



APPEAL

File No. 03-06-044

Integrated Planning Act 1997

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Livingstone Shire Council

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

Applicant: *withheld*

Nature of Appeal

Appeal under Section 4.2.29 of the *Integrated Planning Act 1997* against the decision of the Livingstone Shire Council to approve an application for Building Works – siting variation – subject to conditions, on land described as “the subject site”.

Date and Place of Hearing: 10:00am on Monday 15th May 2006 at “the subject site”

Tribunal: Mr Chris Schomburgk

Present: Applicants;
Applicants’ building certifier;
Applicants’ building designer;
Owner of adjacent property; and
Mr Ken Hodby – Livingstone Shire Council.

Decision:

The decision of the Livingstone Shire Council as contained in its written Decision Notice dated 2nd April 2006, to approve an application for relaxation of the boundary setback subject to conditions, is **changed and the application is approved, subject to the deletion of condition c) ii).**

Material Considered

The material considered in arriving at this decision comprises:

- The application and supporting plans and documentation;
- The relevant provisions of the Town Planning Scheme for Livingstone Shire Council;
- Council’s Decision Notice dated 2nd April 2006;
- The relevant provisions of Part 12 of the Queensland Development Code; and
- The *Integrated Planning Act 1997*.

Findings of Fact

I make the following findings of fact:

- The site comprises *withheld* and is located at “the subject site”.
- The site currently contains an older style house which, at the time of the site inspection, was in the process of being removed from the site. A new house is proposed to be erected on the site.
- This eastern side of *withheld* slopes steeply away (down) from the road to the east. Allotments along this eastern side of the road enjoy spectacular views to the ocean and offshore islands. There are a number of new, large homes along this part of the street, each of which is oriented to take maximum advantage of these views.
- The subject application seeks to provide an enclosed garage at the front of the allotment, approximately 2.0m from the front boundary. The front boundary setback has been approved by the Council and is not an issue in this appeal.
- The proposed garage is to be approximately 450mm from the southern boundary for the entire length of the garage (approximately 14.08m). The Council’s conditions of approval include Condition c) ii) which requires that the garage comply with the Acceptable Solutions in the Queensland Development Code (QDC) Part 12. The relevant provisions of Part 12 require that, as an Acceptable Solution, “*the length of all building parts of any class within the boundary clearance is not more than 9m along any one boundary*”. It is this condition which is under appeal, and compliance would require a “stepping” of the garage wall for approximately 5m of the wall.
- There is some articulation proposed in the garage’s southern wall by means of obscured glass blocks at approximately 3.0m centres along the wall’s length.
- At the hearing, I had the advantage of the presence of the adjoining neighbour on the southern side of the subject site, being the neighbour most likely to be affected by the proposed garage. The neighbour has strong views that the stepping of the wall required by the condition would be more of a hindrance to his property than an advantage. His property has a swimming pool, outdoor entertaining area and small shed along its northern boundary. In his opinion, the proposed wall will create some additional privacy for his outdoor area. There are no habitable rooms on his property in the vicinity of the proposed garage.
- At the hearing, all parties had the advantage of seeing the existing house on the subject site prior to its removal. The house is approximately the same height as the proposed garage wall and extends slightly further east than will the proposed garage. As such, all parties, including the neighbour are able to discern the likely extent of impacts of the proposed garage. Of some relevance is that the neighbour is himself a builder and is thus perhaps more able to appreciate the resultant built form from the design plans than a layman.
- At the hearing, the Council officer fairly noted that an important consideration in the decision is the opinion of the affected neighbour/s.
- The QDC is a performance-based Code and sets out Acceptable Solutions as suggested means of satisfying the relevant Performance Criteria. In this case, the Performance Criterion (P2) provides that “*buildings and structures:*
 - *Provide adequate daylight and ventilation to habitable rooms; and*
 - *Allow adequate daylight and ventilation to habitable rooms of buildings on adjoining allotments.*”
- There are no habitable rooms in the proposed garage or in the vicinity of the garage on the adjoining property to the south.
- Since the application was lodged, the QDC has been amended to include a clause c) in this Performance Criterion, which new clause deals with issues of amenity and character. While that clause is not strictly relevant in this assessment, there was no suggestion that the garage as proposed would detrimentally affect the amenity of character of the locality.

Based on my assessment of these facts, it is my decision that **Council's decision** to approve the Application for Building Works - siting variation - is **changed** and **the application is approved, with the deletion of condition c) ii).**

Reasons for the Decision

- The proposal, when developed in accordance with the approved plans, will not detract from the daylight or ventilation of any habitable rooms either on the subject site or on the neighbouring property to the south.
- The proposal will, therefore, satisfy the relevant Performance Criteria (P2) of part of Part 12 of the Queensland Development Code
- The adjoining neighbour to the south is the person most likely to be affected and has indicated his strong support for the proposal as lodged.
- In this case, the strict application of the relevant Acceptable Solution to the Performance Criteria in the Queensland Development Code achieves no practical purpose, and no person is disaffected by the proposal.

Chris Schomburgk
Building and Development Tribunal General Referee
Date: 22nd May 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:

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