



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	14- 18
Appellant:	Roslyn Bourguignon
Assessment Manager:	GMA Certification – Jeff Evans
Concurrence Agency: (if applicable)	Cairns City Council
Site Address:	28a Joseph Banks Close, Kewarra Beach and described as Lot 2 on SP 241484 – the subject site

Appeal

Appeal under section 229 of the *Planning Act 2016* (PA) against a decision by Cairns Regional Council to refuse a development application for a carport on the basis that siting does not comply with the Rural Residential Zone Code outlined in section 6.2.18 of Cairns Plan 2016.

Date and time of hearing:	10am, 27 June 2018
Place of hearing:	The subject site
Tribunal:	George James – Chair Kristy Gilvear – Member
Present:	Roslyn Bourguignon – Appellant Jeff Evans - Certifier Jane Proberts – Cairns Regional Council Chris Bryant – Cairns Regional Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA), **changes** the decision by GMA Certification to refuse the development application for a carport (as directed by Cairns Regional Council on the basis that siting does not comply with the Rural Residential zone code outlined in Section 6.2.18 of the Cairns Plan 2015) to a decision **approving** the development application.

Please be advised that an appeal about this matter may be lodged in the Planning and Environment Court (the Court). See 'Appeal Rights' at the end of this decision notice.

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>

Background

1. On 18 January 2018 a Development Application was submitted (DA form 1) by Benck Marketing, on behalf of owner Roslyn Bourguignon for 28a Joseph Banks Close Kewarra Beach. It included DA forms 1 and 2, the owners consent, assessment against the relevant code and a copy of the plans.
2. On 18 January 2018, a Development Application involving building work was submitted (DA form 2) by Benck Marketing P/L trading as Patio World. It included a description of the work – new patio and carport with relevant plans attached.
3. On 2 February 2018, an Information Request for Concurrence Agency response was sent to the appellant, Roslyn Bourguignon, setting out the prescribed setback within the Rural Residential zone of 6m. The proposed setback for the carport is 0.00m which is an encroachment of 6m.
4. Justification for the proposal was included, stating that it will not impact upon the Rural Residential Character of the area.
5. There are no other structures within the vicinity that are located on the boundary as is proposed.
6. Site characteristics enable a carport to be located in a compliant position. Further justification is required as to why the proposed location is appropriate.
7. A note as follows was included in in the Council's 'Information Request for Concurrence Agency Response' dated 2nd February 2018 – in accordance with Part 3 of the Development Assessment Rules, if the applicant does not respond to the Information Request within three (3) months, Council's assessment will continue without the benefit of this information.
8. On 13 February an early Concurrence Agency Response was sent to the appellant Roslyn Bourguignon care of Patio World, refusing the application for siting of the carport measuring 1 metres from the outermost projection to the side (northern) boundary for the following reasons:
 - The proposed carport has been assessed against the performance criteria stated in the Rural Residential zone code outlined in section 6.2.18 of Cairns Plan 2016 v 1.2.
 - The proposed carport is situated 0.00m from the outermost projection to the side (northern) boundary and is considered to compromise the amenity of the neighbour's premise.
 - The proposed carport is therefore considered to compromise the achievement of the performance criteria stated in the Rural Residential zone code outlined in section 6.2.18 of Cairns Plan 2016 v1.2.
9. On 22 February 2018 GMA Certification Group issued a decision notice to Benck Marketing trading as Patio World, refusing the development application as follows:
 - All works are to comply with the Concurrence Agency Response issued by Cairns Regional Council No.639/2018 on 13th February 2018.
 - The application and submitted plans do not comply with the Concurrence Agency Response issued by Cairns Regional Council.
10. On 12 March 2018, Roslyn Bourguignon submitted an appeal application (Form 10) to the Registry, Development Tribunals, including advice from GMA Certification Group, authorised to act for the appellant, as follows:
 - Specifically, the application for siting dispensation addressed Performance Requirements PO3 of the zone code as the proposal did not meet the Acceptable Outcomes.
 - The Appellant asserts the proposed carport will maintain the amenity of the adjoining premises. The proposed carport is to be located adjacent the front yard of adjoining premises. The front yard is not utilised for entertainment and recreation purposes.
 - Further, the wall of the dwelling on the adjacent property has no windows near the proposed carport.

Material Considered

The material considered in arriving at this decision comprises:

- i. 'Form 10 - Application for Appeal, grounds for appeal, and correspondence accompanying the appeal lodged with the Development Tribunal Registrar on 12 March 2018.
- ii. Development application involving code assessment or impact assessment. Submitted - DA Form 1 - Development Application details.
- iii. Development Application involving building work. Submitted - DA Form 2 - Building Work details.
- iv. Information request for Concurrence Agency response - addressed to R.L. Bourguignon.
- v. Early Concurrence Agency Response - Addressed to R.L. Bourguignon C/- Patio World.
- vi. The *Planning Act 2016* (PA.)
- vii. Planning Regulations 2017 (PR).
- viii. Cairns Plan 2016 v1.2.
- ix. Verbal submissions from the appellant at the hearing.
- x. Verbal submissions from the respondent at the hearing.
- xi. Information requested through the Registry - endorsed by all parties at the Hearing.
 - from Council - copy of original Application submitted by Patio World including forms and supporting discussion information.
 - from Council - information request communication between Appellant and/or representative and Council (given Council advice that an information request was issued/discussed).
 - from Appellant - copy of structural certificate for the structure proposed, if available.
- xii. Additional information provided by Council
 - Decision Notice dated 13th October 2010 - under S335 of the *Sustainable Planning Act 2009*, confirming reconfiguration of 28 Joseph Banks Close, Kewarra Beach (then No.28) into 2 Lots presently No.28a and 28b Joseph Banks Close, Kewarra Beach.

Findings of Fact

The Tribunal makes the following findings of fact:

11. The subject allotment appears to have been created following prior subdivision approvals, the most recent being reconfiguration of Lot 1 (No.28 Joseph Banks Close) into 2 Lots (No.28a and 28b) granted 13 October 2010.
12. The site plan attached to the Decision Notice 13 October 2010 indicates both sites 28a and 28b being vacant at the time of the approval.
13. It is noted that 28b Joseph Banks Close is benefited by home-based business approval, appearing to be for a hairdressing salon, granted in 2015.
14. Both sites (28a and 28b) have previously been included within the Low Density Residential Planning Area in superseded Cairns Plan (2009 as amended).

Reasons for the Decision

15. Cairns Plan 2016 v1.2 - S1.6 table 1.6a - Building Assessment provisions include alternative Assessment criteria to QDC boundary clearance provisions being the relevant zone code contained in Part 6.
16. Cairns Plan 2016 v1.2 - S5.4 - Additional matters about determining the assessment criteria

state the following rule applies in determining assessment criteria for each level of assessment:

- (a) Self assessable development.....
 - (iii) that does not comply with one or more identified self-assessable outcomes of the applicable code/s become code assessable development unless otherwise specified.
- (b) Development requiring compliance.....
- (c) Code assessable development
 - (iii) that complies with;
 - (A) the purpose and overall outcomes of the code and
 - (B) the performance or acceptable outcomes - complies with the code.

17. Reference Planning Regulation 2017, Division 2, Table 1 provides that for Class 10 buildings (including private garages, sheds and the like where Council is referral agency for "amenity and aesthetics impacts") the assessment must be against:

"whether the building or structure will impact on the amenity or aesthetics of the locality, including for example, whether the building or structure complies with a matter stated in a local instrument that regulates impacts on amenity or aesthetics."

18. The Rural Residential Zone Code, Section 6.1.18 of Cairns Plan 2016 V1.2, provides the following Performance Outcome in regards building setbacks from side boundaries:

"PO3 The setback of buildings and structures:

- (a) maintains the amenity of adjoining premises and the rural residential character of the area;*
- (b) achieves separation from neighbouring buildings and frontages."*

22. The Acceptable Outcome associated with PO3 within Section 6.1.18 of Cairns Plan 2016 V1.2 provides that structures have a 6m setback from side boundaries in the Rural Residential Zone.

23. Having regard to legislation, regulations, Council's planning scheme and assessment benchmarks, it would be expected that Council would have considered the following when considering compliance with setback requirements in Section 6.1.18 of Cairns Plan 2016 V1.2:

- whether the structure will impact adversely on the amenity or aesthetics of the locality;
- will the structure maintain the amenity of adjoining premises and locality;
- will appropriate separation from adjoining buildings, frontages or boundaries be achieved.

24. Council's Information Request Response dated 02 February 2018, in regards the siting variation submission, refers to *"the prescribed side setback within the Rural Residential zone is 6.00m"*. This incorrectly refers to the 6m *"acceptable outcome setback"* which is not "prescribed" but merely one way in which the relevant Performance Outcome can be achieved.

25. During discussion at the hearing and questioning from Tribunal referee (Kristy Gilvear) as to whether Council had considered compliance with performance outcomes as an alternative to acceptable outcomes, given the reason for refusal was non-compliance with acceptable outcomes, Council confirmed the boundary setback proposed was considered non-compliant with acceptable outcomes, as the requirement was 6m and that 0.00m was too much of a departure.

26. With reference to Cairns Plan 2016 v1.2 – S5.4 - Additional matters about determining the assessment criteria, it is clearly stated that Code assessable development that complies with:

- (A) the purpose and overall outcomes of the code; and
- (B) the performance or acceptable outcomes, complies with the code.

27. The Tribunal accepts GMA's submission on behalf of the Owner as being reasonable. Council did not appear to consider alternatives to the 6.0m acceptable solution in its assessment of the application.

28. Submissions, queries and responses at the hearing:

GMA on behalf of Appellant (also present)

- i. Setbacks proposed are from neighbouring buildings - frontage being not applicable.
- ii. Proposed setback does not impact adversely on adjacent building or the Rural Residential zone code and that setbacks less than 6m have been approved on site 28b (two buildings), site 28a (two buildings), site 26 (0 setback for shed) and site 24 (approx. 1.5m - shed).
- iii. Commented that there were several examples of setbacks less than 6m within the immediate neighbourhood and that the proposal did not have a negative impact on the intent of the Rural Residential zone code.

Cairns Regional Council (CRC)

- i. Confirmed assessment made on basis of the Rural Residential zone code.
- ii. Confirmed siting must comply with performance criteria of the zone code.
- iii. Considered 0m setback proposed was non-compliant with acceptable outcomes in regard to separation from the adjacent property boundary.
- iv. Confirmed consideration had been given to separation of buildings as called for by performance outcomes of the zone code.

Referee - Kristy Gilvear

- i. Queried whether Council had considered Performance Outcomes (including impact on amenity) - Council advised the proposal for a 0m setback was not acceptable for a 6m requirement.
- ii. Queried whether proposed separation of buildings had been reviewed as per requirement of Performance Outcomes - Council advised this had been considered.

Appellant (present)

- i. Queried as to why the adjacent house had been approved with significant reduction of setback requirements.
Council response was it was a previous unrelated decision.

Reassessment of Development application 18 January 2018 involving code assessment of the Rural Residential Code.

29. The Tribunal accepts GMA's submission on behalf of the Owner as being reasonable.

30. The acceptable solution requiring a 6.0m setback is merely one way of achieving compliance with the performance outcome. Compliance with the performance outcome deviating from a 6.0m setback may still be capable of compliance, even if the setback is significantly less than the nominated distance.

31. Accordingly, the Tribunal reassesses the application based on the Rural Residential Code – Criteria for assessment:

Section 6.2.18.2 Purpose

- (1) *The purpose of the Rural residential zone code is to provide for residential development on large lots where local government infrastructure and services may not be provided on the basis that the intensity of development is generally dispersed.*

32. Lots in question have been the result from subdivision of an original large lot. The dispersed intensity of development has been compromised, given both lots have been extensively developed with approved setback variation approvals.

(2) *The local government purpose of the code is to maintain the semi-rural character that is achieved through large residential lots.*

Semi-rural character of the area has been compromised.

33. Both properties appear, when viewed from the street, as standard residential lots, are private, fully fenced, with residences and sheds developed with approved setback approvals and limited visibility from street.

34. The addition of the proposed carport is considered unlikely to result in the character, amenity or aesthetics of the area being significantly further affected.

(3) *The purpose of the code will be achieved through the following overall outcomes:*

(a) *the dominant character of the area is single detached dwelling houses on large lots with a high standard of amenity;*

Development will not result in this purpose being impacted. Development / use on the site remains "large dwelling house".

(b) *areas with limited accessibility, infrastructure and services are not developed;*

Not applicable as:

- new significant development is not proposed,
- subdivisional works are not proposed, and
- a structure on an existing lot only is proposed.

(c) *reconfiguration results in lots of regular shapes and proportions;*

Not applicable as reconfiguration is not proposed.

(d) *land within the zone that is constrained by factors such as slope, ecological values, vegetation or waterways may be appropriate for rural residential uses where a functional and practical building envelope can be established without compromising the integrity, stability and natural structure of those slopes, ecological values, vegetation or waterways;*

Not applicable as the site is not impacted by constraints as nominated.

(e) *development reflects and responds to the natural features and constraints of the land;*

The site is relatively unconstrained insofar as "natural" features are concerned.

(f) *rural residential development is contained within identified areas to prevent the loss and further fragmentation of agricultural land.*

Not applicable as new rural residential development in agricultural areas is not proposed.

Will the structure maintain the amenity of adjoining premises and locality?

PO1 - AO1.1 Height - compliant.

PO2 - AO2.1 Site cover - existing site cover is approx 29.8%.

Additional carport is approx 1.6%.

Additional approved site cover is negligible – compliant.

Will appropriate separation from adjoining buildings, frontages or boundaries be achieved?

PO3 (a) Adjoining premises are separated by 1.8m and 2m fences and limited buffer landscaping that effectively obscures adjoining premises.

Adjoining premises are not visible from street.

The proposal is not visible from the street and will not impact on the existing residential amenity and character of the area.

Dividing fences between site 28a and 28b are 1.8m high along the common driveway and 2.0m high along boundary between buildings provide visual separation between properties.

There is no loss of amenity – compliant.

PO3(b) Separation from buildings and frontages

Separation of existing buildings are as follows:

Existing external wall to external wall- 4.8m and 7.1m (including fenestration).

Proposed external wall to external wall- 4.5m at corner, 5.3m at robe window- 7.2m at centreline of bedroom window.

Separation of proposed carport from neighbouring building is greater than separation between existing buildings.

Satisfactory separation from neighbouring residence is achieved.

7.2m separation satisfies the Performance Outcome of the zone code.

Frontage setback is approx. 47m – compliant.

AO3.1(a) Separation from state-controlled road - not applicable.

Separation from frontage to other road - 47m – compliant.

Setback from adjacent building (Performance Outcomes) is greater than requirement for separation from side boundary (Acceptable Outcomes) - therefore is compliant.

PO4 - AO4.1 Proposed development is consistent – compliant.

PO5 - AO5.1 Proposed development responds to site constraints – compliant.

PO6 - AO6.1 Development does not adversely affect the rural residential character and amenity of the area.

35. In summary the proposal is not visible from the street, is of minor scale, will not impact on traffic or create noise or dust, will not impact on the existing residential amenity and character of the area, will achieve separation from neighbouring building to a greater degree than separation between existing buildings, satisfies Performance Outcome PO3(b) of the Rural Residential zone code, and therefore is considered compliant with the code.

George James
Chair Development Tribunals
31 July 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