



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-010
Appellant:	Gerard Quinn
Respondent (Assessment Manager):	Trevor Gerhardt of Sunshine Coast Building Approvals and Inspection Services
Co-Respondent (Concurrence Agency):	Sunshine Coast Regional Council
Site Address:	4 Echo Court Buderim QLD 4556 and described as Lot 20 on SP107291 – the subject site

Appeal

Appeal under section 229 and item 1(a) of table 1 of section 1 of schedule 1 of the *Planning Act 2016* against the decision to refuse a development permit for construction of a class 10a carport within the road boundary setback.

Date and time of hearing:	2.00pm Friday 9 July 2021
Place of hearing:	The subject site
Tribunal:	John O'Dwyer – Chair Rebecca Moore - Member Bryan Payne - Member
Present:	Gerard Quinn – Appellant Stephen Whitby, Marc Cornell – Council representatives Trevor Gerhardt – Sunshine Coast Building Approvals and Inspection Services - Assessment Manager

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **replaces** the original Refusal with an Approval subject to the following conditions:

- A. The development application is approved subject to the development being generally in accordance with the plans submitted with the application.
- B. Landscaping on the western side of the driveway is to be retained.
- C. The carport is to remain an open carport with no enclosing wall or panelling on its eastern or western side.
- D. Any additional conditions attached to the building approval by the building certifier to address the requirements of the Building Act 1975.

Background

1. The allotment is an irregular shaped allotment cut into the side of the ridge on which Icarus Court is located. The dwelling on the site is constructed on an excavated platform adjacent to the western boundary with a double garage at the front and with an eastward extension in the middle. In front of the eastern section is a grassed area that slopes inward to a drainage sump in the middle. The existing driveway slopes down from Echo Court to the garage with a drain in front of the garage connected to the sump. From the driveway to the eastern boundary there is a landscaped retaining structure across the frontage that rises from the building platform level to match into the Echo Court topography. There is a retaining wall on the eastern side of the property. Landscaping at the front of the site obscures the site until one is in front of the driveway. There is landscaping on the western boundary that obscures the site from further down Echo Court.
2. On the opposite site of Echo Court there is a dwelling with a high wall on top of a retaining structure on the boundary that has been built up rather than cut into the side of the ridge. Below the subject site and this elevated dwelling opposite the rest of the dwellings around the base of Echo Court are set back a standard distance from the frontage.
3. The owners currently use the existing garage to garage their car and campervan and have applied to construct a carport over the existing driveway to cover their adult children's vehicles that will be parked outside the garage.
4. Echo Court has a narrow roadway with rollover curbs and street trees resulting in parking partly on the verge with enough space for one car between street trees as occurred on the day of the appeal, with people associated with the appeal parked from Icarus Court down into the turnaround area at the head of Echo Court.
5. The Appellants applied in early June 2020 to the Assessment Manager for a development approval to construct an irregular shaped double carport (Class 10A) in the southern part of the site. The proposed double carport is proposed to be set back 100mm from the front boundary on the eastern side of the driveway and extending further back from the frontage towards the western boundary and towards the eastern edge of the carport with a depth of approximately 6.3 m and a width of approximately 7.5 m with a side setback of 0.2 m from the west side boundary and 8 m from the east side boundary. The carport is classed as an "open" carport, being unenclosed on three sides. Due to the irregular frontage and irregular carport shape on the frontage side, the carport comes within 100mm of the frontage adjacent to the eastern side of the driveway and then gradually extending further from the frontage towards the west and east. The carport is mainly within the 6m frontage setback.
6. On 8 June 2020 an application for a siting variation was lodged with Sunshine Coast Regional Council (Council) as a concurrence agency for building work for design and siting under the *Planning Regulation 2017*, schedule 9, part 3, division 2, table 3. The application from the Assessment Manager was accompanied by drawings, a justification letter and letters of no objection from neighbours at 3, 5, 6 and 8 Echo Court.
7. On 17 September 2020, Council issued its Concurrence Agency response directing that the application be refused as follows.

DIRECT REFUSAL of CAR20/0305 for the following and for the reason identified below:

- 100mm setback from outer most projection of the carport to the road/property boundary

Reasons

1. The proposal does not meet the Sunshine Coast Planning Scheme 2014 Dwelling House Code (amended 11 November 2019), Performance Outcome PO2 (d).

PO2 (d) – maintain the visual continuity and pattern of buildings and landscape elements within the street.

The visual continuity and pattern of buildings in the street comprises predominantly of dwellings approximately 6m from the road frontage with the continuity of the built form generally being maintained. As this carport is set forward of the general setbacks of the buildings in the street, the carport will not maintain the visual continuity and pattern of the buildings within the street.

2. The existing car parking provided on the site achieves the requirements of the Dwelling house code, therefore council can see no reason to depart from the planning scheme for this proposal.

8. Between September 2020 and February 2021, the Appellants were considering the decision of Council and their options.
9. The Assessment Manager issued the Decision Notice on 8 February 2021 refusing the application.
10. On 16 February 2021, the Owner lodged the current appeal against the decision of the Assessment Manager to refuse the application.

Jurisdiction

11. The Tribunal has jurisdiction to hear this appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(1)(b), 1(2)(g) and Table 1, item 1(a) being an appeal by the Appellant against the refusal of the development application by the Assessment Manager on the direction of the Referral Agency.
12. The appeal was made in time, thus enlivening the Tribunal's jurisdiction.

Decision framework

13. This is an appeal against a refusal of a development application, the onus rests on the Appellant to establish that the appeal should be upheld.
14. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Assessment Manager and Concurrence Agency who made the decision appealed against (PA section 253(4)) and for an appeal about a development application, this may mean addressing matters which an assessment manager or concurrence agency did not expressly rely on in refusing or directing refusal of the application respectively and relevant matters raised at the hearing by any party.
15. Under the PA section 254, 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.
16. As the development is not accepted development under AO2.1, the Dwelling House Code PO2 and QDC MP1.2 become the relevant assessment benchmarks for the carport.
17. In this appeal, the Tribunal considers the appellant has satisfied the onus to demonstrate the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision of the Assessment Manager as set out above for the reasons set out below.

Material Considered

18. The material considered in arriving at this decision comprises:

- A Form 10 – Appeal Notice’, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 23 February 2021, comprising the following documents:
- Form 10 - Notice of Appeal dated 23 February 2021
- Document A attached to Form 10, from the appellant to the Registrar, providing background to the decision and Reasons for the Appeal
- Preliminary Approval Decision Notice dated 2 February 2021 refusing the application from Sunshine Coast Building Approvals as the Assessment Manager.
- DA Form 2 – Building Work Details dated 8 February 2021
- Referral Agency Response dated 17 September 2020 directing refusal of the application.
- Request for Concurrence Agency response dated 8 June 2020, including drawings dated 25 May 2020 by Brendon Maddock detailing the design of the carport
- Letters of No objection from the adjoining and nearby landowners in Echo Court as listed below:
- Form letter from Adrian and Ashleigh Deans at 6 Echo Court – the owners of the land immediately adjoining the carport dated 4 June 2020
- Form letter from Lucinda and Anthony Jeffery at 8 Echo Court dated 2 June 2020
- Form letter from Ben and Nikhia Itzkovich at 3 Echo Court dated 2 June 2020
- Form letter from Richard and Jonathan McCosker at 5 Echo Court dated 3 June 2020
- B. Sunshine Coast Planning Scheme 2014
- C. Department of Resources – Queensland Globe mapping
- D. Queensland Building and Construction Commission Licence Search
- E. The Planning Act 2016 (PA);
- F. The Planning Regulation 2017 (PR);
- G. The Development Assessment Rules 2017;
- H. The Building Act 1975 (BA);
- I. The Building Regulation 2006 (BR);
- J. The Queensland Development Code (QDC) Part MP 1.2; and
- K. The verbal submissions made by the parties at the hearing and during the site inspection as referred to in the body of the decision.
- L. Email dated 20 July 2021 from Sunshine Coast Building Approvals and Inspection Services advising the Appellant was not providing amended plans and asking the Tribunal to continue with the Appeal.
- M. Email dated 21 July 2021 advising the Parties that the Appellant had elected not to submit amended plans and elevations and giving the Parties an opportunity to make a submission on the relevance of the three appeals cited (Appeal 19-003, Appeal 20-024 and Appeal 20-028) to this appeal.
- N. Email dated 22 July 2021 from Sunshine Coast Building Approvals and Inspection Services confirming those Appeal decisions were relied on for this appeal.
- O. Email dated 27 July 2021 from Council reaffirming its decision and reasons and addressing the specific circumstances of Echo Court and the intent of PO2 of the code.

19. The Tribunal in reaching this decision has considered all the above material but only identifies in this decision the material on which it has specifically relied to reach its decision.

Findings of Fact

20. The subject site is zoned Low Density Residential under the Sunshine Coast Planning Scheme 2014 and a carport is subject to the Dwelling House Code in this zone.
21. The minimum 0.1 metre setback to road frontage of the proposed double carport does not comply with the Acceptable Outcome AO2.1 of the Dwelling House Code which is an alternative provision to QDC MP1.2 and is the applicable assessment benchmark for initial consideration by Council.
22. The Tribunal considered the submissions by the parties on visual continuity and patterns of buildings and landscape elements and inspected Echo Court. The Tribunal found there were four distinct parts of Echo Court, the part of Echo Court steeply sloping down from Icarus Court between the lots fronting Icarus Court, the subject site, no. 3 Echo Court opposite the subject site; and the flat area around the turnaround at the western end of Echo Court comprising numbers 5, 6 and 8 Echo Court where the dwellings have open front yards and at numbers 5 and 6 are set back 6 metres. A small part of the dwelling at no. 6 is less than 5 m from the frontage due to the irregular frontage of the lot but would average 6m setback. The tall fence on top of the retaining wall at no. 3 is less than 2 m from the frontage and dominates the streetscape of Echo Court.
23. The Tribunal has determined that no. 4 Echo Court, the subject site does not form part of the visual continuity that exists at the bottom of Echo Court because it is set on a platform largely hidden from the street by landscaping on the retaining structure on the eastern part of the frontage in comparison to the area from no. 6 around to no. 5 characterised by flat open front yards with dwellings clearly visible from the majority of Echo Court.

Reasons for the Decision

24. The Appellant has requested the carport to protect any car in the driveway from damage by the weather - sun, rain, wind or hail damage. He has children who are about to get their own cars. The Tribunal considers this is not an unreasonable expectation of an owner when a car is usually the second largest asset after the home. However, this was only given minor weight by the Tribunal.
25. At the hearing, the Assessment Manager as representative for the Appellants, drew the Tribunal's attention to the Development Tribunal decisions in Appeal 19-003, Appeal 20-024 and Appeal 20-028 and requested the Tribunal to consider generally the three Appeal Decisions and in particular Appeal 19-003 paragraph 58 of the Reasons for the Decision as guidance in deciding this appeal. The Tribunal has noted as relevant considerations in reaching its decision in this case, both the Findings of fact in paragraphs 41-44, 46-47 and 49-52 of Appeal Decision 19-003 and the Reasons for the Decision in paragraph 58 of Appeal Decision 19-003. These provisions provide guidance as they set out the relationship between the PA and BA in relation to building assessment provisions under the QDC MP1.2 under the BA and in relation to alternative provisions to the QDC MP1.2 in Planning Scheme provisions.
26. The Tribunal Chair in this Appeal was the Tribunal Chair in Appeal 20-024 and Appeal 20-028. The Tribunal has noted the two decisions, but neither was of direct assistance in this case. Both appeals were for carports within the 6m setback and both were decided on the merits of the particular circumstances of the relevant site.
27. AO2.1 of the Dwelling House Code is a quantifiable standard that is an alternative provision to the QDC MP 1.2. Where a development cannot comply with that quantifiable standard, the Referral Agency assessment defaults to consideration of the Performance Outcome for that Acceptable Outcome. In this case Council have relied on PO2(d) as the basis for its decision.

28. Council's referral agency response stated, and the Council's representatives at the Appeal confirmed Council's position was that the visual continuity and pattern of buildings in the street and the landscape comprises predominantly of dwellings and car accommodation approximately 6 metres from the road frontage with the continuity of the built form generally being maintained. Council considered the location of the carport within the 6 metre setback would not maintain the visual continuity and pattern of buildings and landscape in the street.
29. Council's representatives stated that while other structures may be within the 6m setback, the focus of the code is in ensuring that the buildings are set back 6 metres and the other structures are not applicable to assessing the application.
30. Council's email of 27 July 2021 in rejecting the relevance of the other three cited appeals states:

Council is of the opinion that a front fence less than 1.8m does not fall within the definition of a "building" under the definitions of the *Planning Act 2016*, but are rather considered part of the landscape.

building means—

- (a) a fixed structure that is wholly or partly enclosed by walls and is roofed; or
- (b) a floating building; or
- (c) any part of a building.

The applicable benchmark requires the carport "*maintain the visual continuity and pattern of buildings and landscape elements within the street.*" The benchmark refers to both buildings and landscape. To comply with the benchmark, the proposed carport must maintain the visual continuity and pattern of the buildings in the street and the erection of the carport must also maintain the visual continuity and pattern of the landscape within the street. A carport is not landscaping and a fence is not a building. A proposed carport being consistent with just the street's landscape is only one element of the applicable benchmark and of particular relevance for the Echo Court matter. A carport that might be partially screened by landscaping is also of no relevance to this particular performance outcome of maintaining the visual continuity and pattern of buildings.

In Echo Court, there is a fence on top of a retaining wall opposite the subject site, but this is only the landscape element of this nature in the street. Even with this landscape feature, the dwelling house is clearly identifiable and visible behind and setback 6m, overlooking this landscape feature. All buildings within Echo Court are setback approximately 6m from the road frontage.

Council maintains the view that the proposal does not "*maintain the visual continuity and pattern of buildings and landscape elements within the street*". The proposed carport is a building that will be set within close proximity to the front boundary and will not maintain the visual continuity and pattern of buildings within the street. The site has other suitable locations for a carport that would comply with the Performance Outcome of the code.

31. The Tribunal notes the emphasis of Council on the fence not being a building and the carport being a building as defined in the PA. The Tribunal has some difficulty in seeing how this carport is "enclosed" as it does not have any wall apart from being built over and supported by the garage structure. It is not "enclosed by walls". The plural "walls" is integral to the concept of enclosure. Three sides of the carport are open, therefore it does not come within the term 'building' as set out in the PA. Accordingly, the proposed carport can be assessed as part of the landscape. However, even if the Tribunal is in error about this interpretation, it is considered that this would not change the outcome in this instance because the Tribunal considers there is no visual continuity and pattern in the landscape

along the whole of Echo Court as discussed in paragraphs 22 and 23 and the following paragraph.

32. The Tribunal considers that the phrase “*maintain the visual continuity and pattern of buildings and landscape elements within the street*” is an all-encompassing phrase requiring assessment of the two elements within the street. As discussed above, the Tribunal considers that there is no visual continuity and pattern of landscape elements that encompass all the properties in Echo Court. There is visual continuity and pattern of landscape that encompasses nos. 5, 6 and 8 but these elements do not extend to nos. 3 and 4.
33. There is an argument that the pattern of buildings set in nos. 5, 6 and 8 extends to nos. 3 and 4 in that all buildings are set back 6 m or more from the street frontage. This is accepted in respect of the dwellings.
34. The Tribunal does not accept the position of Council in regards to the landscape elements. The combined height of the retaining structure and tall wall near the frontage at no. 3 opposite the subject site is a dominant element in the street landscape. The landscaping atop the retaining structure at the front of the subject site is totally different to the open landscape of nos. 5, 6 and 8.
35. Accordingly, the Tribunal does not accept Council’s underlying reliance on the argument that the elements of PO2 are consistent throughout Echo Court.
36. At the hearing, two options were discussed, one which moved the front of the carport back approximately 0.4 metres from the frontage. The owner was not prepared to accept that option and the Tribunal did not consider the minor additional setback would change the situation in any appreciable manner.
37. The second option was for the owner to consider moving the carport into the lawn area on the east side of the garage.
38. The hearing was adjourned to allow the owner to consider the second option and for the parties to consider the three appeals cited by the Assessment Manager. The owner subsequently responded advising that this second option was not acceptable.
39. The Tribunal notes Council’s comment in its email dated 27 July 2021 that there are other places on site where the carport could be located. The Tribunal is of the opinion that it may be possible to locate a single carport in the lawn area. However, it considers that there may be issues for a vehicle to access that part of the site. The Tribunal also considers that it would not be possible to fit a double carport into the lawn space due to the lack of manoeuvring space between the carport and the driveway due to the retaining structures along the Echo Court frontage and eastern edge of the subject site.
40. The Tribunal considers Performance Outcome PO2(d) has been satisfied in relation to the proposed carport as there is no visual continuity and pattern of landscape that includes the subject site and the subject site has a landscape appearance different to the rest of the street. The Tribunal also considers the open carport will be less visually obtrusive by its unenclosed nature.
41. As a result of the site viewing, the Tribunal is of the opinion that there should be some landscaping on the west side of the proposed carport site.

John O’Dwyer

Development Tribunal Chair
Date: 9 November 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
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Brisbane QLD 4001

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