

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Brisbane City Council

Site Address: 5 Conda Place, Carindale

Nature of Appeal

Appeal under section 4.2.9 of the Integrated Planning Act 1997 against the decision of the Brisbane City Council not to vary the application of Division 2 – Boundary Clearances, as provided for under the Standard Building Regulation, to the extent requested by the applicants, for a single detached house on land described as Lot 27 SP 140920, situated at 5 Conda Place, Carindale.

Date and Place of Hearing: 11.00 am on 6 September 2001
at 5 Conda Place, Carindale.

Tribunal: G S Cornish

Present: G S Cornish - Tribunal Referee
The Applicant
G Kranz - Brisbane City Council

Decision

I **confirm** the decision appealed against, namely the decision of Greg Kranz as delegate of the Brisbane City Council made on 2 August 2001 (Reference DRS/BLD/A01-1140026) to refuse a relaxation of the boundary clearance to the extent requested on the Pacific Close road frontage and instead grant a lesser setback to 5.71 metres, and I **vary** the relaxation granted to the Conda Place road frontage to 4.522 metres to the outermost projection to conform with the details shown on Sheet 1 of the submitted plans, dated 30/07/01 and amended as at 10/08/01, as agreed on site.

Material Considered

1. Sheets 1 to 5 of drawings of the proposed residence (dated 30/07/01) showing the relevant elevations of the dwelling, site levels, floor levels and the setback relaxations sought. Sheets 1 to 4 are as amended as at 10/08/01. Sheet 5 is unamended.
2. Owners' letter dated 24 July 2001 to Brisbane City Council requesting road boundary setback relaxations to 4.522 metres from Conda Place and 4.610 metres from Pacific Close.

3. Support letter dated 26 July 2001 from Kadet Pty Ltd, then owners of the land, setting out their agreement to the application for relaxations.
4. Letters from the owners of Lots 22, 25, 26 and 28 supporting the application.
5. Copy of the real property plans for the subdivision.
6. Letter of the Brisbane City Council dated 2 August 2001 refusing the application in part and granting a reduced setback relaxation to the Pacific Close frontage in lieu of that sought.
7. Applicants appeal letter and form dated 21 August 2001 appealing the Council's decision.
8. Letter from the applicants, dated 3 September 2001, confirming that the appeal application related to Lot 27 and not Lot 21 as stated on the original appeal form.
9. An unsigned copy of a letter from Morgan Consulting Engineers Pty Ltd, dated 24 August 2001, recommending that any swimming pool constructed adjacent to the eastern rock retaining wall be constructed a minimum of 1500mm clear of the base of the wall.
10. Verbal submission of the applicant on 06/09/01 supporting his application and expanding on reasons why the relaxations should be given.
11. Verbal submission of Mr. Kranz of Brisbane City Council on 06/09/01 clarifying the reasons the relaxations were granted in part only.
12. Further verbal submission of Mr. Kranz of Brisbane City Council on 10/09/01, in response to a telephone enquiry from me on 07/09/01, regarding whether the relaxation granted to Mr. Foo for Lot 22 was in fact to the Pacific Close road boundary as stated in the applicant's submission, or to the Conda Place road boundary as I believed to be the case.
13. The Standard Building Regulation.

Findings of Fact

I made the following findings of fact:

1. The subdivision was approved by Brisbane City Council as a standard subdivision to which the setback provisions of the Standard Building Regulation apply and not as a subdivision to which a pre-existing local law or planning instrument applied, or to which the local government had applied, by way of a resolution, the provisions of the Queensland Residential Design Guidelines. Hence no alternative siting provisions, as provided for in Section 45 of the Standard Building Regulation, apply to this subdivision. The relaxations therefore granted by Brisbane City Council in other subdivisions approved by resolution under alternative siting provisions do not have relevance to this application.
2. Lots 22, 23, 25, 26, 27 and 28, are all of a rectangular or near rectangular shape.

3. Lots 22, 27 and 28 are all corner allotments of a size and shape to which the provisions of Section 47 of the Standard Building Regulation apply. Under the standard provisions, each of these allotments would be entitled to a concession, to one road frontage only, to a setback of approximately 5.7 metres, with the local government deciding the road frontage to which this concession would apply.
4. In deciding relaxation applications for both Lots 22 and 27, Council has consistently applied the concession to the Conda Place road frontage. The applicant's letter of appeal states that *"the owner of Lot 22 has been granted a 4.5 metre relaxation from Pacific Close."* A check of Council's file for this property, however, indicates that in fact the concession granted is for Conda Place and that the setback to the Pacific Close road frontage is maintained at 6.0 metres. It is believed that the construction on Lot 22 conforms to this approval.
5. The relaxations granted to the Conda Place road frontages of Lots 22 and 27 are considerably more generous than provided for in Section 47 of the Standard Building Regulation.
6. The granting of a relaxation to the second road frontage would set a precedent for other allotments fronting Pacific Close. The applicant has stated that his neighbour at Lot 26 will also be seeking a relaxation to 4.5 metres from the Pacific Close road boundary.
7. Lot 26 would not normally be entitled to a relaxation because of the size, regular shape and generally level nature of the allotment, but could become so entitled if special circumstances such as a precedent applied.
8. A retaining wall constructed at the eastern end of the allotment as part of the subdivision reduces the area of the allotment suitable for the construction of a swimming pool in close proximity to it. The applicant's consulting engineer recommends that any pool be kept a minimum of 1.5 metres from the base of this wall. The applicant's home, outdoor entertaining area and pool have been optimised to suit his requirements and not to meet the constraints of the allotment. The applicant appears to be of the view that he is entitled to place his desired home on the allotment and that it is the responsibility of the approving authority to grant the necessary concessions to facilitate this. I am of the view that the applicant has a responsibility to design within the guidelines and justify any concessions requested, except where unusual site conditions exist. It is noted that the corresponding allotment on the opposite side of Pacific Close, Lot 22, is shorter in length than Lot 27 by a distance equivalent to that lost to Lot 27 by virtue of the eastern retaining wall. For building purposes, therefore, both these allotments are equivalent and the loss of area on Lot 27 should not be seen as an unfair imposition.
9. The footpath widths in this subdivision are as for most subdivisions. They are not so significant as to suggest that they would have any effect in giving an appearance of compliance with normal setbacks in the event significant reductions were approved.
10. Under Section 48 of the Standard Building Regulation, a local government may vary how Division 2 applies to the application after considering the following points listed in Section 48(3) -

(a) *The levels, depth, shape or conditions of the allotment and adjoining allotments.*

The allotment is at a lower level than the adjoining allotments by approximately 1 and 2

metres respectively. A 2 metre high rock boulder retaining wall exists approximately one metre in from the eastern boundary of the allotment and a 1 metre high timber retaining wall exists along the northern boundary. The allotment falls from the east to the west approximately 0.9 of a metre. There are no existing buildings on either of the two adjoining allotments. The site conditions applicable to this allotment and adjoining allotments are not unusual such as to warrant special consideration.

(b) The nature of any proposed building or structure on the allotment.

The proposed dwelling will be two storey and of a height of approximately 5.3 metres above slab height to the eaves. The slab level has been set at approximately the same level as the ground at the rear or eastern end of the allotment. The apparent height of the dwelling at the Pacific Close frontage will therefore be approximately 6.3 metres above the existing ground to the eaves at the south western corner and 6.0 metres at the north western corner. This is a significant structure so close to a road frontage. The height of the entry/patio structure fronting Conda Place at a setback of 4.561 metres is even higher than this. The impact on the streetscape will be significantly increased if the reduced setback is applied to the second road frontage.

(c) The nature of any existing or proposed buildings or structures on adjoining allotments.

There are no existing buildings on either of the two adjoining allotments, however it was stated that the owner of the property to the north is proposing to request a boundary relaxation for his dwelling to 4.5 metres from the road boundary.

(d) Whether the allotment is a corner allotment.

The allotment is a corner allotment. The local government has agreed to a substantial reduction in the setback to one road frontage and offered a further relaxation to the other. The disputed relaxation is equal to that given in the guidelines of the Standard Building Regulation for relaxation on a corner allotment of these dimensions.

(e) Whether the allotment has 2 road frontages.

The allotment has 2 road frontages as it is a corner allotment.

(f) Any other matter considered relevant.

The local government considers that the granting of a second substantial relaxation to the Pacific Close frontage would set a precedent for other allotments in the subdivision. This would be particularly relevant to any application for a relaxation submitted by the owner of the adjoining allotment, Lot 26, and for other allotments in Pacific Close.

10. In varying the siting requirements, the local government must be satisfied that a building or structure, built on the allotment in the way proposed, would not unduly –

(a) Obstruct the natural light or ventilation of an adjoining allotment.

The proposed dwelling will not have any effect upon the natural light or ventilation of any future dwelling built on either of the adjoining allotments.

(b) Interfere with the privacy of an adjoining owner.

The proposed dwelling will not interfere with the privacy of any adjoining owner.

(c) *Restrict the areas of the allotment suitable for landscaping.*

Approval of the application would not restrict the areas of the allotment suitable for landscaping.

(d) *Obstruct the outlook from an adjoining allotment.*

Allowing the proposed two storey dwelling to be constructed closer to the Pacific Close road frontage than provided for in the Standard Building Regulation will obstruct the southerly views from the adjoining property to the north. The applicant has stated in his verbal submission that the principal views are to the south and not to the west.

(e) *Overcrowd the allotment.*

The proposed building will have an allotment coverage of approximately 40% which is below the 50% permitted under Section 43 of the Standard Building Regulation.

(f) *Restrict off-street parking for the allotment.*

There will be no restriction to the off-street parking available to this allotment.

(g) *Obstruct access for normal building maintenance.*

There will be no obstruction for normal building maintenance resulting from this application.

Reasons for the Decision

An assessment of the facts and the requirements of Sections 36, 45, 47 and 48 of the Standard Building Regulation leads me to the conclusion that the local government has fulfilled the obligations placed upon it by the Regulation. Section 48(2) provides that a local government **may** vary how the provisions of Division 2 apply to the application and not that a local government **must** vary how they apply. The obligations placed upon the local government in such a situation are twofold, firstly to **consider** the application and secondly to be **satisfied** that certain matters do not unduly affect various aspects of the application's environment if the provisions are to be varied.

As Section 48 gives the local government discretionary powers, I am of the view that the local government has a duty to ensure that the relaxation granted is correctly assessed, documented, justified and can be supported in the event of any subsequent third party appeal investigation undertaken under the Judicial Review Act process. To this end, I am of the view that the applicant has a responsibility to provide justification, to the satisfaction of the local government, which would convince the local government to grant the application. In this instance the local government has not been convinced that adequate reason exists and has granted a varied decision accordingly.

I also have not been convinced that the applicant has sufficient justification, and am of the view that the extent and value of development proposed on an allotment do not constitute relevant and valid grounds for the exercising of a discretion to grant a concession.

G S Cornish
Building and Development
Tribunal Referee
Date: 13 September 2001

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
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