

**APPEAL***Integrated Planning Act 1997***BUILDING AND DEVELOPMENT TRIBUNAL - DECISION****Assessment Manager:** GMA Certification Group**Concurrence Agency:** Gold Coast City Council**Site Address:** *withheld*- 'the subject site'**Applicants:** *withheld***Nature of Appeal**

Appeal under Section 4.2.7(2)(b) of the *Integrated Planning Act 1997* against the decision of GMA Certification Group, based on a concurrence agency response from Gold Coast City Council, pursuant to Section 9(a), Schedule 2, Table 1 of the *Integrated Planning Regulation 1998*, to refuse an application for a Preliminary Approval for Building Work for a garage to a Detached Dwelling.

Date and Place of Hearing: 9:00 am on Wednesday 14 May 2008 at 'the subject site'**Tribunal:**
Dennis Leadbetter Chairperson
Ernie Harvey General Referee**Present:**
Applicant / Owner
Tanya Smith GMA Certification Group Representative
Jack Matijevic Gold Coast City Council Representative
Peter Krook Gold Coast City Council Representative**Decision**

The tribunal **sets aside** the decision of GMA Certification Group, dated 2 May 2008, to refuse the building development application and replaces it with the following decision:-

GMA Certification Group is directed to approve the development application for preliminary approval for building work for a garage to a detached dwelling subject to compliance with the following conditions:-

1. The minimum secondary road boundary setback shall not be less than 2.6m measured to the outermost projection and the nearest point on the alignment. The outermost projection is defined as *in the case of a roof, the outside face of the fascia, or the roof structure where there is no fascia, or attached sun hoods or the like, but does not include retractable blinds, fixed screens, rainwater fittings, or ornamental attachments.*

2. The area between the garage and the southern road alignment to be landscaped, with plants similar to those existing along part of that boundary to provide a visual screen of the garage building to the road.
3. Roof water to the garage to be piped to the street channel or to a rainwater storage tank with overflow from the tank piped to the street channel.

Background

The appeal relates to a recently constructed metal framed and sheeted garage, built approximately 2600mm at its nearest corner from the southern boundary of a residential property in a low density residential area, without any approvals in place.

Council responded to an enquiry and issued a show cause notice as there were no approvals in place for the garage to the site. In response to that notice, the appellant lodged an application for a development approval and on 19 and 22 May 2007. Council issued identical refusal notices, both refer to a reference No BLD: 2708475 PN: 200030/16(P1). GMA Certification Group issued a decision notice refusing the application on 2 May 2008.

Council refused the application on the basis that it did not conform to the Plan of Development (POD) applicable to the residential subdivision incorporating this parcel of land, which requires a 4.5m setback from the secondary road alignment, and also considered the building would detract from the visual amenity of the neighbourhood.

Material Considered

1. 'Form 10 – Notice of Appeal' and grounds of appeal contained therein;
2. 'Form 18 – Notice of Election' provided to the Registrar 18 March 2008 from Council;
3. Drawings submitted with the appeal;
4. Letters from Council dated 19 and 22 May 2007, refusing the application;
5. Development Application Decision Notice from GMA Certification Group dated 2 May 2008, refusing the application based on Council's concurrence agency refusal (item 4);
6. Written submissions from the adjoining owner;
7. Verbal submissions from the owner at the hearing;
8. Verbal and written submissions from Council's representatives at the hearing;
9. The *Integrated Planning Act 1997*;
10. The *Integrated Planning Regulation 1998*;
11. The *Building Act 1975*;
12. The Building Code of Australia;
13. The Queensland Development Code (QDC), specifically MP 1.2;
14. Council's planning scheme, specifically the POD for the site.

Findings of Fact

The Tribunal makes the following findings of fact:

- 'The subject site' is a corner allotment of irregular shape and has a gentle fall to the south west;
- The site is approximately 650m² in area;
- The available locations to place a garage on the site, because of shape and the location of the residence, are severely limited;
- Rotation of the garage parallel to the street alignment would create a triangular shaped area to the rear that would be of little practical value and such positioning would make access to the garage extremely difficult;
- Movement of the garage northward to increase the alignment setback or achieve the statutory 4.5m would necessitate movement westward to avoid coming into the 1.5m required separation to adjoining property buildings, resulting in the garage being attached to the existing residence;
- The secondary road is a short street serving only two homes beyond the subject site, and as such has little traffic;
- The location of the garage building does not in any way impede the view of traffic at the road intersection as it is set close to the rear alignment;
- The garage is constructed in materials coloured to match the existing house and is sympathetic to the existing house in scale.

There are no further concurrence agency requirements.

Reason for the Decision

The refusal of the development application by GMA Certification Group, based on a refusal by Council, as a concurrence agency, was based on the premise that the garage setback from the southern street alignment did not comply with the POD, which stipulates a 4.5m secondary road setback.

MP 1.2 of the QDC does have provisions for alignment setbacks for a ***building or structure***, and provides **Performance Criteria** and an **Acceptable Solution**, but allows the local government to vary the application of siting requirements to take account of alternative solutions and specific site conditions that may necessitate an alternative solution or a modification of an acceptable solution.

MP 1.2 of the QDC, under acceptable solution A2, subsection (a) requires the side and rear boundary clearance for a part of a building or structure to be:-

- (i) Where the *height* of that part is 4.5m or less – 1.5 m;

but under (d), allows a class 10a buildings or parts may be within the boundary clearances nominated in A2(a) where:-

- (i) the height of a part within the boundary clearance is not more than 4.5m and has a mean height of not more than 3.5m; and
- (ii) the total length of all buildings or parts, or any class, within the boundary clearance is not more than 9m long along any one boundary; and
- (iii) the class 10a buildings or parts within the boundary clearance are located no closer than 1.5m to a required window in a habitable room of an adjoining dwelling.

The position of the garage complies with the relaxation for a side or rear boundary provided within the QDC MP1.2.

In relation to the secondary street alignment setback, the QDC MP1.2, lists the **Performance Criteria P1** in relation to street setbacks as follows:

- P1** The location of a building or structure facilitates an acceptable streetscape, appropriate for-
- (a) the bulk of the *building* or *structure*; and
 - (b) the *road* boundary *setbacks* of neighbouring buildings or *structure*; and
 - (c) the outlook and views of neighbouring residents; and
 - (d) nuisance and safety to the public.

The QDC provides **an acceptable solution** which states:

- A1**
- (a) For a dwelling, garage or a carport the minimum road setback is –
 - (i) 6m; or
 - (ii) where there are existing dwellings on both adjoining lots and at least one of the dwellings is set back from the road between 3m and 6m and the difference between their road setbacks is –
 - (A) not more than 2m – a distance between the two dwellings; or
 - (B) more than 2m – the road setbacks of the adjacent dwellings; and
 - (b) For a corner lot, the minimum road setbacks are –
 - (i) As for A1(a) (i); or
 - (ii) where the lot has an average depth of 24m or less –
 - (A) for the nominated road frontage – as for A1(a) (i) ; and
 - (B) for the other road frontage – as for A1(a) (i); and
 - (C) no building or structure over 2m high is built within a 9m by 9m truncation at the corner of the two road frontages.
 - (c) For open carports, the minimum road setback may be less than required by A1 (a) (i) if –
 - (i) the aggregate perimeter dimension of walls, solid screens, and supports located within the setback does not exceed 15% of the total perimeter dimension (along the line of supports) of that part of the *carport* within the same setback; and
 - (ii) there is no alternative on-site location for a *garage or carport* that –
 - (A) complies with A1(a) (i); and
 - (B) will allow vehicular access having a minimum width of 2.5m; and
 - (C) has a maximum gradient of 1:5.

In determining this appeal, the Tribunal has considered the provisions of the QDC MP 1.2 and specifically the Performance Criteria P1 in relation to the four very specific criteria stated, and it is the Tribunal's opinion that the siting of the garage meets with the intent of those four criteria. Specifically:

- the bulk of the building is small and in character with the residential buildings in the area;
- the building is approximately in line with the road boundary setback of the adjoining property to the east (which is setback 6m as the street is the primary road frontage for that building);
- the building's position will not interfere with the outlook and views of the neighbouring residents and the provision of landscaping will enhance that outlook; and
- its position will not cause a nuisance or safety issue to the public.

The Tribunal has also considered the impact of a reduced alignment setback compared to the requirements of the QDC MP 1.2 or the requirements of the POD for the building on the visual amenity of the low density residential area. It is the Tribunal's opinion that the reduction will have little impact, principally because of the site topography and the inclusion of suitable landscaping, basically obscuring the view of the garage building.

The Tribunal **does** believe there are reasonable grounds to vary the requirements of the QDC MP 1.2, to accommodate the garage, the subject of this appeal, as the impact on the visual amenity and property generally to the adjoining owners is minimal.

General comments

At the commencement of the hearing, Council representatives presented the Tribunal with a letter dated 13 May 2008, ref 2802713, indicating that the refusal of the application was **not** made on the merits of the proposed siting variation but on the basis that the application should have been for a *generally in accordance determination*, and continues that the Council may consider an alternative setback through such an application, which would be assessed against the existing POD. Council officers at the hearing also indicated that a relaxation of the POD's 4.5m setback could receive favourable consideration.

The Tribunal has difficulty in accepting the content of this letter and the inferred willingness of Council to reasonably consider a relaxation of the road boundary setback contained in the POD in this instance, having cognisance of Council's actions to date, which include instituting court action against the appellant, without first initiating mediation, despite the appellant's actions to comply with the show cause and enforcement notices issued by Council, by seeking a preliminary development approval and relaxation, which was refused by Council.

The Tribunal is also concerned that this specific action, i.e. the lodgement of a *generally in accordance application*, appears not to have been communicated to the appellant before the date of this hearing.

It was also of considerable concern to the Tribunal that Council's representatives at the hearing indicated that they had no prior knowledge that Council had instituted court action against the appellant in this matter.

Dennis Leadbetter
Building and Development Tribunal Chairperson
Date: 20 May 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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