Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	**03-09-079**
Applicant:	Johathon Fitzsimmons
Assessment Manager:	Burnett Country Certifiers (Assessment Manager)
Concurrence Agency: (if applicable)	Bundaberg Regional Council (Council)
Site Address:	13 Hibiscus Court, Woodgate and described as Lot 34 SP161714 – the subject site

Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Bundaberg Regional Council, to refuse an application for a shed and carport to the subject site

Date of hearing:	Wednesday 25 November 2009 at 11.00 am		
Place of hearing:	Bundaberg Regional Council Offices, 190 Bourbong Street, Bundaberg		
Tribunal:	Dennis Leadbetter	-	Chairperson
	Don Grehan	-	Member
	Michael Harris	-	Member
Present:	Jonathon Fitzsimmons	-	Owner
	Rick Drew	-	Assessment Manager
	Wal Kenney	-	Assessment Manager
	Bradley Geaney	-	Council representative
	Stephen Curran	-	Council representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2)(e) of the IPA, **sets aside** the decision of Burnett Regional Council dated 29 September 2009, of a concurrency agency refusal and replaces it with the following decision:-

The assessment manager, in accordance with Section 4.2.34 (1), is **directed** to decide the development application for building works as if there were no concurrence agency requirements and if the application complies with the following:-

1. The shed and carport structure is to be located as shown on the site plan submitted to the Tribunal post the hearing, with a minimum set back to the south eastern alignment of 1.500 metres measured to the outer most projection, and approximately 3.000 metres to the south west alignment or such greater dimension to provide the required minimum clearance to the council sewer main and for access for maintenance as stipulated by council.

2. The shed and carport shall be of plan dimension and heights as nominated on drawings described as Job No. BDBG10353 sheet 1 and 2 of 5, prepared by Acame engineers, dated 25 November 2009, being 12.000 metre long by 9.000 metre wide, with a wall height of 3.000 metres and an overall ridge of 4.206 metres, the heights being measured from the finished surface of the concrete floor slab. It would be estimated that the slab be approx 0.150 metres above surrounding ground level.

Background

The owner lodged an application for consideration against council's Amenity and Aesthetics Policy as a concurrence agency on 22 July 2009. A few days later the owner lodged a Development Application for Building Works for the structure with Burnett Country Certifiers, who then lodged the notice of engagement with council on 27 July 2009.

There were numerous verbal communications between the owner and council over the following period, with the first written communication on 15 September 2009, to advise the matter would go before a council meeting on 23 September 2009. On 29 September 2009, council advised the owner that the application had been refused as it did not meet the requirements of Policy Number 5.6 of the former Isis Shire Council, (now amalgamated to form Bundaberg Regional Council).

Council refused the application on the grounds that:

- *The floor area and maximum height of the garage far exceeds the maximums specified in Council's policy and as such, is not considered to be complimentary and compatible with the surrounding areas; and*
- *Due to the height and length of the garage, it has been considered that the proposal could have an adverse impact on the adjoining properties and there appears to be alternative siting options available to reduce this impact.*

The appeal was made as an amenity and aesthetic appeal based on the fact that council did not respond within the nominated time period stipulated in Schedule 4 *Integrated Planning Regulation 1998*, which nominates a response time frame of 10 working days, and under section 3.3.16 (4) (a) – (d) being an amenity and aesthetics matter a non response should be considered as being *assessed by the agency and had no concurrence agency requirements*.

Material Considered

1. *Form 10 – Notice of Appeal* and grounds of appeal contained therein.
2. *Form 8 – Notice of Election* provided to the Registrar by the COUNCIL.
3. Drawings submitted with the appeal.
4. Verbal submissions from those attending the appeal.
5. *The Integrated Planning Act 1997*.
6. *The Integrated Planning Regulation 1998*.
7. *Policy 5.6* Isis Shire Council Amenity and Aesthetics Policy
8. *The Queensland Development Code* (QDC) Part MP 1.2.
9. Additional drawings submitted by the owner post the hearing at the Tribunal's request.

Findings of Fact

The Tribunal made the following findings of fact:

1. The site is currently vacant, has an area of 943 m^2, is of rectangular shape, and is basically flat.

2. The site has a public access walkway adjoining its south eastern boundary.

3. The sites adjoining each side boundary are vacant, and the site behind (lot 36) has a shed located to its north east corner with a minimal set back to both alignments, and a dwelling located towards the street frontage of the site.

4. That there were other instances of outbuildings built in the area, which exceeded the trigger criteria in the council's amenity and aesthetics policy, some built prior to the policy and some post with consent from council.

5. That the owner lodged the application with council on 22 July 2009, as evidenced by council's receipt, seeking an assessment against council's amenity and aesthetics policy, prior to appointing the private certifier.

6. The assessment manager lodged a notice of appointment with council on 27 July 2009, as evidenced by fax transmission date.

Reason for the Decision

This appeal covered two separate aspects.

First was the issue of council's determination being outside the time frame stipulated in schedule 4 of the IPA and whether that time frame applies and the determination valid.

Second was the assessment of the application against the Amenity and Aesthetics policy and whether, as defined in the act,

> *(i) the building, when erected, will have an **extremely** adverse affect on the amenity or likely amenity of the building's neighbourhood; and*
>
> (ii) *the aesthetics of the building, when erected, will be in **extreme** conflict with the character of the building's neighbourhood.*

The Tribunal considered these issues separately in making its determination, as the Tribunal considered both needed resolution.

<u>TIME FOR RESPONSE:</u>

The assessment manager put forward that, although the owner lodged the concurrence agency request prior to lodging the development application for building works with the assessment manager, upon receipt of the notice of engagement as the assessment manager, the time frame nominated in schedule 4, in this instance 10 working days, should commence. Council responded that under section 3.3.2, while nothing in the IPA stops a referral agency from giving a referral agency response on a matter within its jurisdiction about a development before an application for the development is made to the assessment manager, a referral agency is not obliged to give a referral agency response before the application is made. Council have interpreted that as not invoking the time frame scheduled under schedule 4 as it only applies to a concurrency agency application made after a development application has been made.

It is the Tribunal's opinion that the act is not clear on this matter. Firstly the act is not specific on who can lodge such an application, certainly it could be the applicant, in this case the owner, or the assessment

manager. Certainly the act is clear in section 3.3.2 (2) that a referral agency is not obliged to give any response before the (development) application has been lodged.

On the matter of the notice of engagement as the assessment manager, and whether the receipt by council is a trigger of the assessment and response time frame, again there is no specific inclusion in the legislation.

It is the Tribunal's opinion that per se it is not. However the Tribunal rejects council's comments that it would be impossible for council to unite all the various submissions relevant to a particular site. The Tribunal considers it would be highly probable that various applications and notices could be received at differing times for an application of this nature, and be submitted by different parties, as in this instance, and it is council's responsibility to connect these applications, and meet its obligations under relevant legislation.

It is also the Tribunal's opinion that council's suggestion, that to trigger the response time frame under schedule 4, the original application should have been withdrawn and a new application made, is extreme and unworkable. There is nothing in the act requiring this action or from preventing a transfer of the existing application. It is the Tribunal's opinion that, where an application has been made to a referral agency prior to a development application being made, once the development application has been made, a notification from the assessment manager to the council, advising of the original concurrence agency application and its relationship to a development application, is sufficient notice to represent a concurrence agency request and to trigger the schedule 4 response time frame.

It is also the Tribunal's opinion that, should an application be lodged for a concurrence agency response prior to lodgement of a Development Application and council chooses to respond, if that response was favourable, the assessment manager can accept that response as council's assessment and can process the Development Application without further referral to council.

AMENITY AND AESTHETICS:

The Tribunal has considered this application in terms of Amenity and Aesthetics and to the triggers and application of policy, contained in Policy 5.6 of the Isis Shire Council and also the Performance Criteria of the QDC part MP 1.2, for siting as Council determined the application on those grounds.

The first point that the Tribunal raises is that the council has determined and refused the application on the grounds stated in its letter of 29 September 2009:

> *That the floor area and maximum height of the garage far exceeds the maximums specified in Council's policy and as such, is not considered to be complementary and compatible with the surrounding areas; and*
>
> *Due to the height and length of the garage, is (sic) has been considered that the proposal could have an adverse impact on the adjoining properties and there appears to be alternative siting options available to reduce this impact.*

The Tribunal would point out that council's policy, under either section 4.8 or elsewhere, does not set maximums for floor area or height of a class 10 building, but gives indicators which act as triggers for further assessment by council.

The Tribunal would also remind council that although a proposed structure *may or could have an adverse impact*, the act is very specific in that council can only refuse an application where:-

*(i) the building, when erected**, will have an extremely adverse** affect on the amenity or likely amenity of the building's neighbourhood; and*

*(ii) the aesthetics of the building, when erected, **will be in extreme conflict** with the character of the building's neighbourhood.*

AMENITY.

Council's policy defines *Amenity* as *the attractiveness or pleasant quality of a neighbourhood, Factors which may result in an extremely adverse effect on an amenity of a locality include:*

- *Loss of natural light, direct sunlight, breezes, visual privacy, acoustic separation and outlook;*
- *Incompatible land use, eg. over-development in a semi-rural area;*
- *Excessive site cover, insufficient separation between buildings and overshadowing; and*
- *Lack of landscaped area.*

In assessing the proposed structure against these criteria, the Tribunal has also taken cognizance of the alignment setbacks and other requirements contained within the QDC part MP1.2, as these must be held, in terms of residential neighbourhoods, to provide a reasonable and acceptable environment. In addition consider orientation and placement of the building, future residence on the site, the prevailing weather directions and the location of buildings and vegetation where they occur on adjoining sites.

It is the Tribunal's opinion that the proposed building does not, in any way, unduly impact any of those items specifically listed in council's definition of amenity, and the factors which council consider may result in an **extremely** adverse effect on the amenity of the locality.

AESTHETICS.

Council's policy defines *Aesthetics* as *the character of a locality as dictated by the architectural style and features of the buildings in the locality. Factors which may result in a building being in extreme conflict with the character of a locality include:*

- *Conflicting architectural style – eg. a contemporary house in a heritage area;*
- *Building form – eg. high set, low set, slab on ground, one or two storey;*
- *Construction materials – eg. reflective characteristics of roofs;*
- *Visual impact – eg. extensive exposed cut and fill embankments on hilly terrain.*

In assessing the proposed structure against these criteria, the Tribunal has taken account of the fact that:

- The area is a reasonably new development, that there are several vacant blocks, the neighbourhood is therefore of a contemporary style.
- The proposed dwelling is to be single storey with an elevated floor approx 1 metre above ground.
- The class 10 building is of similar height.
- The class 10 building is of Colorbond cladding, and can be in colours similar to the future dwelling.
- The class 10 building is of considerably lesser floor area than the proposed dwelling and reflects that secondary status.
- The materials proposed are compatible with contemporary residential developments.

It is the Tribunal's opinion that the proposed building will not be in conflict with those buildings currently in the neighbourhood and when the residence is constructed will present a unified development on the subject site.

PERFORMANCE CRITERIA OF THE QDC.

In determining this appeal, the Tribunal believes that the Performance Criteria P1 of QDC MP 1.2 is relevant to this appeal.

The specific criteria of P1 are:

(a) the bulk of the building or structure; and
(b) the road boundary setbacks of neighbouring buildings or structures; and
(c) the outlook and views of neighbouring residents; and
(d) nuisance and safety to the public.

The Tribunal considers that the proposed building is of a residential scale, architectural style and materials appropriate to the residential neighbourhood in which it is to be placed. It reflects materials and styles of buildings on neighbouring sites. As the adjoining properties to Hibiscus Court are vacant, it is impossible to consider adjoining buildings to those sites. The location of the building has been located to facilitate views from the neighbour to the rear, being placed immediately adjacent to that properties' own shed. The building does not cause any nuisance or safety issue to the public greater than any normal residential development.

General Comments

The Tribunal is also concerned with the practice at Bundaberg Regional Council, that applications for Amenity and Aesthetics, where a refusal is proposed by assessing officers, in that it has to be presented to a full council meeting.

The Tribunal would remind council of its obligations under the IPA and IPR that under Schedule 4, it has an assessment and notification period of 10 working days following receipt of such an application, and under section 3.3.16 (4)(c) any application for amenity and aesthetics, unlike any other concurrence application to a local authority, is deemed to be assessed and have no concurrence agency requirements if a response is not received within the stipulated time frame. It is the Tribunal's opinion that the current practice could not meet that time restraint.

Dennis Leadbetter
Dip Arch QUT, Grad Dip Proj Man QUT, METM UQ
Building and Development Tribunal Chair
Date: 11 December 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 grounds:

(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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