



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

File No. 3/03/073

Integrated Planning Act 1997

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Brisbane City Council

Site Address: 35 Welsby Street, New Farm

Nature of Appeal

The appeal is against the decision of the Brisbane City Council not to grant approval to vary the requirements of the *Standard Building Regulation 1993* for the siting of an existing dwelling on land described as Lot 78 on RP8743 and located at 35 Welsby Street, New Farm.

Date and Place of Hearing: 9.00 am Friday 5 December 2003
Office of the Department of Local Government & Planning
Level 25 Mineral House, 41 George Street,
Brisbane

Tribunal: L F Blumkie

Present: Mr M Edmonston - Applicant representative
Owner
Mr M Tricarico - Brisbane City Council representative
Mr L Blumkie - Tribunal Referee

Decision

In accordance with Section 4.2.34 (2) (b) of the *Integrated Planning Act 1997* **I change** the decision by the Brisbane City Council and grant a relaxation of the siting requirements to allow the existing residence to be built with a clearance of 400mm to the outermost projection and the right hand side boundary (when viewed from the street) subject to the following conditions:-

- it is to the size and heights as shown on the submitted and approved drawings and
- the Brisbane City Council considering whether a planning approval is still required and advising the applicant accordingly.

Background

A Proposed development.

The property had an existing house which was located some 400mm from the outer most projection to the right hand side boundary. Building approval was granted to raise the house some 700mm on 3 August 2001 provided it was located 900mm from the right hand side boundary. Prior to building approval being issued the Brisbane City Council granted a side boundary relaxation to allow the building to be sited 900mm to the outer most projection (in lieu of the required 1000mm). This relaxation was granted on the 17 July 2001.

The house was raised shortly after the building approval was given, however the Architect apparently failed to notify the building contractor and owner of the need to move the house sideways some 500mm.

A framing inspection was carried out in June 2003 and the house was found to be not located in accordance with the approved plans. As part of the raising it had not been moved the required 500mm sideways from the original location. A stop work notice was issued on the 5 June 2003.

On the 16 October 2003 a new application was made to the Brisbane City Council to vary the siting requirements to allow a boundary clearance of 400mm to the outermost projection.

On the 30 October 2003 the Brisbane City Council determined that the application could not be processed as an application was required under the 'Residential Design - Small Lot Code' contained in the Brisbane City Plan 2000, as the subject site has a frontage of less than 15 metres.

The owner lodged an appeal with the Department of Local Government and Planning on the 1 December 2003.

B Adjoining development

The owner of the neighbouring property Mr Rod McLeod (33 Welsby Street New Farm) has provided written confirmation (dated 4 December 2003) that he has no objection to the subject house being located in its current position. ie 400mm from the outer most projection to his side boundary.

Material Considered

In coming to a decision, consideration was given to the following material: -

- (1) Application to Brisbane City Council for relaxation of boundary clearance dated 16 October 2003;
- (2) Brisbane City Council decision notice dated 30 October 2003;
- (3) Appeal Notice dated 1 December 2003;
- (4) Verbal and written submissions from the owner, owner's adviser and Council representative;
- (5) Email from a Brisbane City Council officer on the application of City Plan at the time the original building application was made;
- (6) *The Building Act 1975*;
- (7) *The Standard Building Regulation 1993*;

- (8) Brisbane City Plan 2000 – Level of Assessment table for the Low-Medium Density Residential Area.
- (9) Brisbane City Plan 2000 - Residential Design – Small Lot Code
- (10) Brisbane City Plan 2000 - House Code.
- (11) *The Integrated Planning Act 1997*.

Findings of Fact

The findings of fact can be separated into two sections namely:-

- (1) Facts under building approval and
- (2) Facts under planning approval

1 FACTS UNDER BUILDING APPROVAL

The siting requirements for Class 1 and 10a buildings are contained in Part 3 of the *Standard Building Regulation 1993*.

Part 3 Siting requirements in particular Division 2 Boundary Clearances under Section 38, establishes amongst other things minimum boundary clearances for single detached class 1 buildings.

Under Section 38 the proposal having a frontage of less than 15m and being less than 7.5 metres in height would require a minimum boundary clearance of 1000 metres.

The Local Government has the power to vary these requirements under both Sections 45 and 48 of the Regulation.

The Brisbane City Council granted a relaxation of the subject boundary clearance to allow 900mm to the outermost projection and the side boundary on the 17 July 2001.

1. Part 3 - Siting requirements of the Standard Building Regulation

A Section 45

The Local Government has the right to prescribe alternative siting requirements under Section 45 of the Standard Building Regulation for Class 1 and 10 buildings or structures.

The Brisbane City Council has not prescribed alternative siting requirements.

B Section 48

Section 48 of the Standard Building Regulation provides power for the Local Government to vary the requirements of Division 2. In considering the variations to the requirements the Local Government must consider the criteria as set out in sections 48(3) and 48(4).

2 FACTS UNDER PLANNING APPROVAL

The property is located in a Low-Medium Density Residential Area and subject to Demolition Control Precinct. The site is also subject to the New Farm and Teneriffe Hill Local Plan

The property is subject to the requirements of the Brisbane City Plan 2000, which was prepared under Schedule 1 of the *Integrated Planning Act 1997*.

Reasons for the Decision

In relation to this appeal two issues need to be considered:-

- 1 Building Approval
- 2 Planning Approval

My consideration of these two issues is as follows:-

1 BUILDING APPROVAL

Building approval for raising of the house was obtained on 3 August 2001. This approval allowed the house to be sited some 900mm from the side boundary. This distance was allowed under a variation given by the Brisbane City Council on 17 July 2001. It is noted the application for this variation was made on the 26 June 2001.

The building approval did not stipulate any specific currency period, nor any completion date for the building work. Hence under 3.5.21.(1) of the *Integrated Planning Act 1997* the currency period is two years starting the day the approval takes effect. As the approval was dated 3 August 2001 then the approval, provided work had not commenced, would have expired on the 3 August 2003.

The applicant advised that work commenced on raising the house in August 2001 and the work stopped on receipt of the stop work notice dated 5 June 2003. Hence it is clear that the development work is not completed and therefore the approval is still current and in my opinion remains current until the work is completed in accordance with the approval and a final inspection certificate is issued.

The application for a further relaxation of the boundary clearance to allow a set back of 400mm in lieu of the approved 900mm was made to the Local Government on the 16 October 2003.

This application appears to have been correctly made under Schedule 6 of the *Standard Building Regulation 1993*.

The Local Government has the power to vary siting requirements under Section 48 of the *Standard Building Regulation 1993*.

Consideration of this criteria by the Council representative was given at the hearing as follows: -

- 1 ***Section 48(3) from (a) to (f)***

(a) the levels, depth, shape or conditions of the allotment and adjoining allotments.

The subject allotment is typical in the subdivision and there is nothing unusual with regard to the levels, depth, shape or conditions of the allotment.

(b) the nature of any proposed building or structure on the allotment.

The raising of the house some 700mm from its original position has limited impact on the adjoining allotments.

(c) the nature of any existing or proposed building or structures on adjoining allotments.

The adjoining allotment to the right hand side has an existing house and the owner has advised they have no objection to the house in its current position

(d) whether the allotment is a corner allotment.

It is **not** a corner allotment.

(e) whether the allotment has two road frontages.

The allotment does **not** have two road frontages.

(f) any other matter it considers relevant.

It is noted the application was merely to raise the existing house some 700mm from its original position.

2 Section 48(4) from (a) to (g).

In considering this legislation it is important to note that the proposal would not **unduly** affect the following criteria.

(a) obstruct the natural light or ventilation of an adjoining allotment.

Taking into account the use and location of the existing adjoining developments, the proposal, will not unduly obstruct natural light or ventilation of the adjoining allotments.

(b) interfere with the privacy of an adjoining allotment.

The proposal would not unduly interfere with the privacy of the adjoining allotments. In fact it improves the privacy as with the house raised the windows are now not at the same level.

(c) restrict the areas of the allotment suitable for landscaping.

The proposal would not unduly restrict the areas of the allotment suitable for landscaping.

(d) obstruct the outlook from adjoining allotments.

The proposal would not unduly obstruct the outlook from adjoining allotments.

(e) *overcrowd the allotment.*

The proposal does not unduly overcrowd the allotment.

(f) *restrict off-street parking for the allotment.*

The proposal does **not** restrict off-street parking. It has no impact on parking. The owner advised the proposal allows for the parking of 3 vehicles on site

(g) *obstruct access for normal building maintenance.*

The proposal would not obstruct access for normal building maintenance. The original distance between the properties remains the same and was found to be quite acceptable for normal building maintenance.

Taking into account the proposal and all the criteria referred to under Section 48 of the *Standard Building Regulation 1993*, I agree with the Council representative, that it would be reasonable to grant a relaxation to allow the proposed residence to be built with a clearance of 400mm to the outermost projection and the right hand side boundary (when viewed from the street) subject to it being to the dimensions and heights as shown on the submitted and approved drawings.

B PLANNING APPROVAL

Planning issues are outside the jurisdiction of the Tribunal. However, advice received on the planning aspects in relation to this development are as follows:-

- At the time the development application was made, the planning scheme applicable was the Brisbane City Plan 2000. This came into affect on the 28 October 2000.
- Under this planning scheme, the development required planning approval and the applicable codes were the Residential Design Code - Character Code, Residential Design - Small Lot Code and the House Code.
- However, it was Council policy at the time the application was made to NOT require a planning application. This is clearly outlined in Council Questions and Answers Newsletter No 5 dated 20 October 2000. The Newsletter states that raising a house, provided the overall height does not exceed 8.5 metres, then no planning application is required. This is also confirmed in a Council planning officer's Email dated 8 December 2003.
- This policy is consistent with the Council not requiring a planning approval when the development approval was given on 3 August 2001.
- The Residential Design - Small Lot Code was amended on the 1 January 2003. This amendment, amongst other things, required, when raising a house, in addition to the height not exceed the 8.5 metres above ground level, that the side boundary clearances must comply with the requirements of the *Standard Building Regulation 1993*.

- In my opinion this amendment is not applicable as the currency period did not expire before the work commenced and no date was set in the approval for completion of the building work. The building work is still not complete, owing to the Stop work Notice. Hence the original approval is still current.
- Section 3.5.24(1) of the *Integrated Planning Act 1997* allows a person to request a change to a development approval.
- It is noted the change must be minor. Minor change is defined in the definitions under Schedule 10 of the *Integrated Planning Act 1997*. In my opinion a change to the side boundary clearance satisfies this definition.
- It is also noted that the building approval did not have any conditions in relation to side boundary clearances. The building application site plan indicated side boundary clearances of 900mm in accordance with the Council variation approval.
- In my opinion the variation application dated 16 October 2003 to the Local Government for the boundary relaxation would also appear to satisfy the criteria set out in 3.5.24.(1)
- Therefore in my opinion the Local Government were **incorrect** in asking the applicant to make application for approval under the Small Lot Code contained in the Brisbane City Plan.

Should the Local Government not agree with this interpretation on the planning aspect then I believe they should advise the applicant accordingly as part of this determination.

Hence after consideration of both the building and planning legislation and in accordance with Section 4.2.34 (2) (b) of the *Integrated Planning Act 1997* **I change** the decision by the Brisbane City Council and grant a relaxation of the siting requirements to allow the existing residence to be built with a clearance of 400mm to the outermost projection and the right hand side boundary (when viewed from the street) subject to the following conditions:-

- it is to the dimensions and heights as shown on the submitted and approved drawings and
- the Brisbane City Council considering whether a planning approval is still required and advising the applicant accordingly.

Leo F Blumkie
Building and Development
Tribunal Referee
Date: 12 December 2003

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:

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