



Building and Development Tribunals – Decision

Integrated Planning Act 1997

Appeal Number:	3–09–011
Applicant:	Dane Morris
Assessment Manager:	Peter Lusio for and on behalf of Kawana Building Approvals
Concurrence Agency:	Sunshine Coast Regional Council ('Council')
Site Address:	120 Mooloolah Drive, Minyama and described as Lot 374 on RP 229851 – the subject site

Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision, dated 19 January 2009, by the assessment manager to refuse a building development application relating to a new building structure (shade sail) within the required rear boundary setback as determined by the revetment wall boundary for the subject site, as directed by Council's concurrence agency response issued on 18 September 2009.

Date of hearing:	10.00 am – Tuesday, 16 February 2009
Place of hearing:	The subject site
Tribunal:	Georgina J Rogers – Chair Phil Dance – Member
Present:	Mr Dane Morris – Owner & Applicant Peter Lusio – Assessment Manager, Kawana Building Approvals Gary Sheffield – Sunshine Coast Regional Council representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2)(c) of the IPA, **sets aside** the decision appealed against to refuse the development application for building works, namely a new building structure (shade sail) which has been constructed within the required rear boundary setback as determined by the revetment wall boundary for the subject site; and replaces it with the following decision:-

The Tribunal, in accordance with section 4.2.34 (1) of the IPA, **directs** the assessment manager to approve the development application subject to the following conditions:-

1. The proposed new building structure (shade sail) is not to be increased in size nor enclosed at any stage beyond that shown on the current building application plans;
2. All other relevant building assessment provisions applicable to the building development application

are to be complied with;

3. 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 residential.

The new building structure (shade sail), subject to the appeal, has been fully constructed to the rear of the site. It is located approximately 2.5 metres from the rear boundary setback as determined by the revetment wall boundary for the subject site in lieu of the required 4.5 metre setback nominated in the planning scheme S4.1.

The structure is shown to be 6.4 metres wide and extends 3.420 metres out from the existing building line with the long side parallel to the rear revetment wall boundary alignment. It is approximately 3.050 metres in height at the central highest point tapering to 2.3 metres at each side corner.

The plans do not show any intention to enclose the shade sail structure.

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

- 23 December 2007 – Form 1 Development Application Part E – IDAS
- 8 September 2008 – Peter Lusio, Building Certifier, Kawana Building Approvals to Sunshine Coast Regional Council – request for siting variation.
- 18 September 2008 – Gary Sheffield, Acting Supervisor Building Regulatory Services, Sunshine Coast Regional Council to Kawana Building Approvals – Referral Agency Response – Building Works – Refusal.
- 19 January 2009 – Peter Lusio, Building Certifier, Kawana Building Approvals to D. Morris – advising of refusal.
- 5 February 2009 – Mrs Tricia Hooper, Applications Manager, The Jetty Specialist to the Registrar, Building and Developments Tribunals – lodgement of appeal with Attachment A.
- 20 January 2009 – Building and Development Tribunals ‘Form 10 – Notice of Appeal’.
- 16 February 2009 – at meeting – information from Sunshine Coast Regional Council being Detached House Code, Caloundra City Plan 2004, amended 27 July 2007; Policy – Clearances from Canals, 12 April 1988; Report.
- Engineers plans.

It was also noted that the neighbours on either side of the site provided advice that they had no objection to the structure.

Based on the above information provided, it was determined that the new building structure (shade sail) was properly lodged for approval with the assessment manager for approval. A development permit relaxation was applied for from the concurrence agency being the Sunshine Coast Regional Council which was subsequently refused.

The assessment manager advised the applicant of the refusal of the building development application as directed by Council's concurrence agency response.

The applicant appealed the decision of the assessment manager to the Building and Development Tribunals on 20 January 2009.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' and grounds for appeal contained in letter dated 5 February 2009;
2. Decision notice from the assessment manager refusing the development application for building works, dated 19 January 2009;
3. Correspondence from Council as the concurrence agency, dated 18 September 2008, refusing approval for the siting of the new building structure (shade sail) to be located less than 4.5 metres from the rear boundary as determined by the revetment wall boundary for the subject site;
4. Various correspondence between Council and the applicant;
5. Site plan, plans and elevations of the new building structure (shade sail);
6. 'Form 8 – Notice of Election', provided by the Council on 13 February 2009;
7. Verbal submissions by the applicant and reasons for provision of new building structure (shade sail) to be located within the required 4.5 metre setback to the required rear boundary setback as determined by the revetment wall boundary for the subject site;
8. Verbal submission by the assessment manager and reasons for the provision of the new building structure (shade sail) to be located within the required 4.5 metre setback to the required rear boundary setback as determined by the revetment wall boundary for the subject site;
9. Verbal submissions by Council's representative at the hearing outlining Council's assessment of the application;
10. The IPA;
11. The Building Regulation 2006;
12. The Queensland Development Code (QDC);
13. Relevant sections of the former Caloundra City Council's planning scheme.

Findings of Fact

The Tribunal makes the following findings of fact:

- Council, as the concurrence agency, wrote to the assessment manager on 18 September 2009, (Reference: BDD-04484) refusing the application for the proposed new building structure (shade sail) to be located within 4.5 metres of the rear boundary as determined by the revetment wall boundary for the subject site. (The former Caloundra City Council Detached House Code refers).
- An on-site visit was carried out at the tribunal hearing. Plans were provided showing the location of the new building structure (shade sail) located within 4.5 metres of the rear boundary as determined by the revetment wall boundary for the subject site. The following was able to be determined:-
 - The site is rectangular in shape and has the rear boundary coincident with an existing revetment wall within an existing canal.
 - A pontoon extends from the site into a canal.
 - The dominant aspect of the site overlooks the canal and the improvements are typical of the area.
 - Vehicle access is from Mooloolah Drive. The property has a frontage of 21.0 metres to that road. The subject site consists of one lot and the existing dwelling has been constructed parallel to road boundary alignment.
- The plans indicate that the new building structure (shade sail) is setback 2.5 metres from the revetment wall boundary for the subject site.
- The neighbourhood is well established with relatively new dwellings. These are generally located with a setback of 4.5 metres from the revetment wall alignment. Within the 4.5 metre setback areas of this and neighbouring sites there is an assortment of decks with balustrading, pools, shade covers and pontoons existing.

- The shade sail in its current form and location benefits the use of the external recreation area by providing much needed shading and reduction of glare from the sun and canal.

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 building structure (shade sail) is located within the required 4.5 metre setback to the required rear boundary setback as determined by the revetment wall boundary for the subject site. It is adjacent to an existing canal and does not affect the provision of adequate daylight and ventilation to the habitable rooms of the existing dwelling.

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

The new building structure (shade sail) is located within the required 4.5 metre setback to the required rear boundary setback as determined by the revetment wall boundary for the subject site. It is adjacent to an existing canal and does not affect the provision of adequate daylight and ventilation to the habitable rooms of the existing adjoining dwellings.

Therefore the structure 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 new building structure (shade sail) is located within the required 4.5 metre setback to the required rear boundary setback as determined by the revetment wall boundary for the subject site. It is adjacent to an existing canal and does not affect the amenity and privacy of residents on the adjoining or adjacent lots.

2. The Detached House Code of the (former) Caloundra City Council Planning Scheme, 2004.

The former Caloundra City Planning Scheme 2004, which applies to the land, includes a code that applies to houses (Section 8.5 – Detached House Code). The code comprises “overall outcomes” and “specific outcomes”. The overall outcomes are said to be the purpose of the code (S8.5.1(i)). Each specific outcome has at least one “probable solution” for assessable development.

The code should be read broadly, taking into account the overall outcomes that it seeks to achieve, as well as the degree to which the specific outcomes are achieved by the adopted solutions, whether they are the nominated probable solution/s or not.

Of the overall outcomes set out at S8.5.1(2) of the code, the following are most relevant:-

“(b) detached houses and associated buildings are compatible with surrounding development”; and

“(c) detached houses and associated buildings are sited and designed to protect residential amenity...”;
and

“(e) detached houses are climatically responsive”

The Tribunal considers that the structure is compatible with surrounding development and has no adverse affect on the amenity of the area. Further, the structure provides shading to an area suitable for outdoor recreation and could therefore be said to be climatically responsive.

The structure achieves the relevant overall outcomes of the detached house code.

The code contains a specific outcome dealing with setbacks to canals and artificial waterways. In summary, the specific outcome is that buildings are to be “adequately setback” to *“(a) protect the structural integrity of the canal and revetment wall; and (b) ensure no “unreasonable loss of amenity” to adjacent land and dwellings.”*

The probable solution for this structure is that it be set back a minimum of 4.5 metres from the canal frontage of the property.

The Council does not claim that the structure affects the structural integrity of the canal or revetment, but does rely on an alleged loss of amenity and conflict with the character of the neighbourhood.

The Tribunal considers that the structure causes no loss of amenity to adjacent dwellings.

The Tribunal considers that the structure satisfies the relevant outcomes of the detached house code, notwithstanding the adoption of an alternative solution in the matter of setback from the canal frontage.

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

3. 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.
4. 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.
5. In assessing the criteria from this part of the Code in relation to the new building structure (shade sail) located within the required 4.5 metre setback to the required rear boundary setback as determined by the revetment wall boundary for the subject site. The Tribunal found that there were grounds to allow for the additional structure of the new building structure (shade sail) in the location shown.
6. The extent of non-compliance with the QDC acceptable solution of 2.5 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: 10 March 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
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