



Building and Development Tribunals — Decision

Integrated Planning Act 1997

Appeal Number:	3—08—071
Applicant:	Alan and Linda Long
Assessment Manager:	Bruce Krenske for and on behalf of Rockhampton Building Approvals
Concurrence Agency:	Rockhampton Regional Council
Site Address:	335 Waterloo Street, Frenchville and described as Lot 63 on RP 602339 — the subject site

Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision, dated 10 September 2008, by the assessment manager to refuse a building development application relating to a new non-habitable building (racing pigeon loft) within the required rear boundary alignment setback for the subject site, as directed by Rockhampton Regional Council's concurrence agency response issued on 25 June 2008.

Date of hearing:	11.30 am — Thursday, 23 October 2008
Place of hearing:	The subject site
Tribunal:	Georgina J Rogers - Chair
Present:	Mr A & Mrs L Long – Owner & Applicant Bruce Krenske – Assessment Manager Brett Robson – Rockhampton Regional Council representative Eric Pabis – Rockhampton Regional Council representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2)(c), **sets aside** the decision appealed against to refuse the development application for building works, namely a new non-habitable building (racing pigeon loft) which has been partially constructed within the required rear boundary setback; and

The Tribunal **directs** the assessment manager to approve the development application subject to the following conditions:-

1. The maximum length of the proposed non-habitable building (racing pigeon loft) must not exceed 6.2 metres;
2. The setback from the rear boundary to the outermost projection is to be no closer than the notated 1.75

metres as shown on the building application plans;

3. The height is not to exceed 4.9 metres at the rear western wall of the new non-habitable building (racing pigeon loft) with a maximum building height of 7.5 metre;
4. The proposed new non-habitable building (racing pigeon loft) is not to be enclosed at any stage beyond that shown on the current building application plans;
5. All other relevant building assessment provisions applicable to the Building Development Application are to be complied with; and
6. The decision held in this application is separate to any other applications which may be made over the property.

Background

The Tribunal conducted an on-site hearing and the opportunity was taken to view the development and character of the neighbourhood.

The neighbourhood has low traffic volume and is well established with minimal vegetation. The character of the immediate neighbourhood is well established and is low density residential.

The new non-habitable building (racing pigeon loft), subject to the appeal, has been substantially constructed to the rear of the site. It is located approximately 1.75 metres from the rear, western alignment, 5.47 metres from the northern side alignment and 8.036 metres from the southern side alignment.

The structure is shown as being 3.9 metres wide by 6.61 metres long with the long side parallel to the western rear alignment. In addition, it has eaves shown as being 250 mm wide. It is approximately 4.9 metres in height to the eaves and has a roof pitch shown as 30 degrees. The height to the ridge of the structure from ground level is approximately 6.27 metres which is about 3.8 metres offset from the rear western alignment.

The plans indicate that the external walls will be clad in sheet metal and the front and internal walls will be galvanized mesh for the pigeon coops. The roof is steel sheeting.

The following correspondence and documentation was reviewed and taken into consideration:-

- 11 March 2008 – an inspection was carried out by Council and observed that the owners were constructing a 'bird house' without a development permit.
- 25 March 2008 – Show cause notice issued by Council.
- 16 April 2008 – a second Show cause notice was issued by Council.
- 3 June 2008 – Form 15 - Design Certificate was issued by an Engineer.
- 10 June 2008 – Receipt for plans lodged by the applicant with Council – receipt covers – Reduced Alignment/Relocation Fee; IDAS; Building Inspection; Registration & Storage; Fully Engineered Domestic Shed.
- 12 June 2008 – application for building alignment dispensation form lodged with Council.
- 17 June 2008 – Information request for plans, floor plans and elevations by Council.
- 23 June 2008 – IPA Information Request for approval for reduced alignment setback by Council.
- 25 June 2008 – Refusal by Council for application on basis of amenity and aesthetic impact and application to vary boundary clearance requirements.
- 17 July 2008 – referral to meeting between Council and the applicant on 16 July 2008 discussing the application – correspondence from Council to the Applicant.
- 23 July 2008 – correspondence from the applicant to Rose (unidentified person) outlining his course of action throughout this process.
- 5 August 2008 – Notice to the owner that a private certifier has been engaged by the applicant – the private certifier being Rockhampton Building Approvals.
- 3 September 2008 – IPA Information Request in relation to a rear boundary relaxation in accordance with QDC MP1.2 to be made to the Local Authority (Rockhampton Regional Council) by Rockhampton

Building Approvals (private certifiers) to the applicant.

- 10 September 2008 – Decision Notice advising refusal of the application based on the Council (concurrence agency) refusal for request for relaxation under QDC MP1.2.
- 30 September 2008 – the Applicant lodged an appeal with the Building and Development Tribunals.

Based on the above information provided it was determined that the new non-habitable building (racing pigeon loft) was substantially constructed without a development permit. After notification was received the applicant undertook due process to provide the required plans and lodged with the required fees and relaxations requests.

The assessment manager refused the building development application as directed by Rockhampton Regional Council's concurrence agency response.

The Applicant appealed the decision of the assessment manager to the Building and Development Tribunals on 30 September 2008.

Material Considered

The material considered in arriving at this decision comprises:

- 'Form 10 – Notice of Appeal' and Grounds for Appeal contained in letter dated 23 September 2008;
- Show Cause Notice from council dated 25 March 2008;
- 'Form 1 Development Application' – Part A and B;
- 'Form 18 – Notice of engagement of Certifier';
- Letter from assessment manager to applicant requesting further information, dated 3 September 2008;
- Decision notice from the assessment manager refusing the development application, dated 10 September;
- Various written correspondence between Council and the applicant;
- Site plan, plans and elevations of the proposed new non-habitable building (racing pigeon loft);
- 'Form 8 – Notice of Election' from Council, dated 15 October 2008;
- Verbal submission by the Applicant and reasons for provision of proposed new non-habitable building (racing pigeon loft) to be located within the required 2.0 metre setback to the rear boundary alignment;
- Verbal submission by the assessment manager and reasons for the provision of the new non-habitable building (racing pigeon loft) to be located within the required 2.0 metre setback of the rear boundary alignment;
- Correspondence from Council as the concurrence agency, dated 25 June 2008, refusing approval for the siting of the proposed new non-habitable building (racing pigeon loft) within the 2.0 metre setback from the rear boundary alignment;
- Verbal submissions by Council's representatives at the hearing outlining Council's assessment of the application;
- The IPA
- The Building Regulation 2006;
- The Queensland Development Code (QDC);
- Relevant sections of the former Rockhampton City Council's planning scheme.

Findings of Fact

The Tribunal makes the following findings of fact:

- Council, as the concurrence agency, wrote to the applicant on 25 June 2008, (Reference: R-76/2008) refusing the application for the proposed new non-habitable building (racing pigeon loft) be constructed within 2.0 metre of the rear boundary alignment.
- An on site visit was undertaken for the tribunal hearing and plans provided showing the location of the proposed new non-habitable building (racing pigeon loft), being an additional structure to the existing dwelling on the subject site. The following was able to be determined:-

- The site is rectangular in shape.
- Vehicle access is via the subject street to the east, and the property has a frontage of 20.117 metres. The subject site consists of one lot and the existing dwelling has been constructed parallel to road boundary alignment.
- The plans indicate that the proposed new non-habitable building (racing pigeon loft) would be setback 1.750 metres from the rear boundary alignment to the eaves, therefore approximately 2.0 metres from the external wall. Indicated eaves overhang to be approximately 250 mm.
- The new non-habitable building (racing pigeon loft) which has been partially constructed to fully indicate size, location and height was further measured on site. There currently exists a collapsing timber paling fence along the rear alignment. Without a survey it is impossible to identify whether the building has been constructed within the 2.0 metre rear boundary setback, however from measuring on site it would appear the structure could be located approximately 1.9 metre offset from the rear alignment to the external wall. The overhang of 250 mm would encroach further into the setback area.
- Other measurements taken established that the building height to the eaves is 4.9 metres.
- The rear adjoining neighbour has a steel shed constructed parallel to the rear boundary. This building is located 3.15 metres from the rear of the new non-habitable building (racing pigeon loft), and is substantially longer and greater than the structure being built on this site.
- The neighbourhood is well established with a mix of older dwellings which are located generally 6 metres back from the front road alignment.
- It is possible to locate the new non-habitable building (racing pigeon loft) elsewhere on the site and further away from the rear boundary alignment, but due to the nature of it's proposed use it would have less of an impact on the residential dwellings within neighbourhood to retain it within it's current location.
- The new non-habitable building (racing pigeon loft) has been partially constructed initially without a building permit. A subsequent application was lodged with the assessment manager and advice sought from the Council as a concurrence agency. Construction has since halted until a resolution in relation to rear boundary setbacks has been determined.

Reasons for the Decision

1. MP1.2 of the QDC sets out Performance Criteria (P2) 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:-

P2 Building and Structures –

(a) Provide adequate daylight and ventilation to habitable rooms

From the plans provided and on site inspection, the new non-habitable building (racing pigeon loft) is setback approximately 1.75 metres from the rear boundary alignment and in excess of 2 metres from the northern (right) and southern (left) side boundary alignments.

The proposed new non-habitable building (racing pigeon loft) is not subject to the requirements for adequate daylight and ventilation, as it is an open loft and therefore it is not a relevant consideration.

(b) Allow adequate light and ventilation to habitable rooms of buildings on adjoining lots

The proposed new non-habitable building (racing pigeon loft) has been located to the rear of the site and is well setback from the side boundaries. The shed located on the adjoining rear site does not have any openings facing the mutual rear boundary and therefore is not impacted on by the proposed new non-habitable building (racing pigeon loft).

Therefore the proposed new non-habitable building (racing pigeon loft) will have no impact on the light and ventilation of habitable rooms on adjoining lots.

(c) Do not adversely impact on the amenity and privacy of residents on adjoining lots

The owners advised that they are currently housing the pigeons under their dwelling in which they themselves live and that the pigeons have had a significant detrimental effect on their health. This is one of the reasons why they wish to relocate the pigeons to a new loft to the rear of the site, well away from the house in which they themselves live.

The pigeons are constantly cooing and moving. Relocating the pigeons away from the dwelling and therefore further away from the adjoining owners dwellings to the new non-habitable building (racing pigeon loft) to the rear of the site will therefore improve the amenity of residents on adjoining lots. This existing dwelling where the owner lives and currently houses the pigeons is located close to the front boundary alignment on a similar setback as the adjoining residential houses.

The proposed location is buffered from the rear adjoining neighbours by an existing shed.

Therefore the proposed relocation of the pigeons to a custom made loft at the rear of the site is beneficial to the overall amenity and privacy of the residents on adjoining lots.

(d) Side and rear boundary clearances – Height in metres

The current QDC setbacks allow structures to be built to a 2 metre height for a maximum length of 9m directly on the rear boundary alignment. Where the building is set back 1.5 metres it may be built to 4.5 metre in height with no restriction on length. Where the height exceeds 4.5 metres to 7.5 metres the setback required is 2.0 metres. The setbacks from the boundary are to the outermost projection.

Taking this into consideration the building constructed and check measured on site is 4.9 metre in height to the eaves adjacent to the rear boundary, and setback 1.75 metres to the eaves from the rear boundary. Therefore the setback to the rear wall of the new non-habitable building (racing pigeon loft) would be 2.0 metres. However this can only be verified by an on site survey. It appears that the non-compliance with the setbacks has been encroached into by the eaves overhangs which are shown to be 250 mm.

The roof truss structure is currently in place and the eaves form a part of the truss structure which cannot be removed without replacing the trusses.

While it could be required to remove these eaves, and therefore re-truss the roof to comply with the recommended setbacks it is necessary to consider the recommendations under QDC MP1.2 P2 Performance Criteria. In this case the recommended heights relate specifically to lots with a frontage of less than 15.0 metres which precludes this application has a 20.117 metre frontage.

By interpolation of the heights in relation to the required setbacks from the rear boundary alignment, the setback could be reduced to as little as 1.566 metres to the eaves. Therefore the setback of 1.75 metres is within the scope of acceptable setback. The structure is shown to have a roof pitch of 30 degrees. At the wall and ridge of the structure the height would be less than the 7.5 metre height constraint.

Therefore the impact of the structure in its proposed location is minimal and within reasonable location of the setback requirements.

2. Based on the above facts it is considered the appeal is upheld.

The decision held in this application is separate to any other applications which may be made over the property at this time or in the future.

3. QDC provides Performance Criteria and some Acceptable Solutions. The Acceptable Solutions are to provide reasonable and achievable outcomes. The local government is in a position to vary the Acceptable Solutions in relation to an application for siting requirements and to assess the application based on its merits.
4. In assessing the criteria from this part of the Code in relation to the proposed new non-habitable building (racing pigeon loft) being constructed within the required 2.0 metre setback from the rear boundary alignment, the Tribunal found that there were grounds to allow for the additional structure of the new non-habitable building (racing pigeon loft) in the location shown.
5. The extent of non-compliance with the QDC Acceptable Solution of 1.75 metres is minimal and does not, in the Tribunal's opinion, detract from the achievement of the relevant Performance Criteria. In addition, the purpose of the QDC is to provide good residential and neighbourhood design and acceptable amenity to resident is not compromised.

Georgina Rogers
Building and Development Tribunal Chair
Date: 20 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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