



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 03-07-085**

## **BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

**Assessment Manager:** Queensland Building Approvals  
**Concurrence Agency:** Gold Coast 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 Enforcement Notice issued by the Gold Coast City Council with respect to a building works being undertaken “without a necessary preliminary approval”. The building works relate to a dwelling house, and in particular it’s siting relative to the waterfront setback, on “the subject site”.

**Date and Place of Hearing:** 1:30 pm on Tuesday 15<sup>th</sup> January 2008  
at “the subject site”

**Tribunal:** Mr Chris Schomburgk – Chairperson

**Present:** Builder for the applicant;  
Engineer for the applicant  
Applicant’s representative  
Designer for the applicant  
Mr Darren Wright – Certifier (Queensland Building Approvals)  
Mr Andrew Powell – Gold Coast City Council  
Mr Bob Clowes – Gold Coast City Council (Building)  
Mr Dale Schroeder – Gold Coast City Council (Planning)  
Mr Brian Gobie – Gold Coast City Council (Building)  
Mr Martin Roberts – Gold Coast City Council – Compliance  
Ms Susie Douglas – Gold Coast City Council – Councillor

### **Decision:**

The Enforcement Notice issued by the Gold Coast City Council in respect of building works – in particular the siting variation for a dwelling house on the subject site - is **set aside**, and the waterfront setback proposed by the applicant is **approved, subject to the following conditions:**

- i) Development is to be undertaken generally in accordance with the approved plans, namely Drawing No. WD03, Job No 273638, dated 14.09.07 prepared by Exel Design.
- ii) The applicant is to provide a densely planted landscape strip along the site's eastern boundary. This strip is to be a minimum of 1.5m wide and extend from the waterfront boundary for a distance of at least 15.0m along that eastern boundary, and is to comprise vegetation species suitable to provide a dense visual screen to a minimum height of 3.0m at planting.
- iii) The vegetation described in condition ii) above is to be planted prior to the issue of a Certificate of Completion, and is to be maintained at all times thereafter.

### **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 on behalf of both the applicant and the Council at the hearing;
- The relevant provisions of the Town Planning Scheme for Gold Coast City Council – in particular, the Canals and Waterways Constraint Code;
- Part 12 of the Queensland Development Code Part 12 (QDC); and
- The *Integrated Planning Act 1997*.

### **Findings of Fact**

I make the following findings of fact:

- The building works that are the subject of the Enforcement Notice is a dwelling house, partly constructed. The site has water frontage to a canal, the setback to which is the subject of this appeal.
- An application was made for relaxation of the waterfront setback in about October 2006. That application was for a different dwelling house than is currently under construction. It was approved by a concurrence agency response of the Council on 30<sup>th</sup> November 2006, but was never proceeded with. The appellants rely on this old approval as an indication of support for the application that is the subject of this appeal.
- On 20<sup>th</sup> September 2007, the applicant made an application for the current dwelling house. That application sought approval for relaxation of the front road setback for a portico, as well as relaxation of the waterfront setback for parts of the proposed dwelling house – namely a cantilevered deck and a small part of the dwelling house proper. The application form clearly identifies both elements as being sought in the application.
- The Council, as a Concurrence Agency, responded by letter dated 10<sup>th</sup> October 2007, in which it approved the plans and made specific reference in its response to only the portico. The plans, which were stamped as approved, clearly show the proposed waterfront setback as sought.
- Whether it can be properly construed as approving the waterfront setback (in addition to the portico) is a matter about which there is disagreement between the parties.

- The Council's representatives allege that the Council's concurrence agency response must be read as approving only the portico and, by default, refusing the waterfront setback.
- The applicant's representatives allege that, because the application clearly sought approval for both relaxations, and that the concurrence agency response approved the plans and required, inter alia, that "*the development shall be carried out generally in accordance with the endorsed plans attached*". The plans were not amended in red lettering as is often the case with this, and other, Councils. There is nothing on the approved plans to suggest that the waterfront setback was not approved, and the applicants have acted on that assumption (that it was approved) in commencing construction of the dwelling house.
- At the hearing, the Council officers provided an internal assessment sheet for the application. This sheet suggests that, despite the application clearly identifying the waterfront setback as part of the application, no assessment of that setback relaxation has occurred. This is based on the fact that there is no commentary on the assessment sheet dealing with the waterfront setback. This lack of evidence about assessment has influenced the Council's view that the waterfront setback was not approved.
- The contrary view offered by the applicant's representatives is that, in the absence of any negative assessment, and the approval of the plans as noted in the concurrence agency response, that component of the application is considered to be approved.
- It emerged at the hearing that the applicant's representative had sought specific information about whether the waterfront setback was indeed approved. An affidavit was provided by the applicant's certifier to the effect that he had verbally sought clarification and had been given a verbal response by an officer of the Council that it had been approved.
- The Council officers at the hearing provided an affidavit from the same officer (who unfortunately was not in attendance at the hearing to be questioned in person), to the effect that he had assessed only the portico. It is clear that, at that time (October 2007), the Council had been made aware that the applicant had assumed the waterfront setback relaxation had been approved. It seems that no further action was taken by the Council until the Enforcement Notice in December 2007.
- Clearly, then, there remains disagreement between the parties as to what was said, or understood to be said, by the Council officer. Nevertheless, neither party committed their views to writing as a follow-up to the conversation. In hindsight, it would have been in both parties' interests if the matter had been committed to writing, and a formal clarification provided.
- The Council, in response to a complaint received, has issued the Enforcement Notice, based on the Council's assumption that the waterfront relaxation was not approved.
- It will, therefore, become a matter for legal interpretation as to whether the approval can be construed as approving both the street-front and the waterfront setback as proposed.
- As a result, the Tribunal has determined to assess the disputed waterfront setback anew, based on the relevant provisions of the Council's Planning Scheme.

- The relevant provisions include the Canals and Waterways Constraint Code. In particular, the proposed building must demonstrate satisfaction of PC1 of that Code which requires that “*all buildings and structures must provide for setbacks from the waterway which ensure the efficient use of the site, respond to the waterside location, and have minimal impact on adjoining properties*”.
- The adjoining property to the east has a pool and deck areas potentially visible from parts of the proposed “alfresco” area – the cantilevered deck. This inter-visibility can be mitigated by the inclusion of dense screen planting along the eastern side boundary setback of the proposed dwelling. At the site inspection and hearing, the applicant’s representatives agreed to the imposition of such a condition.
- The adjoining property owner to the west has provided a letter of support of the proposal, but that property is less likely to be affected by the relaxation than the eastern neighbour because of the design of the alfresco area.
- The Councillor for the area, Cr Douglas, attended the hearing and advised, to the extent that it may be considered relevant, that she had no problems with the proposal. While the personal view of the local Councillor is appreciated, it is of little relevance in the assessment of the proposal.

Based on an assessment of these facts, it is the Tribunal’s decision that **the appeal is upheld, the Enforcement Notice is dismissed, and the waterfront setback is approved, subject to the following conditions:**

- i) Development is to be undertaken generally in accordance with the approved plans, namely Drawing No. WD03, Job No 273638, dated 14.09.07 prepared by Exel Design.
- ii) The applicant is to provide a densely planted landscape strip along the site’s eastern boundary. This strip is to be a minimum of 1.5m wide and extend from the waterfront boundary for a distance of at least 15.0m along that eastern boundary, and is to comprise vegetation species to provide a dense visual screen to a minimum height of 3.0m at planting.
- iii) The vegetation described in condition ii) above is to be planted prior to the issue of a Certificate of Completion and is to be maintained at all times thereafter.

### **Reasons for the Decision**

- While it may be a matter for legal interpretation, there is substance in the appellant’s claim that the concurrence agency response approved the proposal plans in full, as there is nothing on the plans or in the covering letter to state otherwise. While the covering letter includes a reference to the portico, it is silent on the issue of the waterfront setback, other than a reference to development to be generally in accordance with the approved plans. The approved plans clearly show the proposed waterfront setback.
- This Council, like many other Councils, can and often does, note on its approved plans any amendments or conditions of that approval in red lettering. No such notations (for example, that the waterfront setback is not approved) appear on the approved plans in this case.

- Neither party committed their concerns in writing and, in hindsight, it would have been in both parties' interests to do so, to clarify the position.
- It is appropriate to note that the Council's records in this case are less than complete, which has been partly to blame for the confusion experienced between the parties. While the Application Form is clear that two setback relaxations were sought, there is nothing to suggest that both were, in fact, undertaken, or if they were, there is no record of the assessment conclusions. Further, the form and content of the concurrence agency response is less than adequate, and has also exacerbated the confusion between the parties. Council is urged to put procedures in place to ensure that all components of an application are assessed, and the results of that assessment are recorded.
- Notwithstanding the potential confusion between the parties in this case, the Tribunal has undertaken an independent assessment of the application and finds that, with the imposition of appropriate conditions, the proposal satisfies the relevant Performance Criterion of the Canals and Waterways Constraint Code in the Planning Scheme.

---

**Chris Schomburgk**  
**Building and Development Tribunal Chairperson**  
**Date: 23<sup>rd</sup> January 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  
PO Box 15031  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 32371248**