



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 03-08-004**

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

**Assessment Manager:** Kawana Building Approvals

**Concurrence Agency:** Caloundra City Council

**Site Address:** *withheld* – 'the subject site'

**Applicant:** *withheld*

### **Nature of Appeal**

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* against the decision of Kawana Building Approvals, based on concurrence agency response from Caloundra City Council, pursuant to Section 9 (a), Schedule 2, Table 1 of the *Integrated Planning Regulation 1998*, to refuse an application to change a siting variation approval for a proposed carport at "the subject site".

**Date and Place of Hearings:** 12.00 pm Tuesday 12 February 2008 at "the subject site" and  
4.00 pm Thursday 20 March 2008 at "the subject site"

**Tribunal:** Mr Paul Smith Chairperson

**Present 12 February 2008:** Applicant  
Mr Peter Lusio Kawana Building Approvals  
Mr Richard Prout Caloundra City Council Representative

**Present 20 March 2008:** Applicant  
Partner of the Applicant  
Mr Scott Rushton Building Certifier  
Mr Richard Prout Caloundra City Council Representative

### **Decision**

The Tribunal **sets aside** the decision of Kawana Building Approvals, dated 17 January 2008, to refuse the building application because of Caloundra City Council's concurrence agency response **and approves the application subject to reasonable and relevant conditions including the following:-**

- 1) the facade, both to the street and to the sides, is to be reduced to about 600mm measured vertically;
- 2) the "gate house" is to be removed; and

- 3) The enclosing gate to be no higher than fence height and is to be of a “see through” construction when viewed by a person standing in the street. A construction that obstructs vision by no more than 50% when viewed by a person viewing the gate from any point on the street shall be deemed to be of “see through” construction.

The Tribunal also **orders** the applicant to obtain a development permit for the carrying out of building work, subject to the above conditions, before the alterations to the existing structure are commenced.

## **Background**

On 26 March 2007 Council advised Kawana Building Approvals, then acting as building certifier for the appellant, that its concurrence agency response to an application for a siting variation for an open carport on the subject land (herein referred to as the “**initial 2007 application**”) would be refused.

It is the common view of the parties that Council's detached housing code, and in particular specific outcome 07, is relevant to Council's assessment of both the initial 2007 application and the current application which is the subject of this appeal. It is also the common view of the parties that neither application complies with the acceptable solutions, one of which is that minimum road boundary setback is 6m.

Performance outcome 07 is as follows:

*“Garages and carports do not dominate the streetscape and preserve that amenity of adjacent land and dwellings having regard to:*

*(a) building character and appearance;*

*(b) views and vistas;*

*(c) building massing and scale as seen from neighbouring premises.”*

Following further submissions from the applicant, Council advised on 30 March 2007 that its concurrence agency response to the initial 2007 application would be to recommend approval of amended plans, subject to a number of conditions.

Kawana Building Approvals then issued an approval subject to conditions (herein referred to as the “**initial 2007 approval**”).

The plans attached to the initial 2007 approval showed:

- a. an open carport extending from the existing house to within 500mm of the front alignment with an opening of 2.7m high and a horizontal parapet of a depth of about 600mm above the 2.7m high opening; and
- b. no gate house adjacent to the carport.

In December 2007 Kawana Building Approvals, on behalf of the appellant, applied to amend the initial 2007 approval to substitute new plans for the plans attached as a condition of the initial 2007 approval. The proposed new plans would authorise the as-built carport and the gate house to be constructed.

Council as concurrence agency instructed the building certifier to refuse the application.

The application was refused and this appeal is against that refusal.

At the hearing on 12 February 2008 the Tribunal advised that it had formed the preliminary view that the adverse amenity and aesthetic effect on the neighbourhood of the as-built carport and gate house was materially greater than the effect that a carport built in accordance with the initial 2007 approval would have had. Further, the Tribunal advised that if no changes were proposed to the as-built structures, the Tribunal would probably uphold Council's decision thus resulting in the demolition and rebuilding of the carport. The Tribunal adjourned the hearing of 12 February 2008 for the parties to discuss possible changes with the object of obtaining a decision by consent of the parties.

The parties failed to reach agreement and the hearing was reconvened on Thursday 20 March 2008. At the reconvened hearing a number of options were discussed although no agreement was reached between the parties.

### **Material Considered**

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

1. 'Form 10 – Notice of Appeal' lodged with the Registrar on 18 January 2008 including grounds for appeal and correspondence accompanying the appeal;
2. Photographs of the subject property and existing neighbourhood streetscape;
3. Photographs of existing carports built within the 6m setback within the neighbourhood;
4. Plan of the existing carport;
5. 'Form 18 – Notice of Election' received from Caloundra City Council on 22 January 2008;
6. Decision Notice from Kawana Building Approvals, dated 17 January 2008 refusing the development application;
7. Caloundra City Council concurrence agency response dated 20 December 2007;
8. Submission from the applicant at the hearing;
9. Caloundra City Council verbal submission at the hearing and a written submission dated 22 February 2008;
10. Written submission and plan from Scott Rushton, dated 18 March 2008;
11. The *Building Act 1975*;
12. The *Building Regulation 2006*;
13. The Queensland Development Code Part 12;
14. The *Integrated Planning Act 1997*;
15. The *Integrated Planning Regulation 1998*; and
16. The Caloundra City Council planning scheme.

## **Findings of Fact**

The effect of the response of 30 March 2007 to the initial 2007 application was that, in Council's opinion, the carport could be made to comply with performance criteria 07 of Council's detached housing code by the imposition of conditions.

The carport and gate house were not built in accordance with the initial 2007 approval.

While the carport was set back 500mm from the front alignment (in accordance with the 2007 approval), the opening was built at around 2.9m and the parapet was built at a height of around 1150mm above the 2.9m high opening (both the height of the opening and the parapet height were conditions of the 2007 approval that is sought to be changed). Approval is also required for the proposed gate house .

This is an appeal against Council's refusal of an application to change the initial 2007 approval. The Tribunal is therefore required to decide whether the change, namely the greater height and bulk etc of the carport and gate house now proposed, would have a materially greater conflict with Council's detached housing code than would have been the result had the structure fully complied with the initial 2007 approved.

The Tribunal finds that the changes incorporated in the as-built structures would have a much heavier appearance when viewed from the street and from neighbouring premises and would result in a materially greater conflict with Council's detached housing code. If the as-built structures were to be left unchanged, Council's decision would be upheld and the December 2007 change application refused.

However the Tribunal finds that the following conditions, if imposed, would reduce that adverse effect of the changes to an acceptable level:

1. The facade, both to the street and to the sides is to be reduced to around 600mm;
2. The "gate house" to be removed;
3. The enclosing gate to be no higher than fence height and to be constructed of "see through" material when viewed from the street.

Although the structure when altered to comply with these conditions will be higher than the approved structure and will be at an angle, where the approved plans showed a flat roofed structure, its visual effect on the amenity of the neighbourhood will not be materially different to the effect the approved structure would have had.

## **Reasons for the Decision**

The Tribunal formed the opinion that the character of the immediate area is of low scale single family residential nature with few intrusions built to the front boundary. In the Tribunal's opinion, the carport, if built in accordance with the original 2007 approval would have had a significant visual presence in the streetscape, be out of character with the massing and scale as seen from neighbouring premises and have a dominant visual effect on the low scale residential character of the immediate area.

The appellant submitted that the non-compliance with the initial 2007 approval was not an intentional breach of the approval. Instead it was a natural result of the need to attach the carport at a particular height to the existing building, as shown on the approved plans.

The Tribunal believes the appellant did not set out to intentionally breach the conditions of approval to gain an advantage, although the Tribunal is of the opinion that as a professional builder the appellant should have been aware of the need to obtain approval from Council before commencing the work. Had he done so this appeal may have been avoided.

The Tribunal does not accept the applicant's submissions, made at the hearing, that, as grounds for upholding the appeal, Council was somehow at fault by not checked that the carport could have been attached to the building in the manner proposed to meet the required height at the road alignment. Council's jurisdiction is limited to considerations of amenity and aesthetics and has no responsibility to check building compliance issues nor is it required to check that what is proposed can be built in the way proposed. The applicant is a qualified and experienced builder who is well equipped to check these issues himself. No blame can be cast on Council for not doing what the appellant should have done.

The appellant also submitted that no dimensions were shown on the parapet and although it scales off at around 600mm this can not be relied upon. Implied by these submissions is that a parapet of over 1100mm is not in breach of the approved plans. The Tribunal dismisses these submissions. In the absence of a dimension drawn on the plans both the Tribunal and Council are entitled to scale dimensions from the drawing which are said to be drawn to scale. The Tribunal is of the opinion that the 2007 approval shows a parapet of around 600mm deep and the as-built parapet of over 1100mm does not comply with the approved plans.

The Tribunal formed the opinion that the reasonable conditions, referred to herein, can be imposed which will result in the changed carport having no materially greater dominance in the streetscape or adverse effect on the amenity of adjacent land and dwellings than it would have had if built in compliance with the 2007 approval, which would, even without the changes, have been significant.

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**Paul Smith**  
**Building and Development Tribunal Chairperson**  
**Date: 3 April 2008**

## **Appeal Rights**

Section 4.1.37. of the IPA 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  
PO Box 15009  
City East QLD 4002

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