



APPEAL
Integrated Planning Act 1997

File No. 3/03/047

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Hervey Bay City Council

Site Address: 83 Nissen Street Pialba

Nature of Appeal

The appeal is against the decision of the Hervey Bay City Council to impose a condition on an amenity and aesthetics approval for a removal dwelling requiring the maximum floor height above natural ground level measured at the front of the dwelling to not exceed 600mm.

The dwelling is to be located on land described as Lot 2 on RP 880105 and situated at 83 Nissen Street Pialba.

Date and Place of Hearing: 10.30am Friday 29 August 2003.
Inspection of the dwelling at Hyde & Hose, Salt Water Creek Road, Maryborough.
Inspection of the site at 83 Nissen Street Pialba.
Hearing at the Offices of the Hervey Bay City Council, 77 Tavistock Street, Torquay, Hervey Bay.

Tribunal:

Mr Phil Locke	Tribunal member
Mr Jeff Miles	Tribunal member
Mr L F Blumkie	Tribunal Chairperson

Present:

Applicant / Owner	
Mr Bob Gibson	Adviser to Applicant
Mr Steve Clarke	Hervey Bay City Council representative
Mr L Blumkie	Tribunal Chairperson
Mr Jeff Miles	Tribunal
Mr Phil Locke	Tribunal

Decision

The Tribunal, with the consent of the applicant, varies the application and changes clause 4.8 of “**SECTION 4.0 - General Conditions relating to this approval**” of the decision notice of the Hervey Bay City Council dated 31 July 2003 to read as follows:-

- 1 *The front of the dwelling is to be located approximately 13 metres from the front alignment and is to be sited with side boundary clearances generally as shown on the site plan.*
- 2 *The height of the class 1 building to the underside of the bearers when measured at the rear of the building to the lowest point of the **natural** ground level is **not** to exceed 2.2 metres. ie The clearance from slab level at ground level to underside of bearers is not to exceed 2 metres.*
- 3 *The maximum height to the underside of the bearers at the front of the building shall be 1200mm from the **finished** ground line. ie The front set back area will need to be filled, contoured and graded to enable the drive way and car port to meet the proposal as shown on the plans. In this regard, the owner shall ensure that filled areas do not alter the flow of stormwater which, may result in offsite impacts to adjoining properties.*
- 4 *Landscaping, to the front area, including the driveway, shall be indicative in scale and layout to that indicated on the plans. All landscaping to the front area is to be included as part of the development application.*
- 5 *A new colorbond roof is to be provided. It should be noted the roof lines shown on the floor plan are not accurate, the original hip roof pitch is to be maintained.*
- 6 *The colour scheme is to be generally as shown on the submitted plans.*
- 7 *If a car port is to be provided it shall have a hip roof and be sited a minimum of 900mm from the side boundary as shown on the submitted plans.*

It should be noted the Tribunal has only considered the amenity and aesthetics aspects of the preliminary application. All other conditions of the decision notice including a development permit are required to be fulfilled before undertaking building work.

Background

The appellant made a Preliminary Application to the Hervey Bay City Council on the 24 July 2003 seeking an amenity and aesthetics assessment for the relocation of a removal house to 83 Nissen Street Pialba.

Council in their decision notice dated 31 July 2003 offered no objection to relocate the dwelling subject to a number of conditions including:-

- 4.8 *The maximum floor height above natural ground level measured at the front of the dwelling shall not exceed 600mm.*

The applicant considered that such a condition was restrictive and would not satisfy his needs in relation to space required under the dwelling for parking of vehicles and general storage.

The applicant lodged an appeal with the Department of Local Government and Planning on 18 August 2003.

Material Considered

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

1. Preliminary Application dated 24 July 2003.
2. Copy of the Decision Notice dated 31 July 2003.
3. Copy of the Appeal Notice dated 18 August 2003.
4. Correspondence dated 2 September 2003 from the applicant requesting an extension of time to enable plans to be prepared.
5. Written advice from the Tribunal dated 3 September 2003 allowing an extension of time and setting out the further details required in the submission.
6. Copy of Council Resolution dated 13 May 1998.
7. Verbal submissions from the owner.
8. Verbal submissions from Mr Bob Gibson.
9. Verbal submissions from the Hervey Bay City Council representative.
10. Further written submission from the Hervey Bay City Council dated 6 October 2003.
11. Further submissions (including plans) from the applicant dated 29 September 2003.
12. The Standard Building Regulation.
13. The Integrated Planning Act.

Findings of Fact

A *Standard Building Regulation - Division 4 - Amenity and aesthetics*

Hervey Bay City Council by resolution, adopted an Amenity and Aesthetics policy under Section 50(1) of the Standard Building Regulation on the 13 May 1998.

The resolution amongst other things declared that the following categories of building must be assessed by Council for amenity and aesthetics impact:-

- (a) *Any existing dwelling or building intended to be moved to another parcel of land and reinstated and used as a dwelling, regardless of its age, place of origin or form of construction, and etc*

Section 50 (2) of the Standard Building Regulation 1993 states that applications mentioned in Section 50 (1) must be assessed by the local government for the amenity and aesthetics impact of the proposed building work.

Section 50 (3) states that the local government may refuse an application to which subsection (2) applies if the building when built would have an **extremely** adverse effect on the amenity or likely amenity of the building's neighbourhood etc.

B Integrated Planning Act – Division 6 Tribunal process for appeals - Appeal Decision

Section 4.2.34(2)(e) of the Integrated Planning Act grants power to an Amenity and Aesthetics Tribunal to vary applications with the consent of the appellant. The legislation appears not to grant power to a local government to vary applications by conditioning decision notices especially on amenity and aesthetics matters.

C Integrated Planning Act – Division 6 – Conditions

Section 3.5.30.(1) of the Integrated Planning Act states that a condition must be relevant and not unreasonable etc. The condition applied in this instance, because it relates to amenity and aesthetics (for which in the opinion of the Tribunal) the local government does have power to condition is therefore not relevant as part of the Decision Notice.

D Site

The site is vacant and the preliminary application is for a relocated class 1 building. The site falls from the front street boundary to the rear, and is rectangular in shape.

E Development in the neighbourhood.

An inspection of the neighbourhood indicated the majority of houses to be low set. It was noted 2 blocks to the right of the subject property there is a 2 storey class 1 building.

F Forms of buildings and council policy.

The local government representative was unable to provide sufficient information on the forms of buildings, which considered acceptable under council's amenity aesthetics resolution.

Reasons for the Decision

In this instance, even though the local government they considered the application would have an extremely adverse effect on the amenity of the buildings neighbourhood it approved the application with conditions.

In the opinion of the Tribunal if the local government was of this opinion it should have **refused** the application as required by Section 50 (3) of the Standard Building Regulation.

The local government did not have power to impose conditions as a result of an amenity and aesthetic assessment. The application was either:-

- 1 acceptable and therefore approved or
- 2 in **extreme** conflict and refused.

Only the Tribunal has the power to vary the application, and only then with the consent of the applicant.

The Tribunal in this instance decided to consider the appeal as though the local government had refused the application.

After considerable discussion at the hearing on the local governments' assessment of the application, it appeared the main concern was with the height of the proposal.

The council representative was unable to satisfactorily demonstrate to the Tribunal that if the maximum height of 600mm was exceeded the proposal would have an **extreme** adverse effect on the amenity of the buildings neighbourhood etc. No evidence was produced as to how this height was established.

After discussion on the applicant's requirements it was clear that applicant had not undertaken sufficient research to enable him to make decisions on the proposed development. No plans were available.

The Tribunal agreed to adjourn a decision on the appeal for a period of 4 weeks to enable the applicant to prepare detailed plans on the proposal. The details required by the Tribunal in any further submissions were documented in the Tribunals correspondence dated 3 September 2003.

Additional documents from the applicant were received by the Tribunal on the 30 September 2003. A copy was also forwarded by the applicant to the Hervey Bay City Council for written comment.

Hervey Bay City Council forwarded written comment on 6 October 2003.

After consideration of all the further submissions from both the applicant and Hervey Bay City Council, the Tribunal considered the overall shape, size, siting and height of the proposal when compared with existing developments in the neighbourhood would **not** have an **extreme** detrimental effect on the amenity and/or aesthetics of the buildings neighbourhood.

Hence, in accordance with section 4.2.34(1) of the Integrated Planning Act the Tribunal decided to vary the application and change clause 4.8 of "**SECTION 4.0 - General Conditions relating to this approval**" of the Decision Notice of the Hervey Bay City Council dated 31 July 2003 to read as follows:-

- 1 The front of the dwelling is to be located approximately 13 metres from the front alignment and is to be sited with side boundary clearances generally as shown on the site plan.*
- 2 The height of the class 1 building to the underside of the bearers when measured at the rear of the building to the lowest point of the natural ground level is not to exceed 2.2 metres. ie The clearance from slab level at ground level to underside of bearers is not to exceed 2 metres.*
- 3 The maximum height to the underside of the bearers at the front of the building shall be 1200mm from the finished ground line. ie The front set back area will need to be filled, contoured and graded to enable the drive way and car port to meet the proposal as shown on the plans. In this regard, the owner shall ensure that filled areas do not alter the flow of stormwater which, may result in offsite impacts to adjoining properties.*

- 4 *Landscaping, to the front area, including the driveway, shall be indicative in scale and layout to that indicated on the plans. All landscaping to the front area is to be included as part of the development application.*
- 5 *A new colorbond roof is to be provided. It should be noted the roof lines shown on the floor plan are not accurate, the original hip roof pitch is to be maintained.*
- 6 *The colour scheme is to be generally as shown on the submitted plans.*
- 7 *If a car port is to be provided it shall have a hip roof with the same pitch as the house and be sited a minimum of 900mm from the side boundary as shown on the submitted plans.*

It should be noted the Tribunal has only considered the amenity and aesthetics aspects of the preliminary application. All other conditions of the decision notice including a development permit are required to be fulfilled before undertaking building work.

Leo F Blumkie
Building and Development
Tribunal Chairperson
Date: 9 October 2003

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 and Planning
PO Box 31
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