Building and Development Tribunals — Decision

Integrated Planning Act 1997

Appeal Number:	**3–08–049**
Applicant:	*Withdrawn*
Assessment Manager:	Townsville City Council
Concurrence Agency: (if applicable)	n/a
Site Address:	*Withdrawn*–the subject site

Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the Decision Notice issued by Townsville City Council to refuse a Development Application for proposed building works, namely a carport.

Date of hearing:	1pm - Friday 25 July 2008
Place of hearing:	The subject site
Tribunal:	Mr Chris Schomburgk - Chair Mr Bruce Shephard - Member
Present:	*Withdrawn* – Applicant Mr Graeme Kenna – Townsville City Council representative Ms Denise Hinneberg – Townsville City Council representative Ms Barbara Cutler – Townsville City Council representative

Decision:

The Tribunal, in accordance with section 4.2.34(2)(a) of the IPA **confirms** the decision of Townsville City Council to refuse a Development Application for the construction of a carport within the front setback, and the **appeal is dismissed**.

Background

This matter has had a long and complex background, and questions have been raised about the precise nature of the application at hand, a well as the jurisdiction of the Tribunal to hear the appeal.

In summary, the Applicant has sought approval from Council to vary the front setback requirements of the Planning Scheme to erect a carport within that setback. The process for doing so under Council's Planning Scheme is less than clear, and has led to much of the confusion between the parties, which has become the subject of correspondence between the parties and the Tribunal.

In the event, Council has issued two separate notices to the Applicant:

- one purports to be a Referral Agency Response (Concurrence Agency) and is dated 17 June 2008;
- the other purports to be a Development Application Decision Notice also dated 17 June 2008.

At the hearing, Council officers accepted that there was no actual concurrence agency response as there had been no formal application made to Council in that regard. Council officers advised that such a notice was to be taken as a "pre-lodgment advice", but it would not be clear to even an educated applicant that such was the case, based on the form and content of the notice. This is a matter of some concern and one that the Tribunal strongly urges the Council to remedy for future applicants. For the purposes of this appeal, the Tribunal has, therefore, ignored this Notice.

The second Notice is a Refusal of a Development Application for a "Development Permit – Variation to City Plan". What is not clear is what form such an application might take. The IPA refers to only specific forms of application, including Material Change of Use, Building Works, Operational Works, and Reconfiguration of a Lot. There is no formal provision for an application for "Variation to City Plan". It appears, nevertheless, that this Council has dealt with this as a Material Change of Use, (which seems doubtfully appropriate). Most other local governments deal with such an application as a Preliminary Approval for Building Works, or similar. Again, it is the opinion of the Tribunal that Council's processes for this type of application are misleading to applicants, and a more concise and accurate approach needs to be taken, better reflecting the provisions of the legislation.

It is also relevant to note two separate letters from Council to the Tribunal. The first is an email letter of 17 July 2008 seeking participation at the hearing by a Council-employed lawyer. Despite Council's reasons for seeking that participation, the Tribunal rejected the plea, based on an understanding of the legislation which specifically seeks to prevent lawyers participating in Tribunal hearings. The second letter of 25 July 2008 raises Council's view that the Tribunal does not have jurisdiction to hear the appeal as it was made under a Development Application and, as such, should be heard only by the Planning and Environment Court, not the Tribunal. Again, and while it is accepted that it may be a matter of law, the Tribunal has determined that the Tribunal <u>does</u> have jurisdiction, as the matter is considered to be "*a matter under this Act* [the IPA] *that relates to the Building Act 1975*".

Regardless of the processes, which as above may well be flawed, the decision at hand is that Council has refused to allow a variation of the minimum front boundary setback to allow a carport to be erected.

That is the matter to which the Tribunal has turned its attention and is the subject of this decision.

Material Considered

The material considered in arriving at this decision comprises:

- The application, including 'Form 10 – Notice of Appeal', supporting plans and documentation;
- Verbal submissions from all the parties at the hearing;
- Written submission from Council presented at the hearing, regarding jurisdiction;
- Written submissions from the Applicant;
- A written objection to the proposal from an adjoining neighbour;
- The relevant provisions of the Town Planning Scheme for Townsville City Council – in particular, the District Code 4 – Townsville West;
- The Queensland Development Code (QDC); and
- The *Integrated Planning Act 1997*.

Findings of Fact

The Tribunal makes the following findings of fact:

- The subject site is located at *withdrawn*, an older suburb of Townsville. The locality is fully developed and many of the houses are older style, some of which have recently undergone renovation.
- The subject site is within the Townsville West District of the Townsville City Plan 2005 and more particularly within the "Neighbourhood Residential" Precinct in that District.
- The subject property contains a single detached house in average condition, and is an investment property for the Applicant. The house has only recent become vacant, having been tenanted for some considerable years.
- The house is set back from the front boundary by approximately 7.2 m. It has an existing driveway at its eastern side which allows vehicular access to the rear of the property. That driveway is not sealed and is approximately 3.6 m wide, although a fixed-louvre window shade protrudes into that width by about 0.5 m for a small part of the driveway length.
- The Applicant is seeking relaxation of the front setback to erect a carport built to within 1 m of the front boundary. A separate patio and awning are also proposed, but these are outside of the 6 m setback and are not part of this appeal. Council has advised that it has no problem with those components of the proposed building works – it is merely the carport that is at issue.
- The carport is proposed to be 5 m wide, 6 m deep, open sided on all sides, and of lightweight construction to Terrain Category 1 standard. It is to be free-standing and fit under the existing eaves, so that it appears as part of the existing dwelling. It is to be set out to provide for right angled access off the existing driveway, rather than direct access from the street. The Applicant contends that this would allow for a three-point-turn allowing vehicles to enter and exit in a forward gear. Whether that manoeuvre can in fact be achieved when two cars were housed was not confirmed, but the Tribunal accepts that it may be possible. (The plans provided to the Tribunal do not make it entirely clear just how many posts are required to support the carport, and an extra support post may create turning difficulties).
- In the immediate locality a number of structures were observed within the 6 m front boundary setback. Council was asked to ascertain the lawfulness or otherwise of these, as the Applicant relies to some degree on their existence as evidence of a streetscape. Council has since advised that most (but certainly not all) of those observed were, in fact, lawful but were approved due to each site's specific circumstances.
- The Applicant had gone to some trouble to advise neighbours in the locality about the proposal and delivered letters to a number of households in the locality inviting their support. In the event, no letters of support were received, but one letter of objection from the neighbour to the immediate east (the neighbour likely to be most affected) was received. The Applicant has asked the Tribunal to treat the letters that were returned to his letterbox as letters of "no concern" but the Tribunal does not accept that proposition, given that the letters had no comments at all from those residents.
- Council's grounds for refusal of the proposed carport are identified in the Development Application Decision Notice (17 June 2008) as:
  - the carport will be overly dominant of the existing streetscape in the immediate surrounding neighbourhood. The carport will impact on the continuity of the existing streetscape;
  - the carport, when built, will have an extremely adverse effect on the amenity or likely amenity of the building's neighbourhood;
  - the proposed carport, by reason of scale, bulk and location, would have an adverse impact on the appearance and character of the existing dwelling; and
  - having regards (sic) to lot size and lot dimensions, the Applicant has not provided sufficient justification for the proposed relaxation of City Plan 2005 setback provisions, such that this would outweigh the adverse impacts identified above.

- The relevant provisions of City Plan are found in the District Code 4 – Townsville West which is section 4.33 of City Plan. The Code is a performance-based code with Specific Outcomes (SO) and Probable Solutions (PS) for each SO. SO3 provides that "*the scale, bulk and location of a building on a site does not adversely impact on streetscape amenity*". Curiously, City Plan refers only to a "building", not a "structure", and has no separate definition of "building". The IPA defines a "building" as "*a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a floating building and any part of a building*". The IPA does not define a "structure". The QDC defines a "structure" as having the same meaning as in the *Building Act 1975*. That definition is no more helpful in this context. The QDC defines an open carport as "*a carport with two or more sides open … and not less than two-thirds of its perimeter open*". The proposal is clearly an "open carport" as per this definition.
- There is, then, some conjecture about whether the proposed carport, which is open sided on all sides, is indeed a "building" within the meaning of this Code (and this Planning Scheme). This appears to be a deficiency in the Planning Scheme. While this again may be a matter of law, the Tribunal has determined that, given the absence of a separate definition of "carport" or "structure" in this Planning Scheme, the proposed carport is a "building" for the purposes of the relevant Code.
- Of particular relevance to the Tribunal in this case is that there appears to be ample room at the rear of the subject property to provide additional covered car accommodation if required, without intruding into the front setback area. The Applicant has explained that there are potential drainage problems in doing so, but that is not evident on site. The Applicant has already constructed some temporary drainage on site to relieve intermittent ponding, and it seems clear that additional drainage works, if required, could be practically achieved to overcome any such constraint.
- As above, there are some existing structures built within the front setback in the general locality, but each of those needs to considered on its own merits. The nearest such structure is in the same street as the subject site. Only one of the structures in a nearby street was approved under the current City Plan, with many of the other structures being so old as to be prior to current Council records.
- The Applicant claims that the front of the site is preferred to allow for possible future equitable access (handicapped persons, wheelchair, etc) and to allow undercover access from the car accommodation into the house. In the Tribunal's opinion, both of those features could be achieved by having the covered car accommodation at the rear of the house.
- While not specifically referenced by Council in its grounds for refusal, at the hearing Council's officers referred to the QDC provisions relating to open carports (MP1.2, Element 1, P1 and A1(c)). The Performance Criteria P1 provides that "*the location of a building or structure facilitates an acceptable streetscape, appropriate for the bulk of the building or structure; and the road boundary setbacks of neighbouring buildings or structure; and the outlook and views of neighbouring residents; and nuisance and safety to the public*". The Acceptable Solutions provide that a relaxation may be granted where "*there is no alternative on site location for a … carport* …". Such an alternative does exist in this case. Having regard then to the Performance Criterion, the proposal will be out of character with the road boundary setbacks of neighbouring buildings or structures, and thus conflicts with this criterion.

Based on an assessment of these facts, it is the Tribunal's decision that **the appeal is dismissed,** and the **application for relaxation of the front boundary setback for an open carport is refused.**

Reasons for the Decision

- While the Planning Scheme and Council's own internal processes for such a proposal appear to be inadequate, it is the Tribunal's determination that it does have jurisdiction to hear this appeal and that the proposed open carport can be reasonably regarded as a "building" for the purposes of the relevant Code. The Tribunal strongly recommends that amendments be made to the Planning Scheme and to Council's processes for dealing with applications for relaxation of boundary setbacks, such that applicants are not misled or confused, and that Council's processes are in line with the relevant legislation.

- While there are some existing structures within the wider locality that are built within the 6 m front setback, the subject proposal would have a negative impact on the immediate streetscape.
- To the extent that the provisions of the QDC may be relevant, the proposal conflicts with the Acceptable Solutions and the Performance Criterion for open carports in section MP1.2 Element 1.
- There are other alternative practical locations on the subject site for covered car accommodation that do not require a relaxation of the front setback.
- The neighbour likely to be the most affected has provided a written objection to the proposal. No letters of support for the proposal were received, despite efforts by the Applicant to achieve that support.
- There are no grounds to justify this approval despite its conflict with the relevant Code provisions.

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Chris Schomburgk
Building and Development Tribunal Chair
Date: 7 August 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:

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Department of Infrastructure and Planning
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