



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-05-064

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Caloundra City 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 Caloundra City Council to approve, subject to conditions, an application for Preliminary Approval for Building Works - relaxation of boundary setback - on land described as Lot *withheld* and situated at “the subject site”.

Date and Place of Hearing: 10:00am on Thursday 1st December 2005
at “the subject site”

Tribunal: Mr Chris Schomburgk

Present: *withheld* – applicants; and
Mr Steven Leece – Caloundra City Council.

Decision:

The decision of the Caloundra City Council as contained in its written Decision Notice dated 3rd October 2005, to approve an application for relaxation of the rear (canal) boundary setback, subject to specific conditions, is **upheld, but Condition 1 as sought to be imposed by the Council is amended.**

Material Considered

The material considered in arriving at this decision comprises:

- The application and supporting plans and documentation;
- Additional material provided by the applicant and the Council at the hearing, including aerial photographs, the Planning Scheme extract and a copy of a Council Policy on canal setbacks;
- The relevant provisions of the Town Planning Scheme for Caloundra City Council;
- Council’s Decision Notice dated 3rd October 2005; and
- The Integrated Planning Act 1997.

Findings of Fact

I make the following findings of fact:

- The applicants have appealed against one of the conditions of the approval, namely Condition 1 that the structure is to be setback a minimum of 3.5m from the rear southern (canal) boundary.
- The site comprises Lot *withheld*, with frontage to *withheld* Ave at *withheld*, and a rear (southern) boundary to a deepwater canal.
- The applicants have sought approval for a relaxation of the rear (canal) boundary setback for a covered gazebo structure adjacent to the existing swimming pool. The structure has its southern boundary effectively coincident with the rear boundary. The roof of the gazebo now overhangs into the canal area by about 600mm, but all supports and structures appear to be on or within this boundary.
- The structure is set back approximately 2.2m from the side boundary, which is not in contention in this appeal.
- The structure is open on all sides, acts a pool-side shade structure, and has, it was agreed, existed in the same location for many years. The Council provided an aerial photograph dated 1999 which shows a structure in approximately the same location, and the existing swimming pool.
- The applicants have sought and obtained approval for the extension of a timber deck into the canal area, and a new pontoon. That approval was not required from the Council as the canal is outside of the Council's jurisdiction. The gazebo structure is over part of that timber deck but, apart from the roof overhang, is within the subject property.
- It is apparent that the applicants bought the subject property (in early 2002) on the assumption that the structure had been approved. Council's records do not go back far enough to confirm whether this was the case or not.
- The applicants have undertaken considerable renovation of the house and the gardens, including the pool area, but have retained the swimming pool itself. As part of that renovation, they have replaced the roof of the gazebo and one or more of the supports for the structure. It was not contested that the replacement supports were in the same location as that which it replaced.
- The structure presents as an attractive, and now well-maintained, shade structure. It does not impede the views of adjoining residents and I was provided with letters of support from some of those residents, including the adjoining neighbour to the east and two neighbours directly across the canal (with direct line of sight into the subject property). There was no letter of support from the owner of the allotment to the immediate west.
- An inspection of the immediate locality reveals that there are number of similar structures, some of which are within the setback distance. Council was not able to confirm whether any or all of these were approved.
- A similar, but more recent, structure was being erected on the adjoining property to the west, and I was advised by Council that this had been recently approved for a relaxation of the rear boundary, although not to the same extent as is sought in this application.
- The Council's decision included a condition that the structure be located a minimum of 3.5m back from the rear canal boundary. The structure is approximately 3.4m deep (north-south) by 4.6m wide (east-west, across the allotment). The location required by the Council condition would put the structure partly into the existing swimming pool, which is located approximately 4.7m from that boundary. Alternatively, the structure would have to be reduced in depth to no more than 1.0, rendering it of no practical benefit.
- There is little other option for the location of a shade structure on the allotment without removing much of the advanced vegetation on other parts of the rear garden.
- The Council policy (dated 1988 but apparently still in use) and the Planning Scheme require a

minimum setback from the canal of 4.5m. The Council has sought to relax this to some degree, and requires a setback of only 3.5m in this case.

- The relevant Planning Scheme Code is a performance-based Code and the 4.5m setback is an Acceptable Solution for one of the Performance Criterion (O5). The Performance Criterion requires that “*buildings are adequately setback from canals to:*
 - a) *protect property from flooding and inundation;*
 - b) *maintain the flood storage capacity of these waterways; and*
 - c) *protect the structural integrity of the canal profile and revetment wall.”*
- There was no contention from the Council that any of these matters would be compromised by the approval. Council was, however, justifiably concerned about setting a precedent for other sites in these canal areas.

Based on my assessment of these facts, it is my decision that **the appeal is upheld**.

Council’s decision to approve the Preliminary Approval for Building Works - siting application for a structure within the setback area - subject to conditions **is upheld but the conditions are amended** as below. The **application is approved subject to an amended condition** to replace Condition 1 as sought to be imposed by the Council in its Decision Notice of 3rd October 2005:

Reasons for the Decision

- The structure does not impede any views, breezes or sunlight, or cause any other amenity impacts to any adjoining or nearby property. The properties most affected from a visual impact perspective (ie: directly across the canal) have consented to the proposal.
- There is no other practical location for the structure without removing or damaging some mature vegetation on the site.
- The condition sought to be imposed by the Council would result in an impractical outcome given the location of the existing swimming pool.
- The proposal does not offend any of the relevant Performance Criteria in the relevant Planning Scheme Code.
- The issues above, collectively, are such that no adverse precedent is likely to arise.

Conditions of approval:

- Condition 1 of the conditions set out in the Decision Notice of 3rd October 2005 is **amended** to read:
 1. *The Preliminary Approval for Building Works applies only to the roofed area of the gazebo with a minimum setback of 1.5m from the side boundary.*
- Conditions 2 to 5 inclusive remain as per the Decision Notice.

Chris Schomburgk
Building and Development Tribunal General Referee
Date: 5th December 2005

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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