



## Building and Development Tribunals – Decision

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### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	<b>3–08–062</b>
<b>Applicant:</b>	Colin & Lynette Madeley
<b>Assessment Manager:</b>	Tony Kennedy for and behalf of Tony Kennedy Certifier Pty Ltd
<b>Concurrence Agency:</b> (if applicable)	Gold Coast City Council
<b>Site Address:</b>	108 Explorers Way, Highland Park, Nerang and described as Lot 115 RP116203–the subject site

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### **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 Work, namely a carport, fence and roofed patio.

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<b>Date of hearing:</b>	1pm –Thursday 18 September 2008
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Mr John Panaretos – Chair Ms Greg Rust – General Referee
<b>Present:</b>	Colin Madeley – Applicant Tony Kennedy – Assessment Manager, private building certifier
	Gold Coast City Council was not represented at the hearing, instead opting to lodge a written submission

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### **Decision:**

The Tribunal **dismisses** the appeal as the application for Building Work for the carport/patio cannot be determined until such time as:-

- (i) the necessary Code Application is determined under the Gold Coast Planning Scheme as described below; and
- (ii) consent under the *Water Supply (Safety and Reliability) Act 2008*, section 192 has been granted for the work to be over or adjacent to a sewer or water main.

## **Background**

This appeal concerns the construction of a steel Class 10a carport and patio structure wrapping around the northern side of the existing house, running 20.5 metres along the northern side boundary, 8 metres wide at rear, 4.6 metres wide in its middle section and 7.6 metres wide, setback 0.15 metres along the front alignment. There is no demarcation on the plans distinguishing the carport from the patio.

The appeal also concerns a retaining wall and fence along the front alignment with a combined height of 2.6 metres above ground.

Council (as concurrence agency) refused the application for boundary relaxation based on the following:-

- Construction over a sewer infrastructure and easement (no approval from Council).
- Conflict with the Detached Dwelling Domain Code of the Gold Coast Planning Scheme.
- Conflict with the siting provisions P1 and P2 of the Queensland Development Code (QDC).

Construction of the carport/patio structure is complete and the fence has been sheeted but not rendered or painted. The appellant submitted photos of the site demonstrating that the retaining wall and fence were pre-existing and the work proposed consisted only of sheeting and painting of the existing structure.

With respect to the carport/patio, the applicant has offered to comply with Council's requirements for a CCTV camera inspection of the sewer.

## **Material Considered**

The material considered in arriving at this decision comprises:

- (1) The appeal documentation, including 'Form 10 – Notice of Appeal' lodged 1 September 2008.
- (2) Photographs of combined retaining walls and fences in the area submitted by the applicant.
- (3) Council's Concurrence Agency Response dated 24 July 2008.
- (4) The building certifier's Decision Notice dated 4 August 2008.
- (5) Verbal submissions from the applicant and building certifier at the hearing.
- (6) Undated site plan and building detail plans and 'before and after' fence photos presented to the tribunal at the hearing.
- (7) 'Form 8 – Notice of Election' from Council dated 10 September 2008.
- (8) Written Council submission forwarded to the hearing dated 18 September 2008.
- (9) Written submission from the applicants forwarded to the tribunal and dated 20 September 2008.
- (10) The Gold Coast Planning Scheme.
- (11) The QDC – Part MP1.2.
- (12) The IPA.
- (13) The Integrated Planning Regulation 1998.
- (14) The *Building Act 1975* (BA).

## **Findings of Fact**

The Tribunal makes the following findings of fact:-

### Sewerage Issues

- It is accepted by all parties that the building work covers a sewer main and associated easement.

### Combined Retaining Wall and Fence

- The combined retaining wall fence combination appears to have been in existence before the making of the current application.

- The structure is on a slope that has very likely undergone significant modification to surface levels either at the time of road construction or original subdivision.
- No evidence was provided by either party to the appeal with respect to the level of the *natural ground surface* to establish the height of the retaining wall fence combination, nor to establish the lawfulness of its original construction.
- Current work on the wall/fence is limited to external sheeting, rendering and painting.

#### Carport/Patio

- The carport/patio covers an area of 137.6 m<sup>2</sup>, is of varying height, is partially enclosed by a metal fence on the side boundary and two garage doors at front.
- Calculations based on submitted plans indicate that the maximum floor space of the existing house is 314 m<sup>2</sup>. Thus, the new structure represents an increase of over 43% on the floor space of the existing residence.

#### **Reasons for the Decision**

- The site is contained in the Detached Dwelling Domain of the Gold Coast Planning Scheme. A detached dwelling, including its ancillary structures, is Self Assessable in that domain (see Pt 5 Div 2 Ch 4 Table at Section 3.0) where the proposal satisfies Acceptable Solutions of relevant codes; otherwise the level of assessment is elevated to Code Assessment (see Pt 5 Div 1 Ch 2 Section 4.7).
- Despite the above, *Minor Building Work* up to the maximum 25 m<sup>2</sup> is Exempt Development in this case and thus not subject to scheme requirements.
- The carport/patio is enclosed by the side fence, garage doors and northern walls of the house. Hence, at 137.6 m<sup>2</sup>, in its current form, it constitutes Gross Floor Area (GFA) and is captured by the provisions of the planning scheme, in particular, the Detached Dwelling Domain Level of Assessment, Place Code, Detached Dwelling Code and Car Parking, Access and Transport Integration Code.
- The proposal does not comply with Acceptable Solutions AS 2 of the Place Code in that the outermost projection of the structure is within 1.5 m of the side boundary, AS 3.2 of the Detached Dwelling Code in that the building materials, patterns, textures and colours are not the same as the main dwelling and AS 3.1 of the Car Parking, Access and Transport Integration Code with respect to parking grades. Consequently, an application for a material change in use under the planning scheme is required.
- Under Section 83(1) (a) of the BA, a development permit for Building Works may not be issued "...if the building development application includes development other than building work—until, under IPA, all necessary development permits are effective for the other development".
- Under Section 83(1) (f) of the BA, a development permit for Building Works may not be issued "...if the building work is over or adjacent to a sewer or water main—until consent under the *Water Supply (Safety and Reliability) Act 2008*, section 192 has been granted for the work to be over or adjacent to the sewer or water main".
- Except for the proposed gatehouse, there has been no evidence adduced that the modifications to the retaining wall fence combination requires development approval or that it does indeed exceed 2 m above "natural ground surface".

- Notwithstanding the above, by way of comment, the proposal in its present form does not satisfy the relevant Performance Criteria of MP 1.2 of the QDC in that the bulk of the structure is not appropriate to the streetscape, nor is it appropriate to setbacks of neighbouring buildings.
- Modification of the retaining wall fence combination does not require a Development Permit for Building Work. It is for the applicant and Council to determine whether the existing structure is lawful.

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**John Panaretos**  
**Building and Development Tribunal Chair**  
**Date: 14 October 2008**

## **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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