



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-07-065

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: GMA Certification Group Pty Ltd

Concurrency Agency: Gold Coast City Council

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

Applicant: *withheld*

Nature of Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* against the decision of the Gold Coast City Council (as a concurrence agency) to impose conditions on a Development Application for Preliminary Approval for Building Works – siting provisions for a deck and swimming pool fence on “the subject site”.

Date and Place of Hearing: 10:00am on Friday 9th November 2007
at “the subject site”

Tribunal: Mr Chris Schomburgk – Chairperson
Mr Phil Dance – General Referee

Present: Applicants;
Ms Tanya Smith – Building Certifier, GMA Certification Group
Mr Andrew Powell – Gold Coast City Council
Mr Wiremu Cherrington – Gold Coast City Council

Decision:

The decision of GMA Certification Group, as contained in its decision notice dated 17 October 2007, to impose conditions on a development application for Siting Variation for Building Work for a deck and swimming pool fence based on a Concurrence Agency response from Gold Coast City Council is **set aside** and **the application is approved, subject to the following conditions:-**

- i) **The setback to the western boundary is to be planted with additional screening vegetation, with a minimum height at planting of 1.2m and of a species that will achieve visual screening to the western neighbouring property.**
- ii) **A timber or bamboo screen is to remain in place at all times to screen the underside of the deck when viewed from the water.**

Material Considered

The material considered in arriving at this decision comprises:

- The application, including “Form 10 – Notice of Appeal”, supporting plans, photographs and documentation;
- The relevant provisions of the Town Planning Scheme for Gold Coast City Council;
- The Gold Coast City Council’s Concurrence Agency Response dated 30th August 2007;
- “Form 18 – Notice of Election” from Gold Coast City Council;
- Part 12 of the Queensland Development Code (“QDC”); and
- The *Integrated Planning Act 1997*.

Findings of Fact

The Tribunal makes the following findings of fact:

- The site has water frontage to a canal, the setback to which is the subject of this appeal.
- The subject application seeks approval for a carport and roofed patio, and the application plans show the location of the existing pool deck and fencing. Council, in its Concurrence Agency response, amended the plans in red by showing that the pool deck was to be “*reduced in height to maximum 1 metre above batter line*”. The pool deck has already been constructed and is at a height of approximately 2.0m above the revetment wall, and is setback from that wall by about 2.4m. It is this aspect of the approval (the deck height) that is the subject of this appeal.
- Contrary to the plans, the deck is also set back approx 1.5m from the western side boundary. At the site inspection, the Council officers agreed that this setback was preferable to the zero setback shown on the proposal plans. The constructed setback allows space for screening landscaping, some of which has already been planted by the applicant.
- No reasons were given in the Concurrence Agency Response as to the basis for this condition, but it emerged at the hearing that the Council’s decision to seek modification of the deck height is based on alleged non-compliance with the Canals and Waterways Constraint Code in the Planning Scheme. That Code includes Acceptable Solution 1.3 which the Council officers highlighted as in contention, which states, of relevance:
 - *A Class 10 building and/or structure is located within the setback area described in AS1.2.1 and is:
 - *A cantilevered pool deck no more than 1.2m in height above the nominated ground surface ...*”*

- The relevant Performance Criterion is PC1 which states:
 - *All buildings and structures must provide for setbacks from the waterway which ensure the efficient use of the site, respond to the waterside location, and have minimal impact on adjoining properties*".
- However, the subject pool deck is not cantilevered. It appears that AS1.1 may be more relevant, which states that:
 - *The building and/or structure is not located beyond the revetment regulation line as indicated for the site on Overlay map OM13 – Building Setback Line from Canals and Waterways*". The pool deck in this case is set back only 2.4m, where the setback line on the Overlay Map shows 6.0m.
- In any event, it is the Performance Criterion PC1 which becomes paramount for consideration.
- More particularly, non-compliance is alleged with section 3.6.2 of the Land Development Guidelines 2005, which themselves form part of Planning Scheme Policy (PSP) 11 of the Planning Scheme. Section 3.6.2 as referenced calls up Standard Drawing 05-04-004 Issue 2005. That drawing shows a maximum height of 1.0m for structures.
- It is relevant in the context of this appeal that the provisions relied upon by the Council are "Guidelines" contained within a "Planning Scheme Policy". A Planning Scheme Policy cannot regulate the use of premises (s2.1.23 of IPA).
- The relevance of the Overlay Maps referred to above lies in the Constraint Code for Canals and Waterways (Chapter 3 of Part 7, Division 3 of the Planning Scheme). The Acceptable Solutions for Performance Criteria PC1 and PC2 call up the Overlay Maps, although no reference is made in the Code to the Land Development Guidelines or PSP 11.
- At the hearing, the Council officers fairly conceded that, with regard to the PC1, it is only the "*impact on adjoining properties*" element that was of concern. The applicant provided letters of support/no objection from most of the owners of surrounding properties who might have a view of the offending structure.
- The subject property is at the southern end of the canal, such that views to the site are, in practical terms, limited to those properties either side of this end of the canal. The majority of those owners have agreed to the proposal.
- An inspection of the structure shows that it has been constructed with appropriate thought to its appearance from the water. A timber/bamboo screen has been erected below the deck to screen the underside of the structure.
- A very recent pool deck on the adjacent property to the east has a height above that of the subject deck, although the Council officers were not able to say whether that height was approved.

Based on an assessment of these facts, it is the Tribunal's decision that **Council's concurrence agency response requiring conditions to be imposed on the approval is set aside and the application is approved, subject to the following conditions:-**

- i) The setback to the western boundary is to be planted with additional screening vegetation, with a minimum height at planting of 1.2m and of a species that will achieve visual screening to the western neighbouring property.**
- ii) A timber or bamboo screen is to remain in place at all times to screen the underside of the deck when viewed from the water.**

Reasons for the Decision

- The basis for Council's refusal was offered at the hearing as alleged non-compliance with PC1 of the Canals and Waterways Constraint Code. In the opinion of the Tribunal, the decking and pool fence as now constructed are not out of place in the locality, and will not (does not) detract visually from the locality. It will have no impacts on adjoining properties.
- The proposal satisfies other elements of the relevant Performance Criterion PC1.
- While the deck and pool fence are at present visually unobtrusive and do not create privacy problems for neighbouring properties, the conditions required above will ensure that they remain so.
- Reliance on the Council's standard drawing 05-04-004 cannot be mandated as this is a drawing referenced only in the Land Development Guidelines, which themselves are a Local Planning Policy which cannot regulate development. The drawing can be used as a guide only.

Chris Schomburgk
Building and Development Tribunal Chairperson
Date: 19th November 2007

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:

The Registrar of Building and Development Tribunals
Building Codes Queensland
Department of Infrastructure and Planning
PO Box 15031
CITY EAST QLD 4002
Telephone (07) 3237 0403: Facsimile (07) 32371248