Building and Development Tribunals
Queensland Government
Department of Local Government and Planning

APPEAL **File No. 03-05-079**
Integrated Planning Act 1997

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: **Mackay 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 Mackay City Council to refuse an application for variation of boundary setback policy on land described as Lot withheld and situated at "the subject site".

Date and Place of Hearing: 1:30pm on Wednesday 18th January 2006
at "the subject site"

Tribunal: Mr Chris Schomburgk

Present: Applicant – builder on behalf of owner
withheld (owners); and
Mr John Caldwell - Mackay City Council.

Decision:

The decision of the Mackay City Council as contained in its written Decision Notice dated 23rd November 2005, to refuse an application for relaxation of the side boundary setback, is **set aside** and **the application is approved, subject to conditions.**

Material Considered

The material considered in arriving at this decision comprises:
- The application and supporting plans and documentation;
- Additional material provided by the Council at the hearing, including a copy of the Council Policy on boundary setbacks;
- The relevant provisions of the Town Planning Scheme for Mackay City Council;
- Council's Decision Notice dated 23rd November 2005; and
- The Integrated Planning Act 1997.

Findings of Fact
I make the following findings of fact:

- The applicants have appealed against Council's refusal of the application for a reduced boundary setback on the site's north eastern side.
- The site comprises Lot *withheld*, with frontage to *withheld* Crescent at *withheld*. A substantial house has been built on the subject property, and a separate house has been built on the adjoining site to the north east, both part of a recent residential estate in this part of Mackay. A dividing fence of overlapping timber palings approximately 1.8m high has been erected along the common boundary, although it appears to be just inside the subject property.
- The subject land has frontage to the turning area of a small cul-de-sac and as such is fan-shaped, with a narrow street frontage, widening out as one moves into the site.
- The house has been built roughly perpendicular to the site's street frontage, such that it is at an angle to (ie: not parallel to) both side boundaries.
- The applicants had previously gained Council approval for relaxation of the boundary setback on this north eastern boundary from the usual 1.50m to 1.00m. The house has been constructed and the setback has been subsequently measured by two surveyors as being 0.863m and 0.865m off the relevant boundary instead of the approved 1.00m – a discrepancy of 0.135 or 0.137m, depending on which surveyors calculations are adopted. I do not consider that the difference between the surveyors (2mm) is of any significance in this matter.
- It is common ground between the parties that the eaves of the house will intrude (as they do) even further into the setback area. The Council was apparently conscious of this when it approved the relaxation to 1.00m, so that there was an expectation that the eaves would be even closer to the common boundary. The approved setback is to the building wall, not the eaves, as is evident from the approved plans of the first application.
- On inspection, it is evident that the closeness of the eaves is more of an issue than the building wall itself. The location of the boundary fence, which appears to be partly inside the subject property by some small distance, exacerbates the closeness of the eaves to the boundary.
- The building certifier for the original approval issued a Show Cause notice to the applicant alleging that the building had been built closer than the relaxation approval allowed.
- Once the actual setback distance was confirmed by independent survey, the applicants made a further application to the Council seeking approval for the as-constructed setback. It is this application that has been refused by the Council and is the subject of this appeal.
- It is important to note that, due to the shape of the allotment and the orientation of the house, the offending intrusion occurs for only a very short length of the wall (approximately 150-200mm), thereafter the wall is setback more than 1.0m and this setback increases quickly as one moves into the site.
- The Council refused the later application on two grounds being:
    - *The setback has not demonstrated compliance with the performance criteria of the Policy; and*
    - *The request is not supported by the adjoining owner*.
- The relevant Council Policy is Policy 1.12 "Building Setbacks from Boundaries for Class 1 and 10 Buildings" (dated 1999 but still in use) requires a minimum side boundary setback for single storey buildings (less than4.5m high) is 1.5m. However, for narrow lots, the side boundary setback must be in accordance with a Table of sliding scale based on road frontage and building height. For a site with a more regular shape, the minimum setback is to be 0.750m based on a street frontage of only 8.276m. However, this figure applies only to rectangular or near-rectangular shaped narrow lots. The subject lot is not rectangular.
- The Policy has discretionary provisions (section 6) which allow relaxation of this minimum in certain circumstances. These circumstances include, properly, a consideration of matters such

as lot shape, the nature of adjoining buildings, impact on light or ventilation, privacy, access and other matters.

- On site, the parties acknowledged that removal of the offending section of wall would be expensive and would have some negative visual and practical impact on the house (a short truncated corner). The parties agreed that the eaves were the more visually intrusive element (than the wall), and that some modification may be able to be achieved to the eaves to minimise the visual extent of intrusion into the setback area.
- The Council officer present at the hearing, Mr Caldwell, advised that, had the original application been made for the reduced setback of 0.863m, it would not have been approved by him. Mr Caldwell advised that he has delegated authority from the Council to decide such applications.

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

Council's decision to refuse the application for relaxation of the side setback **is set aside.** The **application is approved, subject to conditions as set out below.**

Reasons for the Decision

- The wall intrudes by only 135m into the approved setback, and then only for a short length of wall (approximately 150-200mm). The orientation of the house on the subject lot is a relevant factor in determining the extent of non-compliance.
- The structure does not impede any views, breezes or sunlight, or cause any other significant amenity impacts to the adjoining, or any other, property.
- The location of the dividing fence (with the lot to the east) and the eaves serve to exaggerate the visual impact of the intrusion into the setback area.
- The eaves of the house intrude further into the setback area and some modification of the eaves in this area is warranted to minimise this visual intrusion.
- The proposal, especially as amended as per the condition set out below, does not offend any of the relevant Performance Criteria in the relevant Planning Scheme Policy.
- The issues above, collectively, are such that no adverse impacts are likely to arise as a result of this approval.

Conditions of approval:

- The following Condition is to be part of the approval:
    1. *The existing wall is approved in its current location. The eaves of the roof are to be modified such that no part of the eaves extends any closer than 600mm to the common boundary to the north east.*
    2. *The distance to the eaves from the common boundary is to be certified by a registered surveyor as complying with this condition, prior to final building inspection.*

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Chris Schomburgk
Building and Development Tribunal General Referee
Date: 23rd January 2006

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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