



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	3—09—025
Applicant:	Fiona Jepson and Garry Annis
Assessment Manager:	Stacy Kennedy for and on behalf of Express Plan Approval Services Pty Ltd
Concurrence Agency: (if applicable)	Gold Coast City Council – ‘Council’
Site Address:	126 The Peninsula, Helensvale and described as Lot 103 on SP200523 — the subject site.

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the Assessment Manager to refuse a development application for building works, namely a proposed dwelling. The decision followed a concurrence agency response from the Council as the proposed building works required siting variations in relation to the road and both side boundary setbacks.

Date of hearing:	10.30am – Thursday, 9 April 2009
Place of hearing:	Gold Coast City Council, Nerang Offices
Tribunal:	Debbie Johnson – Chair Greg Rust – Member
Present:	Fiona Jepson – Applicant Paul Gill – Builder’s Representative Stacy Kennedy – Assessment Manager Jonathon Lee – Council Representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2) (c) of the IPA, **sets aside** the decision of the Assessment Manager dated 16 March 2009 and replaces it with the following decision:-

The Tribunal in accordance with section 4.2.34 (1) of the IPA, **directs** the Assessment Manager to reassess the Building Development Application subject to compliance with the following:-

1. The dwelling is to be sited a minimum of 1128mm from the eastern side boundary, 200mm from the western boundary and 4.0m from the road boundary as indicated on the Site Plan prepared by Coral Homes, identified as J15929 dated 31 October 2008; and
2. All other relevant building assessment provisions applicable to the Building Development Application.

Background

On 22 January 2009 a development application for building works was lodged with the Assessment Manager by Coral Homes Pty Ltd on behalf of the Applicants.

The Assessment Manager was required to refer the application to Council as a concurrence agency to assess siting variations pertaining to the development proposal.

The required variations included:-

1. an 1128mm minimum setback to the outermost projection along the eastern side boundary;
2. a 200mm minimum setback to the outermost projection along the western boundary;
3. a 4.0m minimum setback to the outermost projection with reference to the road boundary.

The Council advised the Assessment Manager by written notice on 27 February 2009 that the siting variations were permitted in part, subject to relevant conditions.

The permit stipulated the following concessions:-

1. a 1200mm minimum setback to the eastern side boundary;
2. a 1200mm minimum setback to the western side boundary;
3. the siting of a Class 1 dwelling within the road boundary setback.

Subsequently the Applicant was required to submit amended plans illustrating the following modifications:-

1. a 5.0m minimum setback to the road frontage;
2. a 9.0m minimum setback from the waterway as taken to the rear covered patio with an allowable encroachment for a 1000mm eave overhang;
3. the walk in robe along the western side of the dwelling was to be offset to maintain a minimum of 1200mm clearance to the western side boundary.

The Assessment Manager subsequently refused the building application on 16 March 2009, as the Applicant elected not to amend the proposal in compliance with the advice received from Council.

On the 23 March 2009, the Applicant lodged an appeal against the refusal of the building application with the Building and Development Tribunals.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 23 March 2009.
2. Council's concurrence agency response, dated 27 February 2009.
3. The Assessment Manager's Notice of Refusal, dated 16 March 2009.
4. Property details, including mapping and the Gold Coast City Council's Planning Scheme as available through Council's website.
5. The application material including drawings detailed by 'Coral Homes' and details of other similar developments in the immediate vicinity of the subject site.
6. The Applicant's grounds for appeal against the Council's reasons for refusal submitted with the application.
7. 'Form 8 – Notice of Election' lodged by Council on 1 April 2009.
8. Verbal submissions made by the Applicant at the hearing.
9. Verbal submissions made by the Builder's representative at the hearing.

10. Verbal submissions made by the Assessment Manager at the hearing.
11. Verbal submissions made by the Council's representative at the hearing.
11. Written submission in support by the Body Corporate for The Peninsula.
12. Written submission in support of the application by a local property owner.
13. Photographs of the subject site and adjoining properties as provided at the hearing.
14. The IPA.
15. The Integrated Planning Regulation 1998.
16. The *Building Act 1975* (BA).
17. The Building Regulation 2006 (BR).
18. The Queensland Development Code (QDC).
19. The Building Code of Australia (BCA).

Findings of Fact

The Tribunal makes the following findings of fact:

The subject site is essentially level save the last 10.0m length of the site where the land falls approximately 1.5m down towards the adjacent waterway.

The subject site is basically rectangular but splayed in shape towards the rear boundary. It has a total site area of 712sq/m.

The lot has an effective street frontage of 14.0m an average depth of 47.0m and a water frontage of 17.0m along the rear boundary. The property is not constrained by easements, services or topographic elements.

The outlook from the subject site is over the water to the south through to the south-east. The property is located within the last stage of a gated community where almost all sites enjoy direct waterfront access.

There is a large traffic island being a landscape feature in the middle of the road adjacent to the subject lot. The road way is therefore widened at this point to accommodate the island. To date, none of the sites in the immediate vicinity of the subject site have been developed. Other homes constructed in the earlier stages of this community have been given road boundary siting variations.

The proposed home has been designed and orientated to overlook their swimming pool and beyond to the waterway along the rear boundary. Similarly the living areas are positioned to take advantage of the outdoor recreational areas located at the rear of the site. The single storey dwelling will occupy 47.2% of the site area.

The proposed building elements that require siting variations are:-

1. The entry porch and the garage eave line.
Setback 4.0m from the front boundary line is the entry porch roof line which measures 3.5m across. The entry sits proud of the remainder of the dwelling by 1200mm. Similarly the dwelling includes a double garage that faces the street. The wall of the garage is setback 5.82m from the street boundary however the associated eave line encroaches the 6.0m road boundary clearance by a further 600mm.
2. The eaves overhang along the eastern boundary line.
As the eastern boundary line is slightly splayed the building has been designed to step out as the site widens. In three separate instances the eave line encroaches the prescribed 1.5m side boundary setback at these points.
3. A walk-in-robe along the western boundary.

The 6.0m x 6.5m double garage is to be built to boundary along the western side of the subject site. Immediately to the rear of the garage is the main bedroom which includes a 1.5m x 2.5m walk-in-robe. The robe is aligned with the garage wall and therefore encroaches the side boundary setback for a length of 2.5m. There are no doors or window openings in the external wall of the walk-in-robe. The overall length of the garage and walk-in-robe is 9.0m.

The Council has sited the provisions under Part 5 Division 2 Chapter 4, within the Gold Coast Planning Scheme 2003 for effectively refusing to allow the siting of the entry porch, eave lines and the walk-in-robe to be positioned as proposed. In this instance the siting of residential buildings and other structures is potentially determined by both the requirements of the QDC and the Gold Coast Planning Scheme 2003.

To elaborate on the Gold Coast Planning Scheme provisions relative to the QDC MP 1.2 and the provisions of s.33 of the BA the Tribunal notes the following:-

Section 33 of the BA states:

“33 Alternative planning scheme provisions to QDC boundary clearance and site cover provisions for particular buildings—

- (1) This section applies for work (*relevant work*) that—
 - (a) is building assessment work or self-assessable building work; and
 - (b) is for a single detached class 1 building or a class 10 building or structure located on the same allotment as a single detached class 1 building.
- (2) A planning scheme may include provisions (*alternative provisions*) that, for relevant work, are alternative or different to the QDC boundary clearance and site cover provisions.
- (3) However, a planning scheme may include alternative provisions only if the provisions are a qualitative statement or quantifiable standard.
- (4) If there are alternative provisions for relevant work, the QDC boundary clearance and site cover provisions only apply to the extent the alternative provisions do not apply to the work.
- (5) Alternative provisions can not be made other than under a planning scheme.
- (6) In this section—

qualitative statement means a statement about a performance or outcome sought to be achieved when applicable buildings or structures are completed.

quantifiable standard means a standard that achieves a performance or outcome sought under a qualitative statement”.

This section of the BA was introduced in the version of the Act that came into force on 1 September 2006.

The Gold Coast Planning Scheme makes alternative provisions in Part 5 Domains Detached Dwelling – Division 2, Chapter 4, under the heading of ‘5.3 Development Guidelines’ there are Performance Criteria, Probable Solutions applying to assessable development, and Acceptable Solutions applying to self-assessable development as follows:

BUILDING SETBACK

Probable Solutions

PC2

All buildings must provide for setbacks from the street frontage and the side and rear boundaries, which are appropriate to the efficient use of the site and the streetscape character of this domain.

Acceptable Solutions

AS2

The building (excluding a covered car-parking space or carport) is set back not less than 6.0 metres from the frontage of the site and set back from the side and rear boundaries at not less than:-

- a) 1.5 metres, measured from the outermost projection of that part of the building which is 4.5 metres or less above ground level;
- b) 2.0 metres, measured from the outermost projection of that part of the building which is greater than 4.5 metres but not greater than 7.5 metres above ground level;
- c) 2.0 metres, plus 0.5 metres for every 3 metres or part thereof, measured from the outer most projection of that part of the building which is greater than 7.5 metres above ground level. The minimum side boundary setback for a building (excluding a covered car parking space or carport) is 1.5 metres.

Since the Scheme was amended in January 2007 (Gold Coast Planning Scheme 2003 Version 1.1) and passed State Interest Check, it has to be assumed that the specific requirements of section 33 of the BA are met. However, in contrast to QDC MP 1.2, the Scheme does not differentiate according to the class of building to which the alternative solutions apply, and must therefore be taken to apply to all buildings. The planning scheme stipulates the following Performance Criteria relating to setbacks for buildings on residential lots.

Under the Scheme provisions applying at the subject site, a Concurrence Agency determination from the Council is required for the type of structure described above.

Reasons for the Decision

The Entry Porch is an open structure and an architectural feature of the home. The proposed siting therefore does not afford an unacceptable streetscape particularly as there is a landscaped feature on the road adjacent to the subject site.

The walk-in-robe has been designed in such a way as to appear to be part of the garage. Had this area have been part of the garage and not a walk-in-robe, the siting variation would not have been required. In this particular instance, the potential impacts of the walk-in-robe are therefore no more substantial than a lawful garage structure built to boundary.

Similarly, the eave lines are both aesthetically desirable and practical, offering benefits by shading the external walls and associated openings.

Debbie Johnson
Building and Development Tribunal Chair
Date: 5 May 2009

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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