



Building and Development Tribunals – Decision

Integrated Planning Act 1997

Appeal Number:	3—08—078
Applicant:	<i>Withheld</i>
Assessment Manager:	Mr Gerard Van Eyk for and on behalf of Accord Building Certifiers
Concurrence Agency: (if applicable)	Gold Coast City Council
Site Address:	<i>Withheld - the subject site</i>

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Accord Building Certifiers to refuse a Development Application for Building Work, namely raising and extending a dwelling and a Class 10a carport.

Date of hearing:	9am – Monday, 24 November 2008
Place of hearing:	Offices of the Dept of Infrastructure and Planning
Tribunal:	Mr John Panaretos – Chair Mr David Whittaker – General Referee
Present:	<i>Withheld</i> - Applicant Gerard Van Eyk – Assessment Manager (private building certifier)
	Gold Coast City Council (Council) was not represented at the hearing, instead opting to lodge a written submission.

Decision

The Tribunal, in accordance with section 4.2.34 (1) of the IPA, **orders** the assessment manager to assess and decide the application, the subject of this appeal, subject to the following;

1. The decision is based on
 - a) the raising and alterations to the dwelling in accordance with the site plan (sheet1) and front elevation submitted to the Tribunal on 31 November 2008, and sheets 2 to 6 dated January 2008, to the extent they do not conflict with sheet 1.
 - b) the carport being constructed in accordance with sheet 1 submitted to the Tribunal on 31 November 2008 and sheet 7 dated January 2008.
2. The approval is subject to the following conditions:

- a) The carport must be kept open in accordance with the Building Code of Australia Part 3.7 (figure 3.7.1.7).
- b) Where a new vehicle crossover (VXO) is required, or a change to an existing VXO is necessary, a Vehicular Crossing Permit must be obtained prior to the issuing of a Development Permit for Building Work, in accordance with the requirements of Local Law 11.
- c) The design and construction of the vehicle crossing (VXO - kerb to property boundary) shall comply with the Gold Coast City Council's, Land Development Guidelines 2005, Standard Drawing No. 05-02-302 and 05-02-303 (both "ISSUE 2005 EDITION").
- d) It is the Assessment Manager's responsibility to ensure the driveway (within property boundary) is to be designed in accordance with AS 2890.1-2004 - Section 2.6 Design of Domestic Driveways which specifies a maximum ramp gradient of 1 in 4 (25%). To prevent vehicles scraping and / or bottoming out where changes of grade exceed the thresholds stated in AS 2890.1 Section 2.5.3 (d), the applicant shall provide appropriate grade transitions (equal to or greater than 2.0 metres in length).
- e) The driveway and vehicle crossing are to be interfaced such that a standard vehicle (refer to Appendix B - Figure B2 of the Australian Standard referred to above (85th Percentile Car) can enter and exit the property without scraping or bottoming out at any given point inside or outside of the property boundary line.
- f) It is the Assessment Manager's responsibility to ensure maximum gradients of the parking module (under cover car space) must comply with Part 2.4.6 "Gradients within parking modules" of AS/NZS 2890.1:2004.
- g) The carport must be exclusively used for the parking of vehicles.
- h) The carport is to be constructed using materials with patterns, textures and colours compatible with those of the main building. The carport supports located to the front of the carport are to consist of "350 square" masonry columns or equivalent.
- i) No enclosure, screening, or enclosed covering is to be placed or attached to the north and south sides of the carport.
- j) The carport height shall not exceed 3.0 metres above natural ground level at the road front boundary to the top of fascia.
- k) The overall carport width, including eaves projections, located within the road front property boundary clearance shall not exceed 7.2 metres.
- l) The use must not cause any adverse impact on the amenity of the neighbourhood by reason of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or otherwise to the satisfaction of the Chief Executive Officer.
- m) All lighting devices associated with the development must be positioned on site and shielded to the satisfaction of the Chief Executive Officer so as not to cause glare or other nuisance to nearby residents and motorists.
- n) The main building must be used as a single detached "Class 1a" dwelling - private residence and no part:
 - i. is to be registered for rental
 - ii. is to be used for "family accommodation"; and
 - iii. details of this condition are to be included in any subsequent Development Application for building work.
- o) During the transportation of soil and other fill material:
 - i. all trucks hauling soil, or fill material shall have their loads secure and covered.
 - ii. any spillage that falls from the trucks or their wheels must be collected and removed from the site and streets along which the trucks travel, on a daily basis.

- iii. Prior to vehicles exiting the site measures must be taken to remove soil from the wheels of such vehicles to prevent soil and mud being deposited on public roads and streets.
- p) Evidence demonstrating that all stormwater drainage discharges to a lawful point and does not adversely affect downstream properties must be submitted to the satisfaction of the Chief Executive Officer. This must occur prior to the issue of the Development Permit for carrying out building work, or if an application for carrying out building work is not required, prior to commencement of the use that is the subject of this approval.
- q) Responsibility for the correct siting of the structures rests with the owner of the property. An identification survey, indicating the property and all boundary setbacks of the structures, may be required at an inspection stage to ensure the above-approved boundary clearances do not differ.
- r) Surface water, resulting from a 1 in 20 year storm event which is collected or concentrated by a building or site works, must be disposed of in a way which avoids the likelihood of damage or nuisance to any other building or property in the neighbourhood, to the satisfaction of the Chief Executive Officer.
- s) The applicant must comply with all relevant Specific Development Codes and Constraint Codes for the Domain or Local Area Plan (LAP) in accordance with the Gold Coast Planning Scheme 2003.
- t) All construction work must be carried out between the hours of 6.30am and 6.30pm Monday to Saturday inclusive. No building or construction work will be carried out outside these hours or on Sundays or Public Holidays unless written approval is given by the Chief Executive Officer.
- u) Prior to the issue of a Development Permit for building work, all aspects of Council's policies are to be complied with for structures within 2.0 metres of Council Infrastructure (i.e. sewer, stormwater).
- v) An Operational Works Application (Vegetation Clearing) is required to be submitted and approved by Council for any works proposing the removal of vegetation identified within the Operational Works - Vegetation Clearing "Table of Development" for subject sites Domain or Local Area Plan designation.
- w) The Assessment Manager shall ensure the applicant has paid any outstanding amount relating to the Portable Long Service Leave Levy (PLSL) prior to commencement of building work on site.

Background

The application is for:

- raising and extending an existing dwelling
- creating a habitable ground floor
- constructing a carport at the front of the property.

Plans submitted to the Tribunal include an 'Art Studio' however the Art Studio does not form part of the application and is not approved by this decision.

The project proposes Performance Solutions to satisfy side boundary setbacks for the house and front and side boundary setbacks for the car port as prescribed in Acceptable Solutions to the Gold Coast Planning Scheme's Southport LAP Place Code (Precinct 9). The proposed front setback also conflicts with the Queensland Development Code (QDC) Acceptable Solution.

Council, as Concurrence Agency, has refused to consider the proposed Performance Solutions on the basis that the application was not properly made. On 18 October 2008, the certifier issued a refusal citing as his reason "deemed refusal by the concurrence agency".

Council's reason for arriving at its conclusion is that "...the proposed development can potentially be utilised as an "Apartment" or "Family Accommodation". Both uses require a code application for material change of use prior to an application for building work. It is Council's contention that, despite the internal staircase, each level is capable of being used as a self-contained dwelling unit.

To allay Council's suspicion, the applicant has executed a statutory declaration declaring that the house, "...when raised will not be used for dual occupancy." The Certifier has stated, in his letter to the Tribunal, "There is no intention on the part of the owner to convert the dwelling to two separate apartments".

There is no power in the IPA for a Concurrence Agency to deem an application "not properly made", nor is there provision for "deemed refusal" of an application for building work to assess amenity and aesthetic impacts by a Concurrence Agency (see s 3.3.16(3) and (4)). The Tribunal finds that the proposal does not breach or conflict with any definitions within the planning scheme or the QDC. The presence of a second sink, an awkward floor layout or possible ability for future conversion to alternative use is insufficient cause to deem the proposal an alternative land use. A future change of use is properly dealt with by way of an appropriate application at the time or if the change is not authorized by way of a Development Permit through Council's enforcement powers.

In initial application documents, the applicant indicated that this application was pursuant to a previous approval or approvals relating to this building work. The applicant corrected this advice at the hearing, stating that there are no previous approvals in place relating to this work.

Initial submissions by both parties paid little or no attention to the substantive setback issues. Hence, the Tribunal gave opportunity to the parties to address these issues. The applicant has forwarded a submission and more detailed plans, specifying the increased height of the building and setback distances. Council has indicated it does not oppose the alternative solutions relating to setbacks, subject to the imposition of a range of conditions. Council's proposed conditions have been adopted by the Tribunal with minor necessary changes.

House - Side setbacks

The planning scheme requires 1.5 metre side boundary setbacks for buildings up to two storeys (Southport Local Plan Place Code for Precinct 9, PC6 and AS6.4 apply). The proposed Alternative Solution is to retain the current setbacks of 1.3 metres from side boundaries to the walls of the house, 1.0 metres to the fascia of the eaves and the building raised by 650mm. Since these side setbacks have long been a part of the streetscape and are not atypical of the area, the minor increase in height is unlikely to result in significantly more bulk or visually intrusive built form in the streetscape. The creation of habitable space at the lower level of the house is an efficient use of a constrained site. Finally, the unchanged setbacks comply with the setback provisions of the QDC for narrow allotments.

Carport – Front and side Setbacks

The carport is subject to both the side setback requirement as described above and the front setback prescribed in PC6/AS6.4 of 3.0 metres. The carport is an open structure which will not present as bulky or visually intrusive in the streetscape as long as it conforms to reasonable aesthetic standards. In respect of the QDC, as a single storey open structure, the proposed front setback is unlikely to result in nuisance to neighbours or adversely impact on their outlook. In view of its open sides, low profile and position to the south of the adjoining side boundary, the side boundary setback reduction is unlikely to impact on the daylight, ventilation, privacy or amenity of the neighbouring allotment to the north.

Material Considered

The material considered in arriving at this decision comprises:

1. The application, including 'Form 10 – Notice of Appeal' lodged with the Registrar on 7 November 2008, statement of grounds for appeal, Decision Notice issued by the assessment manager and original and modified plans drafted by Contract Design Staff Pty Ltd;

2. Accord Building Certifiers two referrals to Gold Coast City Council, dated 30 June 2008 and 24 September 2008;
3. Gold Coast City Council's referral agency response, dated 3 October 2008, and its submission to the Tribunal dated 21 November 2008;
4. Verbal submissions from the applicant and the assessment manager at the hearing;
5. The Assessment Manager's submission, amended plans and photo appendix lodged with the Tribunal on 3 December 2008;
6. Council's further submission dated 12 December 2008 and email submissions of 17 December 2008;
7. The Gold Coast Planning Scheme 2003;
8. The QDC – Part MP1.1; and
9. The IPA.

Findings of Fact

The Tribunal makes the following findings of fact:

- The IPA makes no provision for a Concurrence Agency to deem an application 'not properly made', nor for a deemed refusal of an application referred to it on amenity and aesthetic grounds;
- The proposal plans, as originally submitted, provided insufficient detail, particularly with respect to building height and boundary setbacks on which to determine the application;
- The amended plans and report provided sufficient detail for determination of the alternative solution for the house and the carport;
- Council does not oppose the alternative solutions proposed for front and side boundary setbacks under the planning scheme or the QDC;
- The side boundary setbacks of the house will remain unchanged at 1.0 metres to the outermost projection and 1.3 metres to the walls on both sides, the house to be raised by 0.65 metres.

Reasons for the Decision

1. As Referral Agency, Council has no power under the IPA to deem an application "not properly made".
2. There is no avenue for "deemed refusal" from a Concurrence Agency referral within the IPA.
3. The proposal conforms with Performance Criteria P6 of the relevant code since there is no evidence that continuation of the house's established side boundary setbacks, albeit with higher elevations, will result in a bulky or visually intrusive built form; nor are the setbacks atypical of the area. The creation of habitable space at the lower level of the house is an efficient use of a constrained site. The unchanged setbacks comply with the setback.

John Panaretos
Building and Development Tribunal Chair
Date: 6 January 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 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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