

**APPEAL**
*Integrated Planning Act 1997***BUILDING AND DEVELOPMENT TRIBUNAL - DECISION****Assessment Manager:** All Construction Approvals**Concurrence Agency:** Cairns 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* (IPA) against the decision of All Construction Approvals, dated 1/02/2008 (Ref No 3088/07), to refuse a Development Application for Building Works, namely a deck and carport at ‘the subject site’. The decision was based on a concurrence agency response from Cairns City Council, dated 20 December 2007.

Date and Place of Hearing: 9:00 am Monday 17 March 2008 at ‘the subject site’**Tribunal:** Mr Nigel Daniels Chairperson
Mr Steve Adams General Referee**Present:** Applicant / Owner
Owner
Mr Harald Weber All Construction Approvals Representative
Mr Martin Accatino All Construction Approvals Representative
Ms Kelly Barnes Cairns Regional Council Representative
Mr Neil Beck Cairns Regional Council Representative**Decision**

The Tribunal, in accordance with section 4.2.34 (2)(c) of the *Integrated Planning Act 1997* (IPA), **sets aside the decision** of All Construction Approvals dated 1 February 2008 and replaces it with the following decision:-

1. The Assessment Manager is directed to approve the development application (No.3088/07).
2. This approval of the application may be made subject to such conditions as the building certifier may consider to be reasonable and relevant, provided that those conditions may not be inconsistent with this decision.

Background

The property is a 700m² residential block, and is located within a residential area. The property is subject to the provisions of the *Cairns Plan 4.5.4 Residential 1 Planning Area Code and 4.7.12 House Code*. (the "planning scheme")

Under the provision of the *Building Act 1975, Section 33*, the planning scheme includes provisions (alternative provisions) that are alternative or different to the boundary clearance and site cover provisions contained in the Queensland Development Code (QDC). Those alternative provisions take precedence over the equivalent provisions in the QDC. The QDC boundary clearance and site cover provisions only apply to the extent the alternative provisions do not apply to the work.

The site is located in a residential street and slopes steeply from the rear downwards towards the street. There is no access to the sides of the existing dwelling nor to the rear of the dwelling for car parking.

Vehicles must be parked between the dwelling and the road or parked on the road.

An appeal was lodged with the Registrar on 26 February 2008.

Material Considered

The material considered in arriving at this decision includes:

- 'Form 10 – Notice of Appeal' lodged by the applicant and material attached to the Notice;
- 'Form 18 – Notice of Election' from Cairns Regional Council;
- Verbal submissions made at the hearing by the applicant and owners;
- Verbal submission made by the All Construction Approvals Representatives at the hearing;
- Verbal submissions made by the Council Representatives at the hearing;
- The *Building Act 1975*;
- The Building Regulation 2006;
- Queensland Development Code;
- The *Cairns Plan*: Chapter 4.2; Residential 1 Planning Area Code; House Code;
- The *Integrated Planning Act 1997*; and
- The Integrated Planning Regulation 1998.

Findings of Fact

The proposed development, for the purposes of this decision, effectively comprises:

- An open carport; and
- An open (un-roofed) deck above the carport.

The carport complies with the Acceptable Measures of the Cairns Plan House Code and may be approved, because the aggregate perimeter dimension of walls, solid screens and supports located within 6m of the road boundary does not exceed 15% of the total perimeter dimension (along the line of supports) of that part of the carport within 6m of the road boundary; and there is no alternative on-site location for a garage or carport that complies with Acceptable Measure A1.1 of the Code.

The open deck above the carport does not comply with the Acceptable Measures of the Cairns Plan House Code. If the open deck were to be approved it must first be established that it complies with the Performance Criteria of the Cairns Plan House Code.

The representative of the Cairns Regional Council also argued that the purpose of the Residential 1 Planning Area Code; also applies. The purpose of the Code is to facilitate the achievement of a range of desired development outcomes (in the form of amenity provisions), of which the following are relevant:

- The residential character and amenity of these residential neighbourhoods is maintained and enhanced; and
- The scale and density of development are consistent with the existing forms of development in established residential neighbourhoods.

The Residential 1 Planning Area Code has 2 Performance Criteria and associated Acceptable Measures relevant to self-assessable development. These provisions relate to population density and height of buildings. The proposal complies with the relevant Acceptable Measures in both cases (refer Attachment B).

As stated in Chapter 4, Section 4.2 of the *Cairns Plan*, compliance with the Acceptable Measures is a way of achieving the Performance Measures; and compliance with the Performance Measures satisfy the purpose of the Code. As such the purpose of the Residential 1 Planning Area Code has been satisfied in this instance as the relevant Acceptable Measures of the Code have been satisfied.

Consequently, the decision on whether or not to approve construction of the open deck (distinct from the carport, which complies) relies on assessment against the Performance Criteria of the *Cairns Plan*: House Code.

Reasons for the Decision

- The carport complies with the Acceptable Measures of the *Cairns Plan* House Code and may be approved.
- The deck does not impose any significant effect on amenity or aesthetics, compared with the effect of the carport alone. The analysis of the deck against the Performance Criteria from the *Cairns Plan* 4.7.12 House Code is attached as attachment 'A'. The analysis demonstrates reasonable compliance with the Performance Criteria.

Note

At the time of the decision by All Construction Approvals, the local government was Cairns City Council. At the time of the Tribunal hearing, the local government's name had changed to Cairns Regional Council. For the purposes of the Tribunal's hearing and decision, the two names are interchangeable.

Nigel Daniels.
Building and Development Tribunal Chairperson
Date: 26 May 2008

Appeal Rights

Section 4.1.37. of the IPA 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
PO Box 15009
City East QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248

ATTACHMENT 'A'.

Building & Development Tribunal. 03-08-010

All Construction Approvals (Cairns Regional Council, Concurrence Agency).

-vs-

Ms Jacqueline Bowen.

9 Bowen Street, Mount Sheridan. Lot 206 on RP850035

EXTRACT OF PERFORMANCE CRITERIA FROM THE CAIRNS PLAN

4.7.12 House Code

Buildings and Structures (SBR Alternative Provision)

PERFORMANCE CRITERIA	ASSESSMENT
<p>P1 The location of a <i>building</i> or <i>structure</i> facilitates an acceptable streetscape, appropriate for-</p> <ul style="list-style-type: none"> (a) the bulk of the <i>building</i> or <i>structure</i>; and (b) the road boundary <i>setbacks</i> of neighbouring <i>buildings</i> or <i>structure</i>; and (c) the outlook and views of neighbouring residents; and (d) nuisance and safety to the public. <p>(SBR Alternative Provision)</p>	<ul style="list-style-type: none"> (a) the bulk of the building is not significantly different from that of the carport alone. (b) the road boundary setback is not less than that of the carport alone. (c) the outlook and views of neighbouring residents are not affected. (d) there is no adverse effect on the public relevant to nuisance and safety.
<p>P2 Buildings and structures-</p> <ul style="list-style-type: none"> (a) provide adequate daylight and ventilation to <i>habitable</i> rooms; and (b) Allow adequate light and ventilation to <i>habitable</i> rooms on adjoining <i>lots</i>. <p>(SBR Alternative Provision)</p>	<ul style="list-style-type: none"> (a) adequate daylight and ventilation to habitable rooms is provided; light and ventilation complying with the requirements of the Building Code of Australia. (b) light and ventilation to habitable rooms on adjoining lots is unaffected.
<p>P3 Adequate open space is provided for recreation, service facilities and landscaping.</p> <p>(SBR Alternative Provision)</p>	<p>Adequate open space is provided on the allotment for recreation, service facilities and landscaping. Open space for recreation is augmented by provision of the deck.</p>
<p>P4 Buildings are sited and designed to provide adequate visual privacy for neighbours.</p> <p>(SBR Alternative Provision)</p>	<p>Inspection of the site indicates that there would be no significant effect on visual privacy for neighbours.</p>

<p>P5 The location of a <i>building</i> or <i>structure</i> facilitates normal building maintenance.</p> <p>(SBR Alternative Provision)</p>	<p>The location of the structure facilitates normal building maintenance.</p>
<p>P6 The size and location of <i>structures</i> on corner sites provide for adequate sight lines.</p> <p>(SBR Alternative Provision)</p>	<p>Not applicable.</p>
<p>P7 Sufficient space for on-site carparking to satisfy the projected needs of residents and visitors, appropriate for –</p> <ul style="list-style-type: none"> (a) the availability of public transport; and (b) the availability of on-street parking; and (c) the desirability of on-street parking in respect to the streetscape; and (d) the residents likelihood to have or need a vehicle. <p>(SBR Alternative Provision)</p>	<p>The deck has no effect on the provision of on-site carparking.</p> <p>The carport, under the deck, will provide orderly on-site carparking facilities; an improvement on the present ad-hoc carparking on the property.</p>
<p>(Part 11 only)</p> <p>P8 Outdoor living space having suitable size and <i>slope</i> is available to allow residents to extend their living activities outdoors.</p> <p>(SBR Alternative Provision)</p>	<p>Provision of the deck will provide extension of living activities outdoors. The outdoor deck is adjunct to the indoor living facilities.</p>

Height

PERFORMANCE CRITERIA	ASSESSMENT
<p>P1 The <i>height</i> of a <i>building</i> is not to unduly-</p> <ul style="list-style-type: none"> (a) overshadow adjoining houses; and (b) obstruct the outlook from adjoining <i>lots</i>. (c) Affect the residential character of the area. 	<p>Complies with acceptable measures.</p>

ATTACHMENT 'B'.

Building & Development Tribunal. 03-08-010

All Construction Approvals (Cairns Regional Council, Concurrence Agency).

-vs-

Ms Jacqueline Bowen.

9 Bowen Street, Mount Sheridan. Lot 206 on RP850035

EXTRACT OF PERFORMANCE CRITERIA FROM THE CAIRNS PLAN

4.5.4 Residential 1 Planning Area Code

Residential Density

ACCEPTABLE MEASURE	ASSESSMENT
A1.1 Site population density does not exceed 70 persons per hectare	The proposal is only for a carport and deck. It does not result in an increase in the existing population density

Height

ACCEPTABLE MEASURE	ASSESSMENT
A1.1 Buildings are not more than 7.5m in height	The proposal does not exceed 7.5m in height