



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3-06-012**

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

**Assessment Manager:** Maroochy Shire Council

**Site Address:** *withheld*—"the subject site"

**Applicant:** *withheld*

### **Nature of Appeal**

Appeal under Section 21 *Standard Building Regulation 1993* (SBR) against the decision of the Maroochy Shire Council in issuing an enforcement notice number 06E0003, requesting the demolition and removal of a carport to the southern face of the existing detached residence within the 6 metre road alignment setback, on land described as "the subject site".

**Date and Place of Hearing:** 9.00 am on Monday 27 February, 2006  
At "the subject site"

**Tribunal:** Dennis Leadbetter Referee

**Present:** Applicants/Owners  
Owner's representative  
Brian Benporath Maroochy Shire Council

### **Decision**

The decision of the Maroochy Shire Council as contained in its letter dated 6 January 2006, reference PZC:AR 374190, requesting the demolition and removal of a carport located to the southern side of the existing residence within the 6 metre street alignment setback is **set aside, subject to the following conditions:-**

The existing carport may remain, subject to the following conditions:-

- a building approval to be obtained from a building certifier;
- the structure to be modified, as necessary, to conform to legislated structural standards;
- light and ventilation to the bedroom enclosed by the carport to the existing house to comply with the requirements of the Building Code of Australia Parts 3.8.4 and 3.8.5.

## **Background**

The applicant had purchased the residence, which included the carport approximately 18 months ago. At the time of purchase they failed to undertake a council search, which would have alerted them to the illegal building works.

Maroochy Shire Council's (MSC) representative at the hearing indicated that the dwelling had been built in 1998, with a set back to *withheld* of 6.29 metres and to *withheld* of 6 metres, and that in 2001 MSC had received an application from a previous owner to build the carport requesting a siting variation to 2.156 metres setback from *withheld* which MSC had refused on the grounds that there were alternative locations on site for a carport or garage.

Since purchase, the current owners have constructed a single car garage to the north of the site, but require secure vehicle accommodation for two vehicles, and there is no reasonable alternative siting options available.

The garage, incorporated into the house is inaccessible, because of turning circle limitations, but for the smallest of vehicles.

## **Material Considered**

1. Form 10 – Building and Development Tribunals Appeal notice and grounds of appeal contained therein;
2. Drawings submitted with the appeal;
3. Letter from the Maroochy Shire Council issuing the enforcement notice;
4. Verbal submissions from the applicants/owners and *withheld*, the owner's representative, explaining the need for the carport and the limited options available;
5. Verbal submissions from Mr Brian Benporath, Maroochy Shire Council, explaining the reasons why the notice had been issued;
6. The *Standard Building Regulation 1993*;
7. The Queensland Development Code (QDC) Part 12; and

## **Finding of Fact**

I made the following findings of fact:

1. The site is a corner site and has a considerable fall from *withheld* to the north east. Vehicular access from *withheld* would be very difficult if not impossible because of the land gradient.
2. The existing carport has its floor level set slightly below that of the residence's floor level, and the carport floor is approximately 1 metre below natural ground level, and is retained by a sleeper retaining wall.
3. The area above the retaining wall is enclosed by vertical battening, and the entrance is fitted with a mesh gate.
4. There is a considerable and dense area of vegetation along *withheld*.
5. The carport is not visible from the frontage of the site, because of its levels and the planting.
6. The site has substantial retaining walls to the east and north, and development of alternative locations would also present difficulties and require considerable relaxations because of potential heights above natural ground levels. Alternative siting, if available would also have significant cost implications, making them economically unfeasible.

7. The QDC Part 12 *Performance Criteria P1* for road alignment setbacks, lists the following criteria to be considered:

The location of a *building* or *structure* facilitates an acceptable streetscape, appropriate for-

- (a) the bulk of the *building* or *structure*; and
- (b) the *road* boundary *setbacks* of neighbouring buildings or *structures*; and
- (c) the outlook and views of neighbouring residents; and
- (d) nuisance and safety to the public.

and

As an *acceptable solution* of that criteria, acceptable solution **A1** sets that dimension-

- (a) for a dwelling, *garage* or a *carport* the *minimum road setback* is –
  - (i) 6 m; or
  - (ii) where there are existing dwellings on both adjoining *lots* and at least one of the dwellings is *setback* from the road between 3m and 6m, and the difference between their *road setbacks* is-
    - (A) not more than 2m – a distance between the two dwellings; or
    - (B) more than 2m- the average of the *road setbacks* of the adjacent dwellings; and
- (b) For a corner lot, the minimum road setbacks are –
  - (i) as for A1(a)(i); or
  - (ii) where the *lot* has an average depth of 24 m or less –
    - (A) the *nominated road frontage* as in **Table A1**; and
    - (B) for the other *road frontage* – as for A1(a)(i); and
    - (C) no *building* or *structure* over 2m high is built within a 9 m by 9 m truncation at the corner of the 2 *road frontages*.

8. Part 12 QDC, sets out *Performance Criteria P1 – P8* in relation to siting requirements which a local government must consider and be satisfied that the application meets the intent of each criteria for that application and that the development does not **unduly** conflict with the intent of each of the *Performance Criteria*:-

**PERFORMANCE CRITERIA**

**ASSESSMENT AGAINST CRITERIA**

<p><b>P1</b> The location of a <i>building</i> or <i>structure</i> facilitates an acceptable streetscape, appropriate for-</p> <ul style="list-style-type: none"> <li>a. The bulk of the <i>building</i> or <i>structure</i>; and</li> <li>b. The <i>road</i> boundary <i>setbacks</i> of neighbouring buildings or <i>structures</i>; and</li> <li>c. The outlook and views of neighbouring residents; and</li> <li>d. Nuisance and safety to the public.</li> </ul>	<ul style="list-style-type: none"> <li>a. The structure is a single storey carport attached to a detached dwelling and located approx 3.7 metres from the southern, <i>withheld</i> road alignment.</li> <li>b. The area is a relatively new subdivision, and there is a large open allotment to the north. Adjoining properties are developed and maintain the 6 metre road alignment setback provisions.</li> <li>c. The outlook from the adjoining neighbours will not be impeded because of the topography of the site and the fact the roof of the carport and house is substantially below the level of <i>withheld</i> and the carport roof is below the level of <i>withheld</i> for the length of the carport.</li> </ul>
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**P2** Buildings and *structures*-

- a. Provide adequate daylight and ventilation to *habitable* rooms; and
- b. Allow adequate light and ventilation to *habitable* rooms of buildings on adjoining *lots*.

d. The development would not cause any nuisance or increase safety issues to the public.

- a. The carport does enclose the widow to a bedroom of the existing house, but the carport is not totally enclosed and under the BCA, section 3.8.4.2 (a) states:

Natural lighting must be provided by *windows* that:

- (i) have an aggregate light transmitting area measured exclusive of framing members, glazing bars or other obstructions of not less than 10% of the *floor area* of the room; and
- (ii) open to the sky or face a court or other space open to the sky or an open verandah, carport or the like.

Sub section (c) states:

Natural lighting to a room in a Class 1 building may come through a glazed panel or opening from an adjoining room (including an enclosed verandah) if-

- (i) the glazed panel or opening has an area of not less than 10% of the floor area of the room to which it provides light; and
- (ii) the adjoining room has windows with an aggregate light transmitting area of not less than 10% of the combined areas of both rooms; and
- (iii) the areas specified in (i) and (ii) may be reduced as appropriate if direct natural light is provided from another source.

Similarly section 3.8.5.2 states:

Ventilation must be provided to a *habitable room, sanitary compartment, bathroom, shower room, laundry* and any other room occupied by a person for any purpose by any of the following means:

- (a) Permanent openings, windows, doors and other devices which can be opened-

- (i) with an aggregate opening or openable size not less than 5% of the floor area of the room *required* to be ventilated; and
- (ii) open to-
  - (A) a suitable sized court, or space open to the sky; or
  - (B) an open verandah, carport, or the like; or
  - (C) an adjoining room in accordance with (b).
- (b) Natural ventilation to a room may come through a window, opening, ventilating door or other device from an adjoining room (including an enclosed verandah) if-
  - (i) the room to be ventilated or the adjoining room is not a sanitary compartment; and
  - (ii) the window, opening, door or other device has a ventilating area of not less than 5% of the floor area of the room to be ventilated; and
  - (iii) the adjoining room has a window, opening, door or other device with a ventilating area of not less than 5% of the combined floor areas of both rooms; and
  - (iv) the ventilating areas specified may be reduced as appropriate if direct natural ventilation is provided from another source.

It would appear that the location of the carport in relation to the existing bedroom, does not conflict with the legislative requirements of the BCA, in relation to the provision of natural light and ventilation.

- b. The proposed development will not change the daylight or ventilation to any of the adjoining properties, because of the road reserve buffer between the sites.

**P3** Adequate open space is provided for recreational, service facilities and landscaping.

The areas between the proposed development and the road alignment is densely landscaped and adequate areas are available for recreation.

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| <p><b>P4</b> The <i>height</i> of a <i>building</i> is not to unduly-</p> <ul style="list-style-type: none"> <li>a. Overshadow adjoining houses; and</li> <li>b. Obstruct the outlook from adjoining lots</li> </ul>   | <ul style="list-style-type: none"> <li>a. The proposed structure will not overshadow the adjoining lots because of the site topography as the roof of the carport is below the level of the road.</li> <li>b. The proposed structure will not obstruct the outlook, because of the general topography.</li> </ul>                         |
| <p><b>P5</b> Buildings are sited and designed to provide adequate visual privacy for neighbours.</p>   | <p>The carport location enhances the visual privacy between this lot and the adjoining lots, and the existing dense landscaping further enhance that privacy.</p>   |
| <p><b>P6</b> The location of a <i>building</i> or <i>structure</i> facilitates normal <i>building</i> maintenance.</p>   | <p>The setbacks shown provide more than adequate access for normal building maintenance.</p>  |
| <p><b>P7</b> The size and location of <i>structures</i> on corner sites provides for adequate sight lines.</p>   | <p>The site is a corner site, and the position of the carport, even if it were above road level, to the detached house provides adequate sight lines at the intersection. No part of the carport structure enters the 9 metre x 9 metre truncation as provided under part A1(b)(ii) (C) of the QDC Part 12, as an acceptable solution</p> |
| <p><b>P8</b> Sufficient space for on-site carparking to satisfy the projected needs of residents and visitors, appropriate for-</p> <ul style="list-style-type: none"> <li>a. The availability of public transport; and</li> <li>b. The availability of on-street parking; and</li> <li>c. The desirability of on-street parking in respect to the streetscape; and</li> <li>d. The residents likelihood to have or need a vehicle.</li> </ul> | <p>The development will provide secure covered car for two vehicles attached to the dwelling, and the setback from the street alignment will accommodate vehicles totally within the site boundary on the driveway.</p>   |

**Reason for the Decision**

Part 12 of the QDC provides **Performance Criteria** and an **Acceptable Solution**, but allows the local government to vary the application of siting requirements to take account of alternative solutions. In assessing the criteria from this part of the Code and considering the nature and use of the proposed structure and its siting on this allotment and the potential development of adjoining sites, and after considering the minimal impact the reduced southern road alignment setback would have on the adjoining allotments, the Tribunal found that there was reasonable grounds to vary the southern road alignment setback to allow the carport to the detached dwelling to be constructed to within a minimum 3.7 metres of the southern road alignment and 6.6 metres to the western road boundary, measured to the outer most projection.

These setbacks will result in a structure falling outside the required 9 metre x 9 metre corner truncation as indicated in Figure 3 QDC and in accordance with the acceptable solution A1(b)(ii)(C).

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**Dennis Leadbetter**

Dip. Arch. QUT; Grad. Dip. Proj. Man QUT; METM UQ.

**Building and Development**

**Tribunal Referee**

**Date: 28 March 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:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Local Government and Planning  
PO Box 31  
BRISBANE ALBERT STREET QLD 4002  
**Telephone (07) 3237 0403: Facsimile (07) 32371248**