



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-07-050

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Mark McKechnie, QPDB Pty Ltd

Concurrence Agency: Toowoomba City Council

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

Applicant: *withheld*

Nature of Appeal

Appeal against the decision of Toowoomba City Council as a concurrence agency to refuse an application about design and siting requirements of building work. The building work is for a patio attached to the dwelling approximately 2.4 metres in height sited within the prescribed 6.0 metre road boundary clearance under Part P1 and A1 of the Queensland Development Code Part 12.

Date and Place of Hearing: The hearing was conducted by way of written submissions.

Tribunal: David Kay – Chairperson

Decision

The decision of the concurrence agency, Toowoomba City Council, dated 30 August 2007 relating to the siting of a patio within the 6.0 metre road boundary clearance and the length of a garage and workshop exceeding 9.0 metres in length within the 1.5 metre side boundary clearance (Application No. DISBLD/2007/2956) on “the subject site” is **changed** and is to be in accordance with the following decision;-

The siting of a patio having dimensions of approximately 5.4 metres in length, 2.4 metres in height above natural ground level at the 4.46 metre road boundary setback and sited 4.46 metres from the *withheld* road frontage, within the prescribed road boundary clearance of 6.0 metres is approved.

The combined length of the workshop and garage on the western boundary which exceeds 9.0 metres within 1.5 metres of the property boundary is approved.

Background

Applicant's submission to the tribunal.

The applicant provided the following information:-

- The natural ground level at the *withheld* frontage is approximately 0.735 metres above the ground level at which the patio is to be constructed;
- There is an existing 1.8 metre high fence along the *withheld* frontage;
- The outlook from the neighbours property will not change, as the proposed patio roofline will not project above the fence line level;
- The proposed patio structure has a slim roof profile and the location will not cause a nuisance or impact on the safety of the public;
- Other structures such as carports have been erected within the 6.0 metre setback in *withheld* and *withheld*;
- The Council has already acquired land for road widening purposes and searches carried out for the recent purchase of the land did not reveal any proposed road resumptions or widening;
- The applicant has offered to increase the setback to 5.0 metres.

Toowoomba City Council submission to the Tribunal.

The Council considered the following matters in assessing this application:-

- the level, depth, shape and conditions of the allotment and adjoining allotments;
- the nature of any proposed building on the allotment;
- the nature of any existing buildings on the adjoining allotments; and
- nomination of the road frontage.

The Council provided the following information:-

- Council nominated the *withheld* road front boundary as the major street and a building line of 6.0 metres from the street boundary to the outermost projection is to be maintained;
- The proposal does not meet the performance criteria of P1 as listed above;
- The Councils Director of Engineering has issued instructions that a 6.0 metre building line from *withheld* is to be maintained to minimise resumption costs in the event of road widening;
- Council have undertaken road resumptions on the western side of *withheld* in the vicinity and the future road upgrading to four lanes may affect buildings or structures within the 6.0 metre setback;
- Council has maintained a consistent approach in applying P1 of Part 12 of the Queensland Development Code (QDC) in *withheld* and other major streets in the city.

The Private Building Certifiers submission to the Tribunal.

The Private Building Certifier, Mark McKechnie, provided the following verbal submission:-

- The Certifier stated that he has no objections to the proposed building work being sited within the 6.0 metre setback.

Material Considered

1. "Form 10 – Notice of Appeal" submitted to the Building and Development Tribunals with accompanying material;
2. Decision Notice issued by the Certifier dated 12 September 2007;
3. Concurrence Agency Response dated 30 August 2007 for a decision on siting matters under Part 12 of the QDC;
4. Toowoomba City Council written submission to the Tribunal dated 11 October 2007;
5. The applicants written response to the Councils submission dated 15 October 2007;
6. The *Integrated Planning Act 1997*;
7. The *Integrated Planning Regulation 1998*;
8. The *Building Act 1975*;
9. The *Building Regulation 2006*; and
10. Part 12 of the Queensland Development Code.

Findings of Fact

- An application for a concurrence agency response was made to the Toowoomba City Council by Private Building Certifier, Mark McKechnie.
- The application was refused for the patio road boundary clearance and approved for the garage and workshop side boundary clearance by Toowoomba City Council.
- The appeal to a Building and Development Tribunal was lodged within the required time.
- The Tribunal has jurisdiction to hear the appeal.
- This appeal relates only to the road front boundary clearance for the patio.
- The road boundary setback of the patio from the *withheld* road frontage of this site does not comply with the Acceptable Solutions which requires a 6.0 metre road boundary clearance.
- The Performance Criterion "P1" of the QDC Part 12 contains the performance requirements for the assessment of the application.

Reasons for the Decision

Part 12 of the QDC under 'Element 1 – Design and Siting of Buildings and Structures' Building and Structures ,Performance Criteria P1 requires that:-

The location of a building or structure facilitates an acceptable streetscape, appropriate for –

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

Bulk of the building or structure;

- The height of the patio will not extend above the gutter level of the existing dwelling.
- The existing dwelling has a roof level significantly higher than the roof level of the proposed patio.
- The 2.4 metre height of the patio will not extend above the level of the 1.8 metre front boundary fence which is approximately 0.7 metres above the patio ground level.
- The patio is 5.4 metres in length compared to the 15 metre length of the house.

- It is considered that the location of the patio facilitates an acceptable streetscape appropriate for the bulk of the building.

Road boundary setbacks of neighbouring buildings;

- The patio will project significantly in front of the existing front boundary setback of the existing dwelling to the south and will project into the 6.0 metre setback predominantly along *withheld* to the north. However, the ability to construct a 2.0 metre high fence along the *withheld* frontage will have more impact on the road boundary setback relevant to this property as the proposed patio.
- It is considered that the location of the patio facilitates an acceptable streetscape appropriate for the road boundary setbacks of neighbouring properties when compared to a 2.0 metre high fence allowed as of right.

Outlook and views of neighbouring residents;

- The only affected persons would be the adjacent residents to the south.
- The construction of the existing 1.8 metre high fence already obstructs the outlook and views of the neighbouring residents.
- The proposed patio will not diminish the outlook or views any more than the existing fence.
- It is considered that the location of the patio facilitates an acceptable streetscape appropriate for the outlook and views of neighbouring residents.

Nuisance and safety to the public;

- The proposed patio will be behind an existing fence. The patio will not encroach into the 9.0 metre by 9.0 metre sight line truncation across the corner of the road frontages to *withheld* and *withheld*.
- The proposed patio will not affect the visibility of vehicles entering or exiting this site or adjoining sites.
- It is considered that the location of the patio facilitates an acceptable streetscape that does not create issues relating to nuisance and safety to the public.

It is the Tribunals view that the proposed patio satisfies the relevant performance criteria of P1.

Other matters;

- If the Council has intentions to widen the road reserve it should be stated in the desired environmental outcomes of the planning scheme; and
- The Council could have commenced action under section 5.5.1 of the *Integrated Planning Act 1997* to resume the land for planning purposes.
- The Council also has the ability to designate the land required under section 2.6.12 of the *Integrated Planning Act 1997*.
- The Council has taken no action under legislation to give notice of its intentions to the owners of the land to resume the land or designate the land. It is unreasonable to place a perceived restriction on the owner's use of the land without the owners having the right to respond to such a restriction.

- The road has already been widened on the western side between *withheld* to the north and this site. If the Council had intentions to require additional land for road widening it should have exercised that right at the time of subdivision of the subject land.
- There is still approximately 4.5 metres of land left for resumption without affecting the proposed structure.
- The nature of the structure is that there would be a minimal amount of work to reduce the structure to either a 5.0 metre or 6.0 metre setback if the Council found it necessary to resume part of the land.
- The relocation of the front boundary fence would be a far more significant reconstruction project when compared to alterations to the proposed patio.

David Kay
Building and Development Tribunal Chairperson
Date: 18 October 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:

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