



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-029
Appellant:	[names withheld]
Respondent (Assessment Manager):	John Dunn JDBA Certifiers
Co-respondent (Concurrence Agency):	Sunshine Coast Regional Council
Site Address:	116 Dulong School Road Dulong – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the refusal of a Development Application for approval of Building Works relating to an over height fence, being an existing Class 10b structure. The decision followed a concurrence agency response by the Sunshine Coast Regional Council, directing refusal of the application. Council stated in part, that the structure has the potential to adversely impact on the amenity of the adjoining neighbours, contrary to Performance Criteria P2 (c) of the Queensland Development Code MP 1.2.

Date and time of hearing:	10.30am, 17 August 2021
Place of hearing:	The subject site
Tribunal:	Debbie Johnson - Chair Markus Pye - Member Anthony Roberts - Member
Present:	Appellants [names withheld] Pat Ferris JDBA - Assessment Manager representative Tracey Douglas and Mitch Schwieso – Council representatives

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016* (PA), confirms the decision of Council to refuse the development application for building works associated with an existing Class 10b structure being a screening fence.

Background

1. The subject site is a triangular shaped rural property having an area of 4257sq/m. Access to the property is via an easement, through a much larger site which completely enfolds the subject site. Historically the appellants' site was part of the larger property that surrounds it ('the larger site').
2. The existing home and associated outbuildings of the subject site are set in a beautiful garden setting that is very well maintained. The property has a reasonable slope falling from the entry point via the access driveway. The landscaping is sensitively terraced and retained, effectively disguising the contours of the land.

3. The larger site, is open and undulating. That home site is some distance from the subject site and set amongst trees, making it barely visible from the appellants' site. A CCTV surveillance camera is located on a substantial shed within the larger site. The shed is approximately 150m from the subject site. Given the elevation of the land, the shed and the camera are clearly visible from the appellants' property.
4. In recent times the owners of the larger site sought approval and built a secondary dwelling on their land. This dwelling is not in the vicinity of the main residence, rather it is approximately 50m from the fence line of the subject site. The secondary dwelling is occupied.
5. A home on a neighbouring acreage site ('the adjacent site') is also positioned less than 50m from the access driveway shared by the appellants with the occupants of the main house on the larger site and the secondary dwelling. The driveway of the adjacent site is completely separate however, and runs parallel to the easement used by the other three. There is a fence that runs the full length of the larger site and the adjacent site separating the driveways so that you cannot drive from one to the other.
6. Consequently there are three households with homes within 50-100m of each other despite the expansive rural environment that they enjoy. The larger site house is situated much higher and further away than the other three, however given the single shared access, the owners of the larger site must drive through the cluster to enter or leave their own home.
7. The appellants purchased their property in 2006. The owners of the adjacent site purchased their home in 2016. The secondary dwelling was built in 2019. Statements have been provided to the Tribunal indicating that the relationship of the owners of the larger site with both the owners of the adjacent site and the appellants have been and remain strained, due to privacy and other matters. The Tribunal was informed that there is a history of complaints.
8. The appellants stated that they were increasingly concerned about their privacy.
9. The owners of the adjacent site provided a written statement to the Tribunal explaining they have erected a solid colorbond steel 2m high fence along their shared boundary with the larger site to protect their privacy in and around their home. They further stated that the fencing has restored this privacy.
10. In 2019, when the secondary dwelling was built, the appellants erected a fence, built from a variety of materials, mostly sheet metal. This fence has been erected 600mm inside their shared boundary with the secondary dwelling. Predominately the fence extends along the higher portions of the property's perimeter. The fencing follows the contours of the land but varies in height due to the nature of the construction. In parts, the metal sheeting is fixed in a sawtooth pattern. The fence has been erected in stages and exceeds 2m in height reaching 3m in sections. No approvals were sought for this structure at the time of construction.
11. The secondary dwelling is positioned higher than the appellants' home. The living and outdoor areas of the secondary dwelling overlook the appellants' house and property generally. However, the appellants have planted extensively inside the fence to achieve a substantial landscape buffer to screen their home from the main house on the larger site.
12. In or around September 2020, the owners of the larger site lodged a complaint with Council stating the appellants' fence was over height, unsafe and unsightly as it was constructed of poor materials and had a visual impact on the enjoyment of their property.
13. In December 2020, Council received a concurrence agency referral request from the Assessment Manager for the existing fence, as the fence is over 2m in height and within 1.5m of the side boundary.

14. On 22 January 2021, Council directed the Assessment Manager to refuse the building application for the fence, stating it did not meet QDC MP1.2 – Performance Criteria P2 (c) – *Do not adversely impact on the amenity and privacy of residents on adjoining lots*. Council stated in part that the additional height of the fence has the potential to adversely impact on the amenity of the adjoining neighbours.
15. On 24 May 2021, the Assessment Manager issued a Decision Notice refusing the development application for the existing fence being a Class 10b structure.
16. On 3 June 2021, the appellants stated their grounds for appeal, and completed and submitted the Form 10 – Notice of Appeal to the Registrar.

Jurisdiction

17. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
18. Schedule 1 of PA, section 1(2) states Table 1 may apply to a tribunal only if the matter involves one of the circumstances set out in paragraphs (a) to (l) of that section. Paragraph (g) of section 1(2) states: “a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under the Act that may or must be decided by the Queensland Building and Construction Commission”.
19. The tribunal is satisfied that the application lodged with the Assessment Manager and the referral of the development application to Council satisfies that requirement, being a development application for approval of building works under the Building Act 1975, which is assessed against the Queensland Development Code (QDC) side boundary setback provisions for structures. The Local Government is a concurrence agency as per Schedule 9, Table 3 of the Planning Regulation 2017.
20. That application was subsequently refused by the Assessment Manager as directed by Council as the referral agency. Table 1 item 1(a) in Schedule 1 of the PA states that for a development application an appeal may be made to a tribunal against the refusal of all or part of the development application.
21. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

22. Section 246 of the PA provides as follows (omitting the examples contained in the section):

The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.

The person must give the information to the registrar within 10 business days after the registrar asks for the information.

Section 253 of the PA sets out matters relevant to the conduct of this appeal. Subsections (2), (4) and (5) of that section are as follows:

(2) Generally, the appellant must establish the appeal should be upheld.

(4) The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.

(5) However, the tribunal may, but need not, consider— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.

23. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and not relevant here) are as follows:

- (1) This section applies to an appeal to a tribunal against a decision.
- (2) The tribunal must decide the appeal by-
 - (a) confirming the decision; or
 - (b) changing the decision; or
 - (c) replacing the decision with another decision; or
 - (d) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time; or
 - (e) [not relevant].
- (3) However, the tribunal must not make a change, other than a minor change, to a development application.

Material Considered

The material considered in arriving at this decision comprises:

1. Site Plan A1 and Elevation of Fence and Screen – 116 Dulong School Rd Dulong.
2. Referral Agency Response dated 22 January 2021.
3. JDBA Decision Notice refusing the application BA 210680 - dated 24 May 2021.
4. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 3 June 2021.
5. Sunshine Coast Regional Council development for 116 Dulong School Rd Dulong.
6. Google maps and street view images.
7. Nearthmaps satellite images from 2010 to current date.
8. The Planning Act 2016 (PA).
9. The Planning Regulation 2017 (PR).
10. The Development Application Rules.
11. The Building Act 1975 (BA).
12. The Building Regulation 2006 (BR).
13. The Queensland Development Code (QDC) Part MP 1.2.
14. The Sunshine Coast Planning Scheme 2014.
15. The National Construction Code 2019 (NCC).
16. The verbal submissions made by the parties at the hearing and during the site inspection.

Findings of Fact

24. The hearing for the appeal was held at the appellants' home and therefore at the subject site, on 17 August 2021. The Tribunal had the opportunity to view the existing fence, which is the subject of this appeal, from both the subject property and the neighbouring property.
25. The fence is partly constructed as a timber post and rail frame, clad with the random placement of recycled steel sheeting of various colours and profiles fixed vertically and horizontally. The fence is constructed in this manner due to the staging and availability of the recycled materials that were used. However, the fence is mostly concealed by the extent of a mature landscape buffer within beautiful established gardens when viewed from within the appellants' property.
26. By comparison the fence frame and fabric is completely exposed when viewed from the neighbouring property as that side is almost devoid of either structured or soft landscaping. This is in part due to the nature of the neighbouring site being much larger and rural in character. This site primarily comprises open paddocks enclosed by post and wire fencing. The secondary dwelling has a small yard that is fenced but there was no evidence of any gardens in this area.
27. The residents in the secondary dwelling are potentially most affected by the aesthetics of the fence, which is the subject of this appeal. Their property shares the appellant's boundary and they therefore look directly at the fence line. The living areas and verandah of the secondary dwelling are at an upper level. Their site is higher than the neighbouring allotment owned by the appellants. Therefore the residents in the secondary dwelling potentially overlook the appellant's home and their garden. Hence the concerns and the desire by the appellants to restore their privacy by erecting the fence and introducing a substantial landscape buffer along the fence line.
28. The Building Regulation 2016 Schedule 2 Other building work that is accepted development section 4(1) 1 states in part - Work for particular class 10b structures or special structures is prescribed if— (a) the structure is not— (i) a fence.
29. The Building Act defines a Structure - includes a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure.
30. The Queensland Development Code (QDC) MP1.2 also accepts the Building Act's definition for a Structure. The QDC Part MP1.2 is the standard for the Design and Siting requirements applicable to Class 1 Dwellings and Class 10 structures on residential sites over 450sq/m in area. The provisions of the QDC apply to the extent that a local planning scheme does not opt to provide alternative provisions.
31. QDC Acceptable Solution A2 (a) states in part: The side and rear boundary clearance for a part of the building or structure is – (i) where the height of that part is 4.5m or less - 1.5m.
32. QDC Acceptable Solution A2 (c) states in part: Structures may be exempted from A2 (a) (iii) a screen, fence or retaining wall or a combination of screens, fences or retaining walls is not more than 2m in height.
33. The existing fence is a Class 10b structure and varies in height between 2 and 3m in height. Therefore this structure is too high to be considered exempt under QDC A2 (c) provision. As the structure is located 600mm from the boundary and therefore within the 1.5m side and rear boundary clearance, consideration must be given to the QDC Performance Criteria P2.
34. QDC P2 states in part, Buildings and structures – (c) do not adversely impact on the amenity and privacy of residents on adjoining lots.

Reasons for the Decision

35. The existing structure is not aligned with the site boundary and it is 600mm within the side and rear boundaries of the appellants' site. The Tribunal found that the visual impact of the structure when viewed from the neighbouring property is unacceptable. The Tribunal found that this is not only due to the height, it is the extent or length of the structure, the haphazard construction and use of recycled materials. The structure is out of character with the prevailing visual amenity of the rural setting. The Tribunal therefore concurs with Council that the structure offends QDC P2 (c) - do not adversely impact on the amenity and privacy of residents on adjoining lots.
36. While the appellants will have to reduce the height of this existing fence to 2m this will unfortunately do little to improve the amenity from the neighbouring residents particularly those who are living in the secondary dwelling.

Debbie Johnson

Development Tribunal Chair
Date: 28 October 2021

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.

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

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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