



Development Tribunal – Decision Notice

Planning Act 2016 – section 255

Appeal Number:	21-068
Appellant:	David Foran and Rebekah Meere
Respondent (Assessment Manager):	Joshua Turnbull
Co-respondent (Concurrence Agency):	Noosa Shire Council
Site Address:	2 Banjora Place Noosa Heads and described as Lot 27 on RP 862842 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the Planning Act 2016 against the decision of the Assessment Manager, as directed by the Concurrence Agency, for refusal of a Development Permit for Building Works for a Class 10a structure, being a shed, on a residential site. The decision followed a referral agency response by the Noosa Shire Council directing refusal of the application on the grounds that the proposed shed does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2020, Low Density Residential Zone Code PO9 *(f) be consistent with the predominant character of the streetscape;*

Date and time of hearing:	4 April 2022
Place of hearing:	The subject site
Tribunal:	Anthony Roberts – Chair Markus Pye - Member
Present:	David Foran/Rebekah Meere – Appellants Pam Davidson – Planner (Simply Town Planning) Matt Adamson/Brad Geaney - Council representatives

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the Planning Act 2016, confirms the decision of the Assessment Manager, as directed by the Concurrence Agency to refuse the application.

Background

The subject site of this appeal is:

- a corner allotment with steeply sloping frontages to Banjora Place and Naturi Street containing a two-storey dwelling house and including a garage, swimming pool, and well landscaped grounds;
- mostly visually buffered from the street by a high hedge at least partially located on the road reserve and thinning at the proposed shed location;
- surrounded by established dwelling houses with well landscaped grounds;
- zoned Low Density Residential under the Noosa Plan 2020.

The proposed shed is:

- to be located 0.3m from the road boundary at the corner of the site;
- 4m in length with a width of 2.5m and area of 10m² (inclusive of eaves);
- 3.7 metres in height to the street frontage;
- a sloped skillion roof and elevated floor on piers design.

As the proposed shed triggers assessment against the relevant performance criteria of the Noosa Plan 2020 due to the proposed siting within the 6m front setback, the Assessment Manager lodged a Request for a Referral Agency Response for 'Building work for design and siting' relating to a shed within the front setback with the Noosa Shire Council on 20 April 2021.

On 4 November 2021, Council issued a Referral Agency Response directing the Assessment Manager to refuse the application for the reasons stated as follows:

"The application is refused as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:

Noosa Plan 2020 – Low Density Residential Zone Code

PO9 Buildings and structures are designed and sited to:

f) be consistent with the predominant character of the streetscape;

It has been considered that the design and location of the shed provides an insufficient road boundary setback and is not consistent with the predominant character of the streetscape. Furthermore, the predominant character of the streetscape identifies that building and structures are setback consistently at 6.0 metres from the road boundary.

Additionally, the submitted design fails to provide sufficient detail with regard to the contours of the subject site. It is considered that due to the slope of the site the proposed shed is likely to be substantially greater in height, which is in conflict with the information provided. Due to the elevated location of the proposed shed, it is likely to provide a structure that dominates the streetscape."

Accordingly, the Assessment Manager issued a Decision Notice on 4 November 2021 refusing the proposed development based exclusively on the Referral Agency Response from Council. The Appellants subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 26 November 2021.

The hearing for the appeal was held at the subject site on 4 April 2022 commencing at 1-00 p.m. The Tribunal had the opportunity to view the positioning of the proposed structure from the subject site, neighbouring properties, and the streetscape more generally.

Material Considered

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar 4 November 2021;

2. The Planning Act 2016 (PA);
3. The Planning Regulation 2017 (PR);
4. The Building Act 1975 (BA);
5. The Building Regulation 2006 (BR);
6. The Queensland Development Code (QDC) Part MP 1.2;
7. The Noosa Plan 2020 (Noosa Plan);
8. Noosa Plan 2020 – Low Density Residential Zone Code (the Code);
9. The verbal submissions made by the parties at the hearing and during the site inspection;
10. Additional post-hearing written submissions made by Simply Town Planning on behalf of the Appellants dated 19 April and 5 May 2022;
11. Additional post-hearing responses made by Council dated 19 April and 12 May 2022.

Findings of Fact

The Tribunal makes the following findings of fact:

Jurisdiction:

The Tribunal has jurisdiction to hear the 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 Appellants against the refusal of the development application by the Assessment Manager on the direction of the Concurrence Agency.

Decision Framework:

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.

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.

Section 33 of the BA (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) allows a planning scheme to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover.

The Low Density Residential Zone Code Table 6.3.1.3, contains alternate provisions to the QDC. As the proposal does not meet the acceptable outcomes set out in Acceptable Outcome AO 9.1, which as applied to the site requires buildings and structures have a setback of 6m from the road frontage, assessment is made against the list of Performance Outcomes stated at PO9 of the Code. For the purposes of this appeal only PO9 (f) *be consistent with the predominant character of the streetscape* is applicable.

Consistency with predominant character of the existing streetscape:

In relation to the grounds for refusal identified by Council, the Appellants contend that the proposal complies with Performance Outcome PO9 (f) of the Code for the following reasons:

- The subject site features a dense privacy hedge over 4 metres high spanning the front property boundary;
- The siting of the proposed shed will be wholly consistent with the predominant streetscape character as it will be screened from view and will not alter the visual continuity of the street;
- The term 'streetscape' referenced in Performance Outcome 9(f) is not defined by the Noosa Plan 2020 which creates ambiguity about what criteria form part of the assessment of streetscape;
- Council's assessment of the proposed shed against Performance Outcome 9(f) has failed to consider landscaping as a core element of streetscape character and has only considered built form. Council's interpretation and assessment of the proposal's compliance with PO9(f) is incomplete and erroneous given that their assessment only had regard to buildings and structures;
- If the intent is blind adherence to a 6 metre setback irrespective of site specific merit, then the planning scheme has been erroneously drafted and it should be amended to clearly prohibit structures from being established in the front setback zone;
- The dwelling immediately adjoining the site at 1 Bartill Court has a pool deck constructed out to the front boundary and this structure establishes the immediate streetscape character;
- A condition requiring the structure to be screened by landscaping should the existing buffer be removed is a condition that can be reasonably imposed;
- There is no other reasonable location to site the proposed shed.

Council contends that the proposed shed fails to satisfy criterion PO9(f) of the Code as:

- The sole consideration under PO9(f) is the siting and design of the proposed structure;
- Any consideration of 'streetscape' is in relation to the siting of existing buildings and structures, not other features such as vegetation and landscaping;

- The predominant character of the streetscape is defined by buildings and structures which are setback consistently at 6.0 metres from the road boundary;
- Due to the elevated location in close proximity to the front property boundary and height of the proposed shed, it is likely to be a structure that dominates the streetscape;
- The existing hedges are at least partly on road reserve and there is no guarantee that they will be retained into the future;
- Any condition relating to the provision and maintenance of vegetation (should the existing buffer be removed) place an unreasonable regulatory obligation on Council;
- The shed could potentially be sited elsewhere on the property.

Based upon the site inspection conducted at the hearing, the Tribunal finds that Banjora Place and Bartill Court integrate seamlessly with Naturi Street and exhibit a 'leafy' well landscaped street appearance and the subject site is visually well buffered when viewed from the street.

The Tribunal finds that the provisions of PO9(f) have been drafted in way that gives pre-eminence to the built form presented to the streetscape with little or no emphasis in landscape elements. The construction of Performance Outcome PO9 is such that criterion (f) is focused on the pattern of buildings.

The prevailing pattern of buildings in the streetcape framing the subject site, largely comprising Banjora Place and Naturi Street, principally between Bartill Court and Kiata Court, exhibits a consistent 6 metre setback as identified by Council in the reasons for refusal. It is evident that the pattern of buildings and structures is characterised by a consistent setback from the road in compliance with the intent of the Code. A clear pattern of the streetscape, defined primarily by built form, is therefore apparent. The pool deck associated with the adjoining dwelling at 1 Bartill Court is, as acknowledged by the Appellants, subject to different setback criteria.

Further, while the existing hedge on the perimeter of the subject site does provide a visual buffer to the proposed structure there is no guarantee that this buffer will be maintained into the future particularly as it is located on both private property and Council road reserve. The Tribunal considers that conditioning the proposal to require the provision of a new vegetated buffer within the site - should the existing buffer be removed – to be impractical.

Design Considerations:

Alongside concerns about the intended location of the shed, Council holds concerns that the design and height (particularly given the steep contours of the site) means that it would amount to a structure that 'dominates the streetscape.'

At the hearing there was a lack of clarity about the actual maximum height of the proposed structure which was subsequently confirmed as 3.7 metres. There was also lack of clarity about the intended use of the shed, as the Grounds of Appeal documentation submitted by the Appellants stated it was a 'plant shed' whilst at the hearing (and by subsequent written submission) the Appellants stated that the intended use was 'storage of personal art supplies and equipment' and that it needed to be dust free. The Tribunal considered that the design of the proposed building is more consistent with a Class 1 building in appearance and could potentially be used as such into the future. Nevertheless, in relation to the design and height of the proposed shed the Tribunal concurs with Council in considering it to be a potentially dominant element in the streetscape.

In this regard, the Tribunal noted with the small 'footprint' of the structure that there is potential to locate the to the rear of the subject site without impacting the existing streetscape and the reasonable use and enjoyment of the site.

Reasons for the Decision

In this appeal, the Tribunal considers the Appellants have not satisfied the onus to demonstrate the appeal should be upheld. Therefore, the Tribunal has determined to confirm the decision of the Assessment Manager, as directed by the Concurrence Agency, to refuse the application for the reasons identified below.

The Tribunal finds that the provisions of PO9(f) have been drafted in way that gives pre-eminence to the built form and pattern of buildings presented to the streetscape with little or no emphasis in landscape elements.

The prevailing pattern of buildings in the streetcape framing the subject site, largely comprising Banjora Place and Naturi Street principally between Bartill Court and Kiata Court, exhibits a consistent 6 metre setback as identified by Council in the reasons for refusal.

The proposed shed does not satisfy, and cannot be conditioned to satisfy, criterion (f) of Performance Outcome 9 of the Noosa Plan 2020 – Low Density Residential Zone Code (as drafted) requiring that buildings and structures are designed and sited to be consistent with the predominant character of the streetscape.

Given that the location of the proposed shed at 0.3 metres from the front alignment would not maintain the pattern of buildings in the street and the design and height of the proposed structure presents a potentially dominant element in the streetscape the proposed development fails to satisfy the provisions of the applicable Code.



Anthony Roberts

Development Tribunal Chair

Date: 26 May 2022

Appeal Rights

Schedule 1, Table 2, item 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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Brisbane QLD 4001

Telephone 1800 804 833

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