



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	60- 2017
Appellant:	Alpha Planning Applications Pty Ltd
Assessment Manager:	GMA Certification Pty Ltd (not a party to the appeal)
Concurrence Agency: (if applicable)	Toowoomba Regional Council
Site Address:	5 Shelby Street, Glenvale and described as Lot 33 on SP283670 – the subject site

Appeal

Appeal under Section 230 of the *Planning Act 2016* (PA) and Section 1(2)(g) and Table 1 Item 1(a) of Schedule 1 of the PA against the decision of the Assessment Manager to refuse the development application for building work for a duplex based on the recommendation for a refusal by the Concurrence Agency – Toowoomba Regional Council (Council) for the reason that the proposal was inconsistent with the Performance Provision P1 paragraphs (a) and (b) of the *Queensland Development Code, Mandatory Part 1.3 Design and Siting Standard For Duplex Housing* (QDC MP1.3).

Date and time of hearing:	Thursday 15 February 2018
Place of hearing:	Meeting Room 6, Level 3, Toowoomba Regional Council Library building Little Street, Toowoomba
Tribunal:	John O'Dwyer – Chair Lynette Prince-Large – Referee
Present:	Andrew Hill – Representative of Alpha Planning Applications Pty Ltd David Krumins – Toowoomba Regional Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **sets aside** the decision of the Assessment Manager to refuse the application for a duplex and **approves** the application and directs the Assessment Manager to issue a new Decision Notice approving the application subject to appropriate conditions.

Please be advised that you may elect to lodge an appeal/declaration about this matter in the Planning and Environment Court (the Court). The Court appeal period starts again from the date you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

The following link outlines the steps required to lodge an appeal with the Court.

Background

The subject site is located at 5 Shelby Street, Glenvale QLD 4350 in Toowoomba Regional Council area. The land is described as Lot 33 on SP283670 with an area of 508m².

On 18 July 2017, an application for a development approval for building work was lodged by an applicant Australasian Homes Pty Ltd on behalf of the owner Peter Nelson with the Assessment Manager for a single storey duplex and attached garages. The proposed building work was for Class 1a and Class 10a building work.

On 14 August 2017 the Assessment Manager referred the application to Council as a Concurrence Agency for design and siting assessment against QDC MP1.3.

On 29 August 2017, Council made an information request seeking revised plans showing setbacks from road frontages of over 4m from Glenvale Road and over or at 6m from Shelby Street to closely follow or exceed the road setback distances established by existing dwellings/duplexes under construction on this side of the street.

On 7 September 2017, the Assessment Manager forwarded a revised set of plans to Council.

On 7 October 2017, Council issued a Concurrence Agency Response directing the application be refused for the following reasons, stating the assessment had been made pursuant to the provisions of QDC MP1.3 Part 1 only

The reason for Council's refusal is that the proposal is deemed to be inconsistent with Performance Provisions P1 of the *Queensland Development Code Mandatory Part 1.3*, namely:

- P1 The location of a building or structure does not facilitate an acceptable streetscape as it:
- (a) Provides unjustifiable bulk to the street and neighbouring buildings or structures; and
 - (b) Incompatible with the road boundary setbacks of neighbouring buildings or structures.

On Thursday 2 November 2017, the Assessment Manager refused the application on the direction of Council's Concurrence Agency direction.

On 30 November 2017, Alpha Planning Applications Pty Ltd (the Appellant) lodged an appeal against the refusal of the application on behalf of the new owner Rissco Pty Ltd.

The subject site is located on the south side of Shelby Street and has a second frontage to Glenvale Road. Site setbacks from Glenvale Road and the side boundaries are acceptable. The site setback from Shelby Street is 5.077m against the QDC MP1.3 Road Boundary Acceptable Solutions A1 requirement of 6m. The site coverage is 50.47%, against the QDC MP1.3 Open Space Acceptable Solutions A3 requirement not to exceed 50%. Council did not raise an issue with this as Performance Criteria P3 was met. All other Acceptable Solutions in QDC MP1.3 are met.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar 30 November 2017. This notice was accompanied by a written authority from the owner Rissco Pty Ltd authorising Alpha Planning Applications Pty Ltd to act on its behalf, and a report by Alpha Planning Applications Pty Ltd providing supporting information and grounds of appeal.
2. DA Form 2 Building work details lodged with the Assessment Manager on 18 July 2017.
3. Preliminary drawings for approval dated 24 May 2017:
 - 01 Perspective Rev B
 - 02 Site Plan Rev B
 - 03 Ground Floor Plan Rev B
 - 04 Elevations Rev B
 - 05 Landscape Plan Rev B.
4. Preliminary Not for construction drawings dated 7 September 2017, stamped Refused by GMA Certification Group Ref No 20172793:
 - 01 Perspective Rev D
 - 02 Site Plan Rev D
 - 03 Ground Floor Plan Rev D
 - 04 Elevations Rev D
 - 05 Landscape Plan Rev D.
5. Referral Agency Response Application Form with attached assessment against the provisions of QDC MP1.3, submitted to Council on 14 August 2017.
6. Concurrence Agency Information Request dated 29 August 2017.
7. Response to Information Request dated 7 September 2017 submitting the set of 5 plans dated 7 September 2017 referred to in Item 4 above.
8. Concurrence Agency response dated 7 October 2017 directing the Assessment Manager to refuse the application.
9. Decision Notice from the Assessment Manager to the Applicant dated 2 November 2017.
10. Letters dated 5 December 2017, from the Appellant to the Assessment Manager and Council giving Notice of an appeal to other parties.
11. Verbal submissions at the hearing, advising relevant details supporting the party's arguments.
12. Drawing submitted by the Appellant at the hearing showing the difference between the proposed design and a compliant design.
13. Documents submitted by Council at the hearing comprising:
 - a. an internal cover sheet
 - b. a copy of the Referral Agency Response Application Form with attachments
 - c. A copy of the Information Request and the Information Response
 - d. A copy of the Concurrence Agency Response

e. A copy of the internal Council Assessment Report.

14. *Planning Act 2016* (PA)

15. Toowoomba Regional Council *Temporary Local Planning Instrument 01/2017 (dual occupancy)* (TLPI 01/2017)

16. Toowoomba Regional Council *Toowoomba Regional Planning Scheme 2012* (the Scheme)

Issues Raised by the Parties

Appellant

1. Existing Precedents

The Appellant confirmed the location of developments in the vicinity in Shelby Street and other nearby streets where properties had setbacks less than the QDC MP1.3 A1 minimum 6 metres setback.

2. Street Design and Vistas

The Appellant drew the attention of the Tribunal to the curving nature of Shelby Street that would mean the lesser setbacks would not be as obvious as would be if the street frontages were all in a straight line.

3. Increased Setback

The drawing Preliminary Not for Construction page 02 Site Plan Rev D dated 7 September 2017 showed a small increase in the setback to 5.077m from 5.002m shown on the Rev B plan included in the original application.

4. Other Matters

The rear boundary of the property fronts Glenvale Road, a major arterial road under the Scheme. The development has a setback of 4.0m to be compliant with the Scheme but does not comply with the QDC MP1.3 requirement for a 6m setback from Glenvale Road for a secondary road frontage. Council has accepted the lesser Scheme setback to this road. Normally under QDC MP1.3 A2, a rear boundary setback of 1.5m is required where it does not abut a road.

Council

5. Setbacks

Council's major concern is the non-compliance with the QDC MP1.3 Acceptable Solution A1 requirement for a 6m front boundary setback from Shelby Street. Council's refusal was based on QDC MP1.3 in that the proposal did not meet Performance Criteria:

Provide unjustifiable bulk to the street and neighbouring buildings or structures;
and

Incompatible with the road boundary setbacks of neighbouring buildings or structures.

Council advised that the other properties with setbacks of less than 6m in the section of Shelby Street where the subject site is located, have special circumstances whereas the subject site does not have any special circumstances and so should comply with the 6m frontage setback off Shelby Street. At 6 Shelby Street the block is irregular in shape. At 23 Shelby Street, there is a pump station in the footpath in front of the property. Other nearby dwellings and duplexes comply with the setback requirement.

Note: The Tribunal is surprised that a lesser setback was proposed and approved where there is a pump station adjacent to the frontage at 23 Shelby Street.

6. Site cover

Council advised the minor exceedance in site cover is not a significant matter.

7. TLPI 01/2017

Council advised that after the initial application for the building application for the duplex had been submitted for approval, TLPI 01/2017 came into effect on 4 December 2017. The purpose of TLPI 01/2017 is to ensure that development which is a dual occupancy creates pleasant, safe and attractive living environments while facilitating a range of housing types that sensitively blend with existing streetscapes and neighbourhoods and facilitate increased population within proximity to major centres.

Council advised that lesser setbacks are available under TLPI 01/2017, but that the other provisions would make it difficult to build a dual occupancy on this lot, particularly due to the number of other dual occupancies nearby.

Findings of Fact

The Tribunal makes the following findings of fact

1 QDC MP1.3

- P1 Road Boundary - The setback does not comply with the 6m requirement in A1 of QDC MP1.3 for the Shelby Street or for the Glenvale Road frontages.
- Council have accepted the lesser setback of 4m from Glenvale Road under its Scheme provisions.
- P3 – Open Space - The site coverage exceeds the 50% maximum set out in A3 of QDC MP1.3 by 14sqm.
- P9 Private open space - The private open space of 26sqm per unit exceeds the 16sqm per unit requirement in A9 of QDC MP1.3 and this additional space satisfies P3.
- The requirement for a 4.0m rear boundary setback is from a second road frontage is a special circumstance.
- The side boundary setback minimum requirements of QDC MP1.3 A2 are exceeded – 1.6m is provided from the eaves, whereas 1.5m is required.

2 Shelby Street - Streetscape and building bulk

- Shelby Street has a curvilinear design in the east-west section of the street from numbers 1 to 23. Therefore, the bulk of the building will not be as obvious as it would be with a straight street alignment.
- The appearance of bulk is further broken by the articulated design of the frontage and varied roof lines and heights and increased side boundary setbacks.

The parties to the appeal agreed the structures at 6 and 23 Shelby Street have lesser frontage setbacks than the required 6m. The structure at 6 Shelby Street is irregularly shaped and so was allowed a lesser frontage setback. The lot at 23 Shelby Street is a regular lot and Council advised the lesser setback than 6m was allowed due to the presence of a pump station outside the lot in Shelby Street.

3 Setbacks in relation to neighbouring buildings

- There were no buildings on 1-15 Shelby Street at the time of the building application and so there are no neighbouring dwellings or structures for comparison.

Reasons for the Decision

As the frontage setback and site coverage do not meet the Acceptable Solutions A1 and A3 of QDC MP1.3, the Tribunal has assessed the proposed development against the Performance Criteria P1 Road Boundary and P3 Open Space and has also considered the effect of the exceedance of the A9 Outdoor Living Space and A2 Side Boundary setback minimum requirements as mitigating effects that assist in compliance with the overall purpose of QDC MP1.3.

The Tribunal considers the site does have special circumstances. If this lot did not have a second frontage to Glenvale Road, the building could have been constructed to within 1.5m of Shelby Street. Therefore, the site is losing 2.5m of building depth at the rear of the site and seeking less than 1m of lesser setback from the Shelby Street frontage, a net loss of 1.5m site depth for building work in comparison to a similar lot on the other side of Shelby Street. This constrains the nature of the design of the structure on the lot.

The applicant responded to the information request by marginally increasing the setback to reduce the non-compliance.

The Tribunal considered that given the curve in the middle of the southern section of Shelby Street from 9-13 Shelby Street, the lesser setback will help to emphasise the curving nature of the street by providing a transitional setback between the straight and curving sections.

The building is a single storey building with an articulated frontage design and a varied roof line that breaks up the appearance of bulk. The appearance of bulk is further reduced by the slightly greater than required side setbacks. The Tribunal considers the result of these elements is that there will be an acceptable streetscape that does not result in appearance of unjustifiable bulk.

There are no adjoining buildings that the frontage can be compared with given the curvilinear nature of the street.

The Tribunal also recognises that there has been a change in planning provisions relating to duplexes under TLPI 01/2017 that came into effect after the building application was lodged. It contains lesser setback provisions, but also other more restrictive provisions that this development would not meet. The Tribunal has determined not to give weight to the TLPI as the duplex was acceptable development on the land at the time of the building application.

John O'Dwyer
Development Tribunal Chair
Date: 27 March 2018

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833 Facsimile (07) 3237 1248