



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-013
Appellant:	Barry Allen
Assessment Manager:	Rodney Byl, The Building Approval Company
Concurrence Agency:	Cairns Regional Council (“Council”)
Site Address:	29-31 Zanzoo Close, Redlynch, formally described as Lot 6 on RP744005 (‘the subject site’)

Appeal

Appeal under section 229 and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1, of the *Planning Act 2016* (“the PA”) against the assessment manager’s decision to refuse the appellant’s application, under section 51 of the PA (“the application”), for a building works development permit for a shade-sail structure (“the proposed structure”) located adjacent to a boundary of the subject site.

Date and time of site inspection (by the chairperson only):	Friday 11 June 2021 at 11:00am
Date and Time of Hearing:	By video conference – Tuesday, 29 June 2021 at 11:00am (following an earlier site inspection by the chairperson)
Tribunal:	Neil de Bruyn – Chairperson Suzanne Bosanquet – Member Mark Chapple – Member
Present (at inspection):	Barry Allen – appellant Keanu Johnston – Council Representative Ben Santagiuliana – Council Representative
Present (at hearing):	Barry Allen – appellant Keanu Johnston – Council Representative Ben Santagiuliana – Council Representative Sterling Beal – Council Representative Teneille MacKee – Council Representative

Decision:

The Development Tribunal (“the tribunal”), in accordance with section 254(2)(d) of the PA, **sets aside** the decision of the assessment manager to refuse the application, and orders the assessment manager to:

- a) Remake the decision within 25 business days of the date of receiving this decision notice, as if the concurrence agency had no requirements; and
- b) in the event that the re-made decision is one that approves the application, to include the following additional conditions in the development permit thus given:
 - i. *The approved structure is permitted to remain for a maximum of two years from the date of this decision notice, to afford a reasonable opportunity for the applicant to establish soft landscaping along the relevant part of the subject boundary, to achieve a height and coverage sufficient to provide an acceptable standard of visual privacy within the subject site. The structure is to be entirely demolished and removed at the expiry of this period.*
 - ii. *The minimum setback of the approved structure is to be 1.4m to the common boundary with Lot 7 on RP744005 (and 2m in respect of the northernmost supporting post).*

Background:

1. This appeal, Appeal 21-013, has been heard together with Appeal 21-012, a related appeal by the appellant against Council's decision, as an enforcement authority, to issue an enforcement notice pursuant to section 168 of the PA, requiring the removal of a shade-sail structure on the subject site, until all relevant approvals have been obtained. In the related appeal, the tribunal decided to change the decision by the enforcement authority to issue the enforcement notice to one not to issue the notice, and to set the enforcement notice aside.
2. The subject site is included in the Rural Residential Zone under the applicable planning scheme, being the Cairns Plan 2016. The subject site contains two separate, Class 1a dwelling houses, one of which is occupied by the appellant. The appellant's home is located towards the rear of the subject site and close to the western side boundary. The subject site is extensively vegetated, in part because of its ongoing use for a wholesale nursery activity.
3. The appellant has erected a Class 10a structure ("the existing structure") on the subject site, in the form of two vertical shade sails attached to two metal posts and an existing palm tree. The existing structure is located adjacent to a part of the eastern side boundary ("the boundary") of the subject site, which is a common boundary with the adjoining Lot 7 on RP744005 (33-35 Zanzoo Close) ("Lot 7"). This structure is located towards the rear of the relevant boundary and roughly adjacent to an existing dwelling within Lot 7.
4. The appellant's stated purpose for having erected the existing structure is to maintain the visual privacy of the subject site from the adjacent dwelling within Lot 7.
5. The existing dwelling within Lot 7 is a two storey building, with a single-storey attached carport on the southern side, located close to the common boundary. An upstairs deck that is integrated into the roofline of this dwelling faces north and has substantial screening on the side facing the subject site.
6. Notably, this dwelling also has a closed-circuit camera installation attached to the easternmost of the south-facing eaves of the dwelling itself. On observation at the inspection, the chairperson of the tribunal formed the view that this camera could well have some visual access into the associated part of the subject site, albeit that such access would, even irrespective of the existing structure, be restricted by its available field of view and by existing foliage along the boundary and within the subject site. It was also noted that, because of the distance to the appellant's home, and the existence of extensive landscaping and other screening within the intervening area of the subject site, neither this camera nor the deck or windows of the neighbouring dwelling would (again, irrespective of the existing structure) have significant visual access to the appellant's home or associated outdoor living area.
7. Based on plans of the existing structure, as provided, it currently consists of:
 - Two 90mm x 5mm metal posts, each 5.5m in height above ground level and with 1.6m deep, 450mm diameter concrete footings, each set back 1.4m from the boundary;

- a 450mm diameter palm tree, forming a third supporting element of the structure; and
 - two 5m wide x 3.5m high shade sails extending between, and attached to, the three above-mentioned supporting elements.
8. The existing structure, as described above, was erected without a building works development permit having been obtained. There is no dispute among the parties to this appeal that the existing structure, and the proposed structure (as described below), constitute assessable development under the PA and the *Building Act 1975* (“the BA”).
 9. On or about 5 January 2021, the appellant lodged an application for a building works development permit to the assessment manager for works described in the assessment manager’s confirmation notice as “shade sails.” This application was referred to Council as a concurrence agency, which ultimately issued a concurrence agency response approving the design and siting of the applicable works, subject to a concurrence agency condition, limiting, among other things, the height of the relevant works to a maximum of 3.5m, as opposed to the 5.5m that was proposed. From the evidence before the tribunal, this application did not proceed to the issue of a decision notice.
 10. Instead, on or about 15 February 2021, the appellant lodged the application the subject of this appeal (for the proposed structure) with the assessment manager, who duly issued a confirmation notice pursuant to the Development Assessment Rules on that date. Based upon plans attached to the assessment manager’s subsequent decision notice (as detailed below), the proposed structure is similar, but not identical, to the existing structure as described in Paragraph 7 above.
 11. The proposed structure differs from the existing structure in that it involves the replacement of the palm tree as a supporting element with a new metal post, presumably identical in type, design and construction to the two existing such posts. However, unlike the two existing posts, that are set back 1.4m from the boundary, and are to remain so, the new post is to be setback 2m from the boundary, presumably so as not to affect the existing palm tree that will then be located approximately 600mm behind this post.
 12. The assessment manager’s confirmation notice identified Council as a referral agency for the application, stating that this referral was required based upon the side setbacks not being compliant with the Queensland Development Code (“QDC”) Part MP1.2 which sets out design and siting standards for Class 1 buildings and associated Class 10 buildings or structures on lots 450m² and over.
 13. The tribunal notes that this statement as to the applicable referral trigger appears to be incorrect, in that the BA (section 33) permits a planning scheme to include siting and design provisions for Class 1 buildings and associated Class 10 buildings or structures that are different to the applicable QDC provisions (“alternative provisions”). Section 33(4) of the BA provides in effect that, to the extent there are alternative provisions applicable to proposed building work, the QDC design and siting provisions do not apply to that work.
 14. Section 1.6 and Table 1.6a of the planning scheme provide that the relevant zone code under the planning scheme constitutes the alternative provisions for boundary clearances (setbacks) and height provisions. In the case of the subject site, the relevant zone code is the Rural Residential Zone Code, which includes the following provisions relevant to this appeal:
 - a) Performance Outcome (“PO”) 3 provides that the setbacks of buildings and structures are to maintain the amenity of adjoining premises and the rural residential character of the area, and achieve separation from neighbouring buildings.
 - b) Relevantly, the acceptable outcome (“AO”) for PO3, AO3.1, provides that buildings and structures are to be setback no less than 6m from the side boundaries of a site.
 15. The proposed side boundary setbacks of the proposed structure, at 1.4m and 2m, do not achieve the outcome sought by AO3.1.

16. Schedule 9, Part 3, Division 2, Table 3, Section 1 of the *Planning Regulation 2017* (“the PR”) provides that a development application for building works requires referral to the local government in cases where, under section 33 of the BA, alternative provisions for design and siting apply and where the proposed works are not of the quantifiable standard (AO3.1) for qualitative statement (PO3) under the alternative provisions¹.
17. The application was duly referred to Council on 15 February 2021. On 3 March 2021, Council issued its concurrence agency response, directing the refusal of the application on the following grounds:
1. *The proposed Vertical Shade Sail has been assessed against the performance criteria stated in the Rural Residential zone code in CairnsPlan 2016v2.1.”*
 2. *“The proposed Vertical Shade Sails are considered to adversely impact on the amenity of adjoining premises due to the minimum setback of 1.2m and the overall height of 5.5m.*
 3. *The proposed Vertical Shade Sails are therefore considered to compromise the achievement of the performance criteria stated in Rural residential zone code in CairnsPlan 2016v2.1, with specific reference to Performance Outcome PO3*
18. The reasons given by Council for its conclusion that the proposed structure compromised the achievement of PO3, were that:
- a) *“Although impervious daylight and ventilation to the neighbouring dwelling will be restricted in some capability. The proposed shade sails will have a similar height to the neighbouring deck and will impact on the amenity of the structure and will overbear on the neighbouring dwelling. The minimum setback of 1.4m coupled with the 5.5m height of the structure is deemed to not achieve an adequate level of amenity for the Rural Residential Zone.”*
 - b) *“Although there are structures located along the boundary that encroach within the acceptable boundary setback none of these structures appear to have a height of 5.5m. The shade sail will be located a minimum of 6m - 7m from the neighbouring dwelling. Within the Rural Residential Zond (sic) this setback is deemed to not achieve appropriate separation between the neighbouring dwelling and the structure.”*
19. Following receipt of the concurrence agency response, the assessment manager issued a decision notice dated 12 March 2021 refusing the application, solely due to the concurrence agency refusal. No other reasons for this decision were cited in the decision notice. The plans attached to this decision notice, and stamped by the assessment manager, were the plans showing the proposed structure, as described in Paragraph 11 above.
20. The appellant thereafter lodged this appeal on 12 March 2021, essentially on the grounds summarised below:
- a) The concurrence agency response fails to demonstrate that, or how, the proposed structure would compromise the amenity of the adjacent dwelling, or on what basis the proposed setbacks and separation between building and structure are inappropriate;
 - b) the proposed structure will, in fact, not impact on the amenity of the adjacent dwelling, due to its light-weight, visually unobtrusive and inoffensive nature, its location being most closely associated with a garage (or carport) and bathroom/toilet area within adjacent dwelling and the fact that it will not affect access to prevailing breezes from the southeast;
 - c) the proposed structure will not restrict the access of the adjacent dwelling to daylight and ventilation, especially when account is taken of mature vegetation in the vicinity of the proposed structure, which is more likely to have these effects;

¹ Section 33(6) of the BA contains definitions of the terms “qualitative statement” and “quantifiable standard.”

- d) any shading of the adjacent dwelling caused by the proposed structure and/or the aforementioned vegetation would be considered a welcome effect in the context of the local tropical climate;
- e) the deck of the adjacent dwelling is not located near to the proposed structure, and is located on the northern side of this dwelling, with a northerly aspect;
- f) the proposed structure is in keeping with the rural residential character of the local area, and is one of a number of Class 10 structures in the vicinity of the boundary;
- g) the proposed structure does not compromise the achievement of the performance outcomes of the Rural Residential Zone Code; and
- h) the camera attached to the adjacent dwelling impacts significantly on the appellant's privacy and rights to peaceful enjoyment of his property.

Jurisdiction:

- 21. Section 229(1) of the PA provides that Schedule 1 ("the schedule") of the PA states the matters that may be appealed to a tribunal.
- 22. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule ("Table 1") are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in section 1(2).
- 23. Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the BA, other than one that must be decided by the Queensland Building and Construction Commission.
- 24. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision Framework:

- 25. For this appeal, the onus generally rests with the appellant to establish that the appeal should be upheld (section 253(2) of PA).
- 26. The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under section 246 of PA.
- 27. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA and the tribunal's decision takes the place of the decision appealed against (section 254(4)).

Material Considered:

- 28. The following material has been considered by the tribunal in this appeal:
 - a) 'Form 10 – Notice of Appeal' lodged by the appellant with the tribunal's registrar on 12 March 2021, including the appellant's grounds for appeal ("grounds for appeal") outlined in a letter dated 13 March 2021;
 - b) the assessment manager's decision notice dated 12 March 2021 and attached, stamped copies of the associated plans;
 - c) Council's concurrence agency response dated 3 March 2021;
 - d) the assessment manager's letter and attachments dated 15 February 2021 referring the application to Council;

- e) the assessment manager's confirmation notice for the application, dated 15 February 2021;
- f) background material relating to the first application, as submitted on 5 January 2021; and
- g) photographs of the site and photographs and sketches of the existing structure;
- h) photographs of the site and the existing structure taken by the chairperson (with the permission of both parties) at the site inspection on 11 June 2021; and
- i) The *Planning Act 2016*, the *Building Act 1975* and the *Planning Regulation 2017*.

Findings of Fact:

29. Based upon the evidence, the tribunal finds that:

- a) The setbacks of the proposed structure, at 1.4m to 2m, to the boundary are substantially less than the applicable acceptable outcome of 6m, as specified under the Rural Residential Zone Code, but the nature, bulk and scale of the proposed structure are such that it would be extremely unlikely to significantly restrict the access of the adjacent dwelling to natural light and ventilation, despite the reduced setbacks.
- b) The proposed structure would be readily visible from windows within the adjacent dwelling, and from Lot 7 generally, and does impose a degree of visual impact upon the neighbouring premises by virtue of the combined effect of its reduced setbacks and height. That is, despite the fact that the height of the proposed structure complies with the Rural Residential Zone Code, and is substantially less than the applicable acceptable outcome for maximum height, of 8.5m, this visual impact arises from the combined effect of the height and sub-minimum setbacks of the proposed structure.
- c) Due to established screening attached to the deck of the adjacent dwelling, and its northerly location and aspect, this deck is neither impacted upon by the proposed structure, which would not be readily visible from it, nor does this deck impact on the privacy of the subject site.
- d) The extent of visual access to the subject site from the camera attached to the adjacent dwelling is very limited, due to its location relative to the boundary, its potential field of view and the existence of significant intervening vegetation and foliage allocated along the boundary.
- e) In particular, the extent of visual access to the appellant's home and outdoor living area from the camera attached to the adjacent dwelling is so limited as to be effectively non-existent, due to its location relative to these areas of the subject site, its potential field of view and the existence of significant intervening vegetation and other screening located within the subject site.

30. On the above grounds, the tribunal finds further that there is limited need for the proposed structure from the point of view of maintaining a reasonable level of visual privacy for the subject site. However, the tribunal also finds the proposed structure will have limited impact on the amenity of the adjacent dwelling and premises.

31. Accordingly, the tribunal is of the view that a reasonable outcome, in the circumstances, would be to permit the proposed structure to be established for a reasonable period of time, so as to:

- a) Permit boundary vegetation to achieve a comparable height and degree of coverage, such that the visual privacy of the subject site will remain fully protected; and to
- b) minimise visual impacts upon the adjacent dwelling and Lot 7 to a reasonable level and timeframe.

Reasons for the Decision:

32. The tribunal, in accordance with section 254(2)(d) of the PA, has decided this appeal as set out under the heading 'Decision' at the beginning of this decision notice.
33. The reasons for this decision are that:
- a) despite the substantially reduced setbacks of the proposed structure to the boundary, it will not significantly affect the access of the adjacent dwelling to natural light and ventilation;
 - b) whilst the proposed structure will have some visual impact upon the adjacent dwelling and Lot 7, this impact can be mitigated to a reasonable level by limiting the timeframe within which the proposed structure will remain in place to a maximum of two years, and by requiring it to be replaced by soft landscaping during and by the end of such time period; and that
 - c) whilst the impacts of the camera attached to the adjacent dwelling on the visual privacy of the subject site were found to be somewhat limited, the potential for some loss of privacy is evident and this potential is considered to warrant permitting the proposed structure to be established for a reasonable time period of two years, sufficient to enable its function to become replaced by soft landscaping.

Neil de Bruyn
Development Tribunal Chair

Date: 6 August 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:

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

Telephone (07) 1800 804 833

Email: registrar@hpw.qld.gov.au