



## Building and Development Tribunals – Decision

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### *Integrated Planning Act 1997*

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| <b>Appeal Number:</b>                         | <b>3–08–073</b>   |
| <b>Applicant:</b>                             | Shane & Kirsten Lee Dunn  |
| <b>Assessment Manager:</b>                    | John Reeve for and on behalf of The Certification Professionals             |
| <b>Concurrence Agency:</b><br>(if applicable) | Gold Coast City Council   |
| <b>Site Address:</b>                          | 56 Nobby Parade, Miami and described as Lot 896 RP 58795 – the subject site |

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### **Appeal**

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager to refuse the development application for building works, namely an application to erect a dwelling and attached open carport located on the subject site.

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| <b>Date of hearing:</b>  | 9.00 am – Tuesday, 28 November 2008   |
| <b>Place of hearing:</b> | The subject site  |
| <b>Tribunal:</b>         | Mr Paul Smith – Chair<br>Mr Steve Adams – Member  |
| <b>Present:</b>          | Ms Kirsten Dunn – Applicant<br>Mr Gary Macleod – Representative from Glindemann Homes<br>Mr Garry McDowell – Representative from Glindemann Homes |

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### **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 carport located within 6.0 metres of the street alignment does not exceed 6.0 metres measured to the outside of the supporting columns; and
2. the front gate/shutter, if any, on or within 6.0 metres of the road alignment to be, when closed;
  - a) no higher than is permitted for a self assessable front fence; or
  - b) if higher than is permitted for a self assessable front fence, to be of see-through construction for its full height so that a person walking along the Nobby Parade footpath will have at least a 80% unobstructed clear vision through the gate/shutter.

## Background

A development application for carrying out of building work under the IPA was received by the assessment manager for the erection of a single detached dwelling on the subject site.

The application was referred to Council for its response as a referral (concurrence) agency. Council did not respond within the time prescribed by the IPA.

The assessment manager refused the building development application because no response had been received from the concurrence agency, and therefore the application was deemed to have been refused pursuant to section 3.3.16 (4) of the IPA.

The assessment manager issued a decision notice refusing the building development application and the applicant appealed the decision to the Building and Development Tribunals on 13 October 2008.

Council were not present at the onsite hearing and provided a written submission. The submission identified two issues in dispute, namely:

1. "the proposed 450 mm offset to 'OMP' (outer most projection) from the southern side boundary (which runs approximately 15.0 metres along the boundary), has no building line 'articulation' and is deemed an excessive encroachment even with the adjacent owner/s 'non-objection' comment; and
2. the width of the carport within 6.0 metres of the road alignment.

In response to the Tribunal's request for further particulars, Council identified Performance Criteria PC4 of the Place Code in the Residential Choice Domain (Reference Part 5 Division 2 Chapter 5 of the Planning Scheme) as relevant. Council concluded that "It is the opinion of Council that a better design outcome is possible when a new dwelling is proposed on a vacant lot".

## Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' received by the Registrar on 13 October 2008 including grounds for appeal and photographs of other carports in the area and three plans of the proposed development showing plans and elevations dated 5 October 2008 and one "Ground Level Plan" dated 21 October 2008;
2. Development Application decision notice from the Assessment Manager, dated 19 September 2008, refusing the application.
3. 'Form 8 – Notice of Election' received by the Council on 23 October 2008.
4. Verbal submission from the applicant at the hearing.
5. Verbal submissions from the applicant's representative at the hearing.
6. Written submission from Council dated 27 October 2008.
7. Further written submissions from Council dated 10 November 2008.
8. Email from the applicant dated 10 November and email from the neighbour dated 26 November 2008.
9. The *Building Act 1975* (BA).
10. The Building Regulation 2006.
11. The IPA.
12. The Integrated Planning Regulation 1998 (IPR).
13. The Queensland Development Code (QDC).
14. Relevant section of Council's planning scheme.

## Findings of Fact

The Tribunal makes the following findings of fact:

1. The subject site:
  - a) is a vacant 450m<sup>2</sup> residential narrow lot with a street frontage in the order of 15.0 metres and a rear boundary length in the order of 6.0 metres;
  - b) is located on the northern side of Nobby Parade;
  - c) is located at a tight turn in Nobby Parade;
  - d) is generally level;
  - e) is located is a pleasant and quite residential street occupied predominantly by low rise detached residential dwellings.
2. The neighbouring dwelling to the west is occupied by a modern two storey house with an unenclosed double carport extending up to or close to the street alignment. There are no bedrooms or other habitable rooms located along the common side boundary with the subject site that would be adversely affected by 'overlooking' by the proposed development.
3. The local government is identified in IPA part 3.1.8(1) and the IPR schedule 2 as the concurrence agency for assessing non-compliance with the alternative siting provisions established under the BA section 33.
4. The BA Section 83 (d) prevents the private building certifier from approving the building development application if a concurrence agency has jurisdiction for a part of the building assessment work until that part has been assessed by the concurrence agency, under the building assessment provisions. For the BA section 30 (c) a planning scheme provisions made under Section 32 or 33 is a building assessment provision.
5. The Building Setback provisions of the Residential Choice Domain Place Code of Council's Planning Scheme 2003 is therefore relevant to the application.
6. Performance Criteria PC4 of the Code provides:-

*"All buildings must provide for setbacks from the street frontage and the side and rear boundaries, which are appropriate to the efficient use of the site and the streetscape character of this domain".*
7. The corresponding Acceptable Solutions provide:-

AS4.1

*The building (excluding a covered car parking space or carport) is setback not less than six metres from the frontage of the site and setback from the side and rear boundaries at not less than:-*

  - a) 1.5 metres, measured from the outermost projection of that part of the building which is 4.5 metres or less above ground level;
  - b) 2.0 metres, measured from the outermost projection of that part of the building which is greater than 4.5 metres but not greater than 7.5 metres above ground level; and
  - c) 2.0 metres, plus 0.5 metres for every three metres or part thereof, measured from the outermost projection of that part of the building, which is greater than 7.5 metres above ground level.

OR

#### AS4.2

*The building is setback in accordance with a specific development code that provides for a greater building setback.*

8. The proposed carport roof extends close to and within 6.0 metre of the front road alignment and does not comply with Acceptable Solution AS4.1.
9. The height of the building at the outermost projection along the western boundary of the subject site exceeds 4.5 metres and is closer than 2.0 metres and does not comply with Acceptable Solution AS4.1.
10. If Council's Residential Choice Domain Place Code applies to the development application, for the development application to be approved:
  - a) it must comply with Performance Criteria PC4, or made to comply by the imposition of conditions; or
  - b) if it does not comply, or cannot be made to comply by the imposition of conditions, there must be sufficient grounds to justify approval having regard to the purpose of Council's Residential Choice Domain Place Code.
11. Council, in its further written submissions dated 10 November 2008, advise: *"The Planning Scheme does not 'recognise' narrow or corner allotments, but Council does refer to the Queensland Development Code concessions for narrow and corner allotments as an assessment guide. Side and rear boundary setback 'encroachments' based on these concessions, may be granted in most circumstances.*  
  
*Under normal circumstances, additional setback concessions will not be granted. For 'concession' details, refer to the table which forms part of the Performance Criteria P2 'Buildings and Structures' of the Queensland Development Code (Reference MP 1.2 'Design and Siting Standard for Single Detached Housing - on Lots 450m<sup>2</sup> and Over').*
12. The Tribunal is of the opinion that there are two ways the relevant provisions of the Residential Choice Domain Place Code may be interpreted.
13. One interpretation of the alternative siting requirements of PC4 and AS4.1 only apply to buildings (*excluding a covered car parking space or carport*). On this interpretation the QDC will be relevant to the assessment of the carport component of the application.
14. The second interpretation of the alternative siting requirements of PC4 and AS4.1 is that a carport is a "building" and therefore it is dealt with by PC4. On this interpretation the QDC will not be relevant to the assessment of the application.
15. The Tribunal expresses no opinion on which interpretation is correct because, on both views, it believes the performance criteria set out in P1 and P2 of the QDC, including the bulk of the building or structure, whether the proposed development would provide adequate daylight and ventilation to habitable rooms and allow adequate light and ventilation to habitable rooms of buildings on adjoining lots or adversely impact on the amenity and privacy of residents on adjoining lots, would be matters to take into account when assessing an application under both Council's code and the QDC.
16. The Tribunal therefore notes, and agrees with, Council's approach of referring to the QDC for guidelines for assessing compliance with Performance Criteria PC4 of its Code.
17. However in this case Table A2, referred to by Council, that forms part of the 'Performance Criteria P2 Buildings and Structures' of the QDC, is not relevant to the subject site as it is not a rectangular or near rectangular narrow lot with a 15.0 metre or less frontage.

18. The applicant has offered to amend the application so the width of the carport located within 6.0 metres of the road alignment does not exceed 6.0 metres.
19. The applicant also acknowledged orally at the hearing that the enclosure door or shutter would not be solid but be of an open see-through design.

### **Reasons for the Decision**

After consideration of;

1. the particular shape and characteristics of the subject site;
2. the design and location of the proposed building including the location of habitable rooms and windows with the potential of overlooking the adjoining dwelling;
3. the house on the adjoining site to the west, including the location of habitable rooms and windows that have the potential of being overlooked or having reasonable light and ventilation obstructed;
4. the support from the neighbour;
5. development criteria set out in P1 and P2 of the QDC; and
6. the unenclosed design of the carport,

the tribunal formed the opinion that the proposed complies with Performance Criteria PC4 of the Residential Choice Domain Place Code of Council's Planning Scheme 2003 and with the relevant provisions of the QDC.

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**Paul Smith**  
**Building and Development Tribunal Chair**  
**Date: 28 November 2008**

## **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  
Building Codes Queensland  
Department of Infrastructure and Planning  
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