant legislation. However, section 3.2.1 of IPA subsection (9) provides that if an assessment manager receives, and after consideration accepts, an application that is not a properly made application, the application is taken to be a properly made application.
- As the Assessment Manager received, accepted and decided the application, that application became a properly made development application under the IPA.
- The current building legislation provides that the provisions of the QDC, relevant to the subject development at the time of the subsequent application, were Performance Criteria P1, P2, P3, and P6.
- **P1** provides that the **location** of a building or a structure facilitates an **acceptable streetscape**. There are 4 elements when considering that location. They are-
 - (a) *the bulk of the building or structure;*
 - (b) *the road boundary setback of the neighbours;*
 - (c) *the outlook and view of the neighbours;*
 - (d) *nuisance and safety to the public.*

- **Bulk of the building or structure**

The subject development has as its southern neighbour *withheld* (the nursing home) a Class 9b, two storey, brick building that extends for the remainder of the block and presents significant bulk to the streetscape for this residential block, while to the north is a lowset brick (Class 1a) dwelling.

The core of the Class 1a portion of the subject development is aligned closely to the road boundary clearance of the nursing home and while the Class 1a portion of the subject development is higher than the nursing home, this in part, reflects the contour of the land, rising as it does toward the subject development from the nursing home.

The Class 1a portion of the subject development is considerably larger than the lowset brick dwelling of the down hill northern neighbour.

The expansion of the former garage and construction of the bin store, which encroaches on the prescribed road boundary clearance is largely positioned below the natural ground line. The change to the impact caused by the bulk of this building is incremental. The swimming pool is mostly inground and adds little to the bulk of the development.

In view of the bulk of buildings in the immediate vicinity of the subject site the bulk of the subject development as detailed in the approval satisfies the performance requirements of P1 (a).

- **The road boundary setback of the neighbours**

The dwelling located to the north of the subject development has a road boundary clearance to that street of approximately 1 metre. The subject development has a road boundary setback for -

- the Class 1a portion – 5.9 metres;
- the car garage – zero;
- the awning over the garage roof - 0.5 metres;
- the swimming pool - 1.5 metres.

Given the road boundary clearance to the Class 1a building to the north is approximately 1 metre the location of the Class 1a portion of the subject development at 5.9 metres and the garage, which is largely below natural ground level, at zero road boundary clearance satisfies the performance requirements of P1 (b).

The swimming pool at 1.5 metres complies with the Acceptable Solutions of A1 (D) (i) of the QDC.

The awning over the garage roof at 0.5 metres clearance from the road alignment and well above natural ground height, conflicts with neighbouring setbacks, thus emphasising the house in the streetscape and therefore can not satisfy Performance Criteria P1 (b).

- **The outlook and view of the neighbours**

The nursing home to the south has an outlook that is predominantly to the west into *withheld* while the dwelling to the north of the subject development has been designed and constructed to present principally to the north over *withheld* towards the city, with however a minor aspect to *withheld*.

The presence of the awning over the garage terrace would in the Tribunal's view impede the view of the neighbours and to that extent would not satisfy the performance requirements of P1 (c).

- **Nuisance and safety to the public**

Questions of nuisance and public safety are limited to the restricted sightlines to oncoming pedestrians and road traffic in *withheld* resulting from the zero road boundary clearance of the garage and the necessity to reverse across a public footpath and on to the carriageway of the road by vehicles housed in the garage.

While no evidence was presented to the Tribunal in relation to the traffic flows in the street, during the site inspection, it was noted that the traffic in the street was not considered to be such that this should present as a significant risk to public safety that would warrant prohibition of siting of the garage. It was also noted that the subject site was at the crest of the rise in the Street providing good visibility in both directions.

The subject development with appropriate consideration would satisfy the performance requirements of P1 (e).

- **P2 provides that buildings or structures-**

- (a) *provide adequate daylight and ventilation to habitable rooms;*
- (b) *allow adequate light and ventilation to habitable rooms of building on adjoining lots;*
- (c) *do not adversely impact on amenity and privacy of residents on adjoining lots.*

- **Provide adequate daylight and ventilation to habitable rooms**

The subject development provides adequate daylight and ventilation to habitable rooms to satisfy P2 (a).

- **Allow adequate light and ventilation to habitable rooms of building on adjoining lots**

The subject development does not prejudice adequate light and ventilation to habitable rooms of building on adjoining lots and thus satisfies P2 (b).

- **Does not adversely impact on amenity and privacy of residents on adjoining lots**

The subject development contains a building of significant elevation. Building legislation including the QDC does not impose any restriction on the height of a residential building on this site. The Assessment Manager's scheme contains provisions that residential buildings below 8.5 metres in height are self assessable development.

The Assessment Manager in its submission did not identify any conflict with the Assessment Manager's planning scheme for the subject development.

The design of the Class 1a part of the development has an upper north facing balcony approximately 5 metre above average ground level that overlooks the dwelling to the north of the development.

The Acceptable Solution for the P2 (c) provides that a building of the elevation of the Class 1a portion of the subject development, has side boundary clearance of 1.5 metres for the portion below 4.5 metres in height, 2.0 metres for portions from 4.5 to 7.5 metres and 2.5 metres for the remainder of the 8.5 metres height.

The Performance Criterion clearly does not envisage absolute privacy by way of visual intrusion but more a level of privacy that could reasonably be expected on a residential lot.

The Acceptable Solution provides that for buildings below 4.5 metres in height, adequate privacy could be achieved by a separation distance of 3 metres between the residential portions of adjoining residential buildings.

The horizontal distance between the residential portion of the subject development and the dwelling to the north is stated at approximately 12 metres.

The upper balcony does not comply with the Acceptable Solution for the side boundary clearance by approximately 1 metre. The side boundary clearance requirement under the Building Code of Australia for fire protection for a Class 1a building is 900mm.

The side boundary clearance provided does therefore satisfy fire safety concerns. Given the separation distance from the balcony to the adjoining dwelling to the north is a distance well in excess of 3 metres and a little in excess of 12 metres the requirement of the privacy component of Performance Criterion P2 (c) is also achieved.

Although the elevation of the Class 1a portion of the subject development has a maximum reach of 8.5 metres above natural ground at its highset point, the aspect of the site is such that shadowing will not adversely affect the amenity of the adjoining dwelling. Producing, as it will, maximum shade to the adjoining dwelling during the summer months and little if any during winter.

The suburb is observed as hilly and a number of dwellings in the neighbourhood are quite prestigious and well elevated by the contour of the land. The existence of such building form in this locality does not detract from the amenity of the neighbourhood of this area and the building form of the subject development likewise will not compromise the amenity of this neighbourhood

A swimming pool setback less than 1500mm from the side boundary is required by the Acceptable Solution provisions to have a solid wall or fence at least 1.8 metres high above finished ground level and constructed between the water edges of the pool and the side boundary to prevent water entry onto the adjoining property. However, given the setback of 1000mm and that the area on the adjoining property corresponding to the location of the pool is a large commercial driveway, the absence of a splash pool barriers will not offend the Performance Criteria P2 (c).

- **P3 requires that adequate open space is provided for recreation, service facilities and landscaping.**

The subject development provides open space for recreation, service facilities and landscaping to satisfy P3.

- **P6 The location of a *building* or *structure* facilitates normal *building* maintenance.**

The subject development is designed to ensure that the location of the *building* and *structure* facilitates normal *building* maintenance to satisfy P6.

Warren Bolton - Chairperson
Building and Development Tribunal General Referee
Date: 18 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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