



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	3—09—015
Applicant:	Gregory Thornton
Assessment Manager:	Phil Godfrey for and on behalf of Building Surveying Professionals
Concurrence Agency: (if applicable)	Brisbane City Council ('Council')
Site Address:	43 Archibald Street, West End and described as Lot 8 on SP203279 — the subject site. (Also described as 1 Brady Street, West End — Lot 26 on RP11032)

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the Assessment Manager to refuse a development application for building works, namely a new *detached dwelling*. The decision followed a concurrence agency response from the Council directing the Assessment Manager to refuse the application.

Date of hearing:	11.30am – Wednesday, 11 March 2009
Place of hearing:	At the offices of the Department of Infrastructure and Planning
Tribunal:	Debbie Johnson – Chair Paul Smith – Member
Present:	Gregory Thornton – Applicant Peter Bird – Council representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2) (a) of the IPA, **confirms** the decision appealed against and the appeal is dismissed.

Background

In January 2009, the Applicant lodged a building application for the construction of a new *detached dwelling* with the Assessment Manager. The Assessment Manager referred the application to the Council as a concurrence agency in relation to siting.

In this instance, the relevant *side boundary setback* provisions are prescribed in the Queensland Development Code (QDC) MP1 for lots of 450ms and over.

The application could not be regarded as self assessable under the QDC due to:-

- A rendered built to boundary wall, being part of a Class 1a dwelling (laundry / rumpus), is proposed for construction along the southern side boundary of the subject site. As such, it is noncompliant with the acceptable solutions A2 (a) and A6 (b) of MP 1.2 QDC; and
- A rendered boundary wall, which screened an outdoor area on the subject site, is proposed for construction along the northern side boundary. The wall exceeded 2.0m in *height*, as measured from the *natural ground surface*, causing it to be noncompliant with the acceptable solution A2(c) of MP1.2 QDC; and
- A pergola, having an area of approximately 4.0m x 5.0m, is proposed over the outdoor area affectively making it built to the northern boundary. The pergola is proposed to be attached to the proposed dwelling and designed with a *mean height* that exceeded 3.5m above the *natural ground surface*. As such it is noncompliant with A2 (a) of MP1.2 QDC;
- A second pergola having an area of approximately 1.5m x 9.5m is proposed across the western facade of the dwelling. This structure is over 4.5m above the *natural ground surface* as measured in that part of the subject site which is within the 2.0m setback from the northern side boundary. The *structure* as proposed is therefore noncompliant with the acceptable solution A2 (a) of MP1.2 QDC.

Council delivered a concurrence agency response to the Assessment Manager on the 27 January 2009 stating in part:-

“Approval has not been granted to allow the design and siting of the new proposed dwelling on the subject lot, in a position observing a clearance of ‘zero’ metres to the *outermost projection* from the southern side, observing the 2.0metres prescribed building line, for the following reasons, as specified in the *Queensland Development Code MP1.2: Element 1, Design and Siting of Buildings and Structures P1*.

1. P.1 (c)
 - The proposed dwelling, due to the bulk of the structure, will affect the outlook and views of neighbouring residents.
2. P.2 (c)
 - The proposed dwelling impacts on the amenity and privacy of residents on adjoining lots.
3. The proposed dwelling will overshadow southern properties and gardens.
4. A new dwelling on a large lot can be designed to meet the siting requirements of the Queensland Development Code and therefore, lessen the impact on neighbouring properties”.

Subsequently on the 13 February 2009, the Assessment manager refused the application. The decision notice to the Applicant stated in part that Council had through a concurrence agency response directed that the application be refused.

On the 26 February 2009, the Applicant lodged an appeal against the refusal of their building application with the Building and Development Tribunal.

The Applicant, in their written submission to the Tribunal, responded to Council’s reasons for refusal. The Applicant’s responses included submissions that:-

- a. four of the adjoining properties were elevated sufficiently or orientated appropriately in such a manner that their views and outlooks would not be compromised by the development as proposed; and
- b. the new dwelling potentially offered more privacy for neighbouring lots by being built to boundary, affectively negating the option to have windows or other openings facing adjoining sites; and
- c. the proposed works along the boundary was to be constructed in part below natural ground level, affectively below the fence line; and
- d. any subsequent overshadowing would not be increased by that part of the works being proposed within the *side boundary setback* along the southern alignment; and

- e. the design of the dwelling as proposed was well considered and appropriate for the best use of the site, further stating the impacts on adjoining properties was minimal.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' including grounds for appeal and supporting documentation lodged with the Building and Development Tribunals on 26 February 2009.
2. Council's concurrence agency response, dated 27 January 2009.
3. The Assessment Manager's decision notice of Refusal, dated 13 February 2009.
4. Property details, including records of previous development approvals affecting the subject site and mapping as available through PD online through Council's website.
5. The application material including drawings detailed by Bligh Graham Architects.
6. The applicant's grounds for appeal against the Council's reasons for refusal submitted with the application.
7. Verbal submissions made by the Applicant at the hearing.
8. Verbal submissions made by the Council's representative at the hearing.
9. Written submission of complaint against the application by a neighbouring property owner.
10. Written submission by the Applicant provided after the hearing.
11. Written submission by the Council provided after the hearing.
12. The IPA.
13. The *Building Act 1975*.
14. The *Building Regulation 2006* (BR).
15. The Queensland Development Code (QDC).
16. The Building Code of Australia (BCA).

Findings of Fact

The Tribunal makes the following findings of fact:

The subject site falls approximately 5.5m or at 13% from the south east corner diagonally to the north west corner.

The land having an area of 765sq/m is affectively rectangular in shape however it also contains a 3.5m wide access easement therefore it could also be described as 'hatchet' shaped. The access easement extends from the south west corner of the subject site down the slope to the intersection of Brady Lane and Archibald Street.

The subject site is bound on all sides by nine other residential sites for single and multi unit dwelling types. The lot has a predominate depth of 37.15m which effectively runs east-west and a width of 19.8m.

The subject site has resulted from a reconfiguration application approved by council on the 18 May 2007. Through this earlier application process an existing dwelling on the original site (which was 1194sq/m) was demolished, making way for two separate lots to be created. These two lots, being the subject site (lot 8) having an area of 765sq/m and a new small lot (lot 7) having an area of 435sq/m.

Two additional, adjoining sites (lots 2 & 3), were also involved in this application due to the reciprocal access easement being instigated. Similarly through this earlier application, a pre 1946 dwelling was removed from lot 2 and it was subsequently resited on lot 7.

In the current application the architectural drawings illustrate a two storey contemporary house is to sit in the highest corner of the site, that is, in the south east corner. The building is 'L' shaped, and is to be sited predominately 1.5m away from and parallel to the south eastern corner boundary. As the subject site has an area of 765sq/m however, there is a large proportion of the site available for recreational use in the opposite or north eastern corner.

The southern wall of the building is approximately 22.0m in length. The eastern wall is over 19.0m in length as it is built to both the north and southern boundary alignment and therefore runs the entire width of the site.

The southern wall of the dwelling is intended to be partially built to the property boundary for a length of 8.0m. This area of the dwelling will require up to 1.8m depth of excavation along the property line. There is an additional 4.0m length of southern boundary wall in the Drying Court which is attached to the dwelling and measures up to 3.0m high when viewed from the neighbouring allotment.

It should be noted that the current owner of the adjoining site who is likely to be most affected by any buildings along this southern boundary has provided a letter of complaint against the proposal.

Similarly, along the northern boundary of the subject site, it is proposed that an outdoor area will be provided on a level platform which will require retained fill up to 1.65m deep. This recreational area is to be screened for a length of 9.5m along the northern boundary with a rendered masonry wall. The wall in part, measures 3.8m when viewed from the neighbouring allotment. The outdoor area is to be partially covered by a large timber pergola which will extend from the northern face of the dwelling to the northern boundary of the site. The finished height of the structure will be 700mm above the masonry boundary wall.

There is also to be a smaller timber trellis / pergola that runs north- south to screen the proposed outdoor yard area. The yard area is to be built in over an office area which forms part of the proposed dwelling. The resulting effect is that the height of the trellis will exceed 4.5m as taken from the natural ground surface. The structure will be partially within the 1.5m northern boundary and will measure approximately 5.0m in height at this point.

For clarification of the terms used in this decision, the following definitions have been taken from the QDC and these include:-

Area means for enclosed spaces, the area including the outside wall; and for unenclosed spaces, the area is measured along a line 600mm in from the perimeter of the roof.

Building has the same meaning as in the BA.

Building height means the vertical distance between the highest point of a building, excluding any antennae, chimney or flues, and the natural ground surface vertically below that point.

Detached dwelling means a single dwelling not attached to another dwelling and on an individual lot.

Height of a building or structure at any point for the purpose of determining its *setback* from a boundary means the vertical distance between the *outermost projection* and the natural ground. Refer also to *Mean height* and *Building height*.

Mean height, of a building or structure, means the vertical *height* worked out by dividing –
(a) the total elevational area of the wall of a *building* or *structure* facing the boundary; by
(b) the horizontal length of the *building* or *structure* facing the boundary.

Natural ground surface, for a *lot*, means -

- (a) the ground level of the lot on the day the first plan of survey showing the *lot* was registered; or
- (b) if the ground level on the day mentioned in paragraph (a) is not known, the natural ground surface as determined by the *building certifier*.

Outermost projection means the outermost projection of any part of a *building* or *structure* including, in the case of a roof, the outside face of the fascia, or the roof *structure* where there is no fascia, or attached sunhoods or the like, but does not include retractable blinds, fixed screens, rainwater fittings, or ornamental attachments.

Setback means

- (a) for a building or structure other than a swimming pool, the shortest distance measured horizontally from the *outermost projection* of the *building* or *structure* to the vertical projection of the boundary of the lot.
- (b) for a swimming pool, the shortest distance measured horizontally from the water's edge to the vertical projection of a boundary of the lot.

Side and rear boundary clearance means for a building or structure other than a swimming pool, the shortest distance measured horizontally from the *outermost projection* of the *building* or *structure* to the vertical projection of the boundary of the lot.

Structure has the same meaning as in the BA.

Reasons for the Decision

The proposed siting for the dwelling and associated structures does not satisfy performance criteria P1(c) of the QDC, namely the scale and bulk of the proposed encroachment has an unacceptable adversely impact on the amenity and privacy of residents on adjoining lots.

The proposed retainment walls are substantial and the resulting excavation and filling will affect the natural stormwater runoff.

The subject site may be developed without compromising the amenity on the neighbouring allotments.

Debbie Johnson
Building and Development Tribunal Chair
Date: 7 April 2009

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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