



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-07-064

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: GMA Certification Group Pty Ltd

Concurrence Agency: Gold Coast City Council

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

Applicant: *withheld*

Nature of Appeal

Appeal under Section 4.2.24 of the *Integrated Planning Act 1997* against the deemed refusal by the Gold Coast City Council (as a concurrence agency) of a Development Application for Preliminary Approval for Building Works – siting provisions for a deck and pool fence on “the subject site”.

Date and Place of Hearing: 11:30am on Friday 9th November 2007
at “the subject site”

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

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

Decision:

The deemed refusal by the Gold Coast City Council of a development application for Preliminary Approval for Building Work for an as-constructed deck and umbrella is **set aside** and **the application is approved, subject to conditions:-**

- i) **The deck is to be modified such that no supporting structures are located on top of the existing revetment all. This will require the deck to be cantilevered for its southern-most part. No supporting structures are to be located closer than 1.0m from the revetment wall.**

- ii) **The underside of the deck is to be screened with timber or other battens (vertical or horizontal) to provide a minimum of 50% screen.**

Material Considered

The material considered in arriving at this decision comprises:

- The application, including “form 10 – Notice of Appeal”, supporting plans and documentation;
- Plans and documents provided by both the applicant and the Council after the hearing;
- The relevant provisions of the Town Planning Scheme for Gold Coast City Council;
- Part 12 of the Queensland Development Code Part 12 (QDC);
- The *Integrated Planning Act 1997*; and
- The *Integrated Planning Regulation 1998*.

Findings of Fact

I make 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 an as-constructed deck and umbrella, although the umbrella is not in contention in this appeal.
- The application arises from a Show Cause Notice and Enforcement Notice process by the Council commencing in about December 2006 with respect to the deck. The Enforcement Notice was issued on 14th August 2007. The subject application was lodged on 5th April 2007 and the Council, as a Concurrence Agency, did not respond until the 1st May 2007 when it purported to issue an Information Request.
- This is an appeal against a deemed refusal, as the Council did not provide a response or an Information Request within the time specified in Schedule 4 of the *Integrated Planning Regulation* (5 business days).
- It emerged at the hearing that the Council’s opinion is that there is 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 form 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, but its support structures sit on top of the existing revetment wall. 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 located right on the revetment wall, where the setback line on the Overlay Map shows 9.0m. This setback line is intended for buildings, as opposed to swimming pools or decks, as indicated on Standard Drawing 05-04-004 (see below).
- 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 minimum setback of 1.0 from the waterway regulation line for such 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 some of the owners of surrounding properties who might have a view of the offending structure.
- The subject property is at the western 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.
- It was observed at the hearing that a number of the surrounding properties have decks built to a similar height although many of those are set back from the revetment walls.
- An inspection of the deck’s supporting structure shows that its support beams sit on top of the existing revetment wall. This negates any practical opportunity for maintenance of the wall in the future, regardless of who takes responsibility for that maintenance (Council or the land owner). There is evidence of the revetment wall starting to deteriorate, with a number of small cracks appearing.

Based on an assessment of these facts, it is the Tribunal’s decision that **the application is approved, subject to the following conditions:-**

- i) The deck is to be modified such that no supporting structures are located on top of**
- ii) the existing revetment wall. This will require the deck to be cantilevered for its southern-most part. No supporting structures are to be located closer than 1.0m from the revetment wall.**
- iii) The underside of the deck is to be screened with timber or other battens (vertical or horizontal) to provide a minimum of 50% screen.**

Reasons for the Decision

- The basis for Council's refusal is alleged non-compliance with PC1 of the Canals and Waterways Code.
- The decking and pool fence as now constructed are not out of place in the locality, and, as amended by these conditions, will not (does not) detract visually from the locality..
- The removal of any structure on top of the revetment wall will enable maintenance to be carried out on that wall as required from time to time.
- 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: 20 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:

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