



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 3/06/084

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Toowoomba City Council

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

Applicant: *Withheld*

Nature of Appeal

The appeal is against the decision of the Toowoomba City Council not to grant a siting variation for a class 1a Entertainment Pavilion already existing on land at “the subject site”.

Council considers that:-

- 1 The location of the structure on the corner property creates a high visual impact on the streetscape.
 - 2 The location of the structure does not facilitate an acceptable streetscape when considering the bulk of the building, the setbacks of neighbouring residents and the outlook and views of neighbouring residents.
 - 3 The location of the structure as a class 1a entertainment pavilion does not meet the performance criteria or comply with the acceptable solutions of Part 12 of the Queensland Development Code.
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Date and Place of Hearing: 10.30 am Monday 11 September 2006
At “the subject site”

Tribunal: Mr L F Blumkie Tribunal

Present: Applicant / Owner
Mr R Orr Toowoomba City Council representative
Mr L Ross Ford Toowoomba City Council representative
Mr L Blumkie Tribunal

Decision

The Tribunal, in accordance with Section 4.2.34 (2) (b) of the *Integrated Planning Act 1997*, **changes the decision** of the Toowoomba City Council, dated 6 September 2006, **by allowing the structure to remain in its current location and reclassifies the existing structure from a Class 10a carport to a Class 1a building subject to the structure remaining 100% open at all times.**

Background

The site is a corner allotment located on the corner of “withheld” Street and “withheld” Drive. The Council representative advised that Council considered “withheld” Street as the principal street frontage.

Approval was given to a spec builder to erect a single storey class 1 building. The Class 1 building included undercover parking for 2 vehicles. Tandem parking is available on site at the rear of the residence for a further 2 vehicles and also 2 vehicles on the driveway at the front of the residence.

A further approval was given by a private certifier on 25 April 2003 for a class 10a freestanding carport (approximately 3.5m x 5m) to be erected within the 6m setback of “withheld” Street. It is located about 300mm in from the street alignment and approximately half way along the street frontage. It is not attached to the Class 1a building.

At that time, it was an 'as of right' under the *Standard Building Regulation 1993* to obtain approval for an open carport within the street setback subject to other conditions being satisfied.

The carport was completed and used in the promotions for the sale of the property, by the builder, as an entertainment pavilion. The applicants bought the property on the understanding that the structure could be used as an entertainment pavilion.

Vehicular access is currently provided to the carport, via an opening in the 1.8m solid fence at the neighbouring end of the “withheld” Street frontage.

The applicants have never used the carport as a covering for a vehicle and have no intention of using it as a carport. It currently has a table and chairs for outdoor entertainment.

On the 4 July 2006 approval was given by a private certifier to construct a swimming pool between the residence and the “withheld” Street frontage. This approval shows the previously approved carport as a Gazebo and positions the new pool between the gazebo and the end of the residence. That is, it prohibits the current vehicular access to the carport.

As required by Building Legislation, a copy of the pool approval was forwarded to the Toowoomba City Council. On receiving the approval Council realized that the new pool would prohibit vehicular access to the previously approved carport.

An officer (Mr Robert Orr) inspected the property and, upon questioning by the owners, advised that, if the pool were constructed as shown in the approval, a new access gate would need to be provided to the carport.

The owners advised that the property had been bought on the builder's advice, that the structure was

an entertainment pavilion and that it would never be used as a carport and a new gate would therefore not be necessary.

The owners were advised to make application to Council, to make lawful the use of the carport as an entertainment pavilion.

The applicant went to Toowoomba City Council chambers and advised (at the hearing) that Mr David Krumins (Manager Building) had assisted him in documenting the application.

The form was completed, (with the assistance of Mr Krumins) requesting a siting variation and was accompanied by a covering letter requesting that Council "..... vary the siting restrictions and reclassify the structure as a class 1a. This will allow the structure to be legally used pavilion."

Council refused the application for a siting variation for a carport (not a Class 1a as requested) on the 17 August 2006.

An appeal was lodged with the Registrar on the 28 August 2006.

After lodging of the appeal, the original decision of Council dated 17 August 2006 was corrected by Council on 6 September 2006 to advise that the structure was incorrectly described as a carport in the original decision and should have been described as a Class 1a structure.

Material Considered

In coming to a decision, consideration was given to the following material: -

1. Drawings accompanying the application;
2. Copy of the Council Decisions dated 17 August 2006 and 6 September 2006;
3. Copy of the Appeal Notice dated 28 September 2006;
4. Verbal submissions from the applicants;
5. Verbal submissions from the Toowoomba City Council representatives;
6. The *Standard Building Regulation 1993* (SBR);
7. The *Integrated Planning Act 1997*;
8. The Queensland Development Code (QDC);
9. Building Codes Queensland News Flash; and
10. Inspection of the immediate neighbourhood.

Findings of Fact

A *Building Code of Australia Volume 2 (BCA)*

Part 1.3 of the BCA classifies buildings.

A Class 10a is defined as a non-habitable building being a private garage, carport, shed or the like; etc

Habitable is defined in the pocket dictionary as "capable of being lived in".

A Class 1a is defined as a single dwelling being a - (i) a detached house; etc

B Standard Building Regulation 1993 (SBR)

The existing class10a carport approved in April 2003 within the street setback was, at that time, an 'as of right' approval under *Standard Building Regulation 1993*.

The SBR siting requirements was amended some time after April 2003 and called up the Queensland Development Code (QDC) as the new requirements. Part 12 of the Code establishes Performance Criteria and Acceptable Solutions for the design and siting of buildings and structures on lots 450m² and over.

C Queensland Development Code (QDC)

The QDC defines carport as "a class 10a building, other than a garage, providing covered vehicular parking.

D Building codes Queensland - News Flash - Issue: 17 dated: 14.12.98 and News Flash Classification of Patio Roofs dated 28.03.2002.

The news flash amongst other things states that a shade structure with an impervious roof material (e.g. metal or fibre glass) should be classified as a Class 1 building irrespective of whether the structure is attached or detached from a class 1 building.

E Site

The site is a corner allotment developed with an existing class 1 building, carport, landscaping and a 1.8m high solid fence to approximately 75% of the "withheld" Street frontage.

The site has a gentle slope to the "withheld" Drive frontage.

F Development in the neighbourhood.

An inspection of the neighbourhood indicated the majority of houses were low set and there appeared to be no relaxation given to the street setbacks. The streetscape revealed most houses were set back the prescribed distance. There were numerous timber and solid fences up to 1.8m in height along the street boundaries.

One property had a timber retaining wall about 1.5m high and a 1.8m fence above the retaining wall. This wall and fence stood out and apart from the very large trees on numerous frontages was, in my opinion, the most objectionable component of the "withheld" Street streetscape.

F Existing Car accommodation

The existing development has covered lock-up car accommodation for 2 normal size vehicles and tandem parking for 2 vehicles available at the rear of the house.

The existing carport is currently capable of providing covered vehicular parking, although it has never been used as a carport.

G Council representative opinion

The Council representative was of the view that if the pool was constructed in the proposed location and an alternative suitable vehicle access was provided to the carport it could remain classified as a class 10a carport.

Reasons for the Decision

The owners advised that they have no intention of using the structure as a carport and hence, in my opinion, providing a gate to legitimize its use as a carport would be a waste of money. Providing a gate in the fence would not change the streetscape.

The carport structure is a lawful freestanding structure approved under the SBR current at the time. If the pool is proceeded with, then the current vehicular access to the existing carport structure is not available.

The definition of carport in the QDC states "providing covered vehicular parking".

One would not expect anyone who builds a carport to not have vehicular access to it, however it would appear that Qld building law does not categorically state that vehicular access must be provided to a carport.

In my opinion, after considering the definitions and information referred to above, the structure, when used as an entertainment pavilion, is a Class 1a building.

I have come to this conclusion because when used as an entertainment pavilion it is considered habitable i.e used as part of living in the residence.

The information contained in the Newsflash ISSUE 17-14.12.98 and 105-28.03.02 that a shade structure with an impervious roof is a Class 1 building, does not give any guide as to how this interpretation was determined. It makes no reference to the definitions contained in Queensland Building legislation.

However, because there may be some doubt about the above interpretations, I believe it would be reasonable to consider the existing structure/building as a Class 1a/Class 10a (carport and/or entertainment pavilion) under the current performance criteria established in the Queensland Development Code. The Tribunal, in satisfying the performance criteria (whether it be a Class 1a or Class 10a) considers the outcome to be the same and is documented as follows:-

P1 The Location of a building or structure facilitates an acceptable streetscape appropriate for-

(a) the bulk of the building or structure;

The existing structure creates an acceptable streetscape. The small gable roof structure matches the house in style, materials and colour scheme and has limited impact on the streetscape.

The allowable 1.8m high solid fence has a far greater impact on the streetscape. The bulk of large trees on numerous frontages and the bulk of the high retaining wall and fence on

another property have a far greater impact on the streetscape.

(b) the road boundary setbacks of neighbouring buildings or structure

The neighbouring property has a 6m setback to the residence and no fence. If a 1.8m solid fence was provided it would look no different to the subject property.

(c) the outlook and views of neighbouring residents

The existing structure has no detrimental affect on the outlook and views of neighbouring residents.

(d) Nuisance and safety to the public

The structure does not create a nuisance nor is it a safety hazard for the public. Traffic sight visibility lines are not affected.

P2 Buildings and structures-

(a) provide adequate daylight and ventilation to habital rooms;

The structure allows adequate daylight and ventilation to habital rooms.

(b) Allow adequate light and ventilation to habital rooms of buildings on adjoining lots.

The structure has no effect to light and ventilation to habital rooms of buildings on adjoining lots.

P3 Adequate open space is provided for recreation, service facilities and landscaping.

The structure allows for more than adequate space for recreation, service facilities and landscaping.

P4 The height of a building is not to unduly

(a) overshadow adjoining houses;

The structure does not overshadow adjoining houses.

(b) Obstruct the outlook from adjoining lots.

The structure does not obstruct the outlook from adjoining lots provided it remains open.

P5 Buildings are sited and designed to provide adequate visual privacy for neighbours.

The structure, combined with the 1.8m high solid boundary fence, when used as an

entertainment area, provides adequate visual privacy for neighbours.

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

The structure allows for normal building maintenance.

P7 The size and location of structures on corner sites provide for adequate sight lines.

The structure allows for more than adequate sight lines.

P8 Sufficient space for on-site carparking to satisfy the projected needs of residences and visitors, appropriate for-

(a) the availability for public transport; and

(b) the availability of on-street parking; and

(c) the desirability of on-street parking in respect to the streetscape; and

(d) the residents likelihood to have or need a vehicle.

Even when the structure is not available for covered parking, more than adequate parking is available as follows - 2 vehicles in the enclosed garage, 2 tandem parking at the rear of the house and 2 additional vehicles on the driveway if required for visitors. Street parking is also available.

In the opinion of the Tribunal, the existing structure, irrespective of whether it is classified as a Class 1a or Class 10a, satisfies the performance criteria under P1 and acceptable solutions A1(c)(ii) of the Queensland Development Code.

Hence, the Tribunal, in accordance with Section 4.2.34(2)(b) of the *Integrated Planning Act 1997*, changes the decision of the Toowoomba City Council, dated 6 September 2006, by allowing the structure to remain in its current location and re-classifies the existing structure from a Class 10a carport to a Class 1a building subject to the structure remaining 100% open at all times.

Leo F Blumkie
Building and Development
Tribunal
Date: 15 September 2006

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
Building Codes Queensland
Department of Local Government, Planning and Sport
PO Box 15031
CITY EAST QLD 4002
Telephone (07) 3237 0403: Facsimile (07) 32371248