



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-025
Appellants:	Murray See and Janet See
Respondent (Assessment Manager):	Rick Drew of Burnett Country Certifiers
Co- Respondent (Concurrence Agency):	Bundaberg Regional Council (Council)
Site Address:	45 McCavanagh Street, Bargara QLD 4670 and described as Lot 3 on SP174828 (the subject site)

Appeal

Appeal made under Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(a) of the 'Planning Act 2016' (PA) against the decision of the assessment manager, as directed by the concurrence agency, to refuse a development application to build a Class 10a awning (carport). In accordance with the provisions of Schedule 9, Division 2, Table 1 of the 'Planning Regulations 2017' (PR) the concurrence agency directed refusal because the proposal failed to meet performance outcomes of Table 5.1 PO1 of Bundaberg Regional Council 'Amenity and Aesthetics and Building Work involving Removal or Rebuilding Policy' (Council Policy).

Date and time of hearing:	10.30am 9 December 2020
Place of hearing:	The subject site
Tribunal:	John Bright – Chair David Job – Member
Present:	Murray See – Appellant/Owner Janet See – Appellant/Owner Richard Jenner – Council Representative Dean Catorall – Council Representative

Decision

The Development Tribunal (tribunal) in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) confirms the decision of the concurrence agency to instruct the assessment manager to refuse the development application.

Background

1. The subject site at 45 McCavanagh Street (cnr McCavanagh & Croft Sts) Bargara, described as Lot 3 on SP174828, has an area of 701 sqm and is zoned Low Density Residential. The site's topography is flat and its configuration approximately rectangular with approx. 20 metre frontage to McCavanagh Street and approx. 35 metre frontage to Croft Street. The existing residence is single storey, slab on ground, rendered veneer construction with coloured metal sheeted, hipped roof. Existing building setbacks are 6015mm (min)/6106mm respectively from McCavanagh and Croft Street frontages and 1500mm/1787mm (min) respectively from the NE/SE side boundaries. Driveway access is off Croft Street, approx. 28 metres from the streets' corner.
2. It was originally intended to develop a Class 10a unenclosed, skillion roof awning attached to the Croft St side of the existing residence for the purpose of accommodating a future caravan. This structure was to be 9.0L x 5.9W x 3.5H (at street frontage) with 206mm setback from Croft St frontage and approx 12 metres setback from McCavanagh St frontage. Siting of this original proposal within the Croft St frontage setback triggered referral to Bundaberg Regional Council (Council) for concurrence agency assessment (27 June 2019). On 9 July 2019, Council issued a Referral Notice – pre-application response advising approval of that proposal, subject to conditions.
3. Subsequently, (prior to lodgement of a development application) the owner's recreational vehicle requirements changed from a caravan to a motorhome. This necessitated greater height clearance under the proposed awning.
4. A revised proposal (to accommodate a future motorhome) was received by Council for concurrence agency assessment on 19 June 2020. The proposal was similar to that originally approved, except that it was to be 9.0L x 5.3W x approx 4.2H (at street frontage) with 806mm setback from Croft St frontage and approx 12 metres setback from McCavanagh St frontage. Horizontal battening was also to be provided across the street-facing side/end of awning from underside of roof down to approx. 3.4 metres above ground. Screen planting and 1.8 metre high solid fencing were also to be provided along the Croft St frontage adjacent to the proposed structure.
5. On 24 August 2020, Council issued a Referral Notice advising the assessment manager that – *'The development application must be refused'*.
Reasons for refusal were –
 - *The proposal failed to meet the performance Outcome PO1 of Table 5.1 (Carports within the Road Frontage Setback) of the Bundaberg Regional Council Amenity and Aesthetics, and Building work involving Removal or Rebuilding Policy (November) 2017.*
 - *The proposal will have an extreme adverse impact on the dwelling's presentation to the street, will become the dominant built form on the site as seen from the street and will have an extreme adverse impact on the prevailing or intended character of the streetscape.*
6. On 7 September 2020, a development application (DA Form 2) was lodged to Mr Rick Drew (Private Building Certifier A902444, Burnett Country Certifiers).
7. On 16 September 2020, the assessment manager issued a Decision Notice advising refusal of the development application. Details of the refusal were – *'The assessment manager was directed to refuse the application by Bundaberg Regional Council in accordance with their referral agency role. The refusal is solely because of the direction of the referral agency.'* (It is noted that pages 7 and 8 of the Decision Notice referred to a different project and had been included in error).
8. On 19 September 2020, Form 10 – Notice of Appeal was received by the Tribunal Registrar.
9. On 9 December 2020, the Tribunal hearing was conducted at the subject site.

10. On 19 December 2020, the Appellants/Owners, having further researched motorhome options, submitted to the Tribunal a request that the proposed development be amended, as follows –
 - Height of the proposed awning (adjacent to Croft St frontage) to be reduced from 4237mm to 3812 above ground.
 - Width of the proposed awning to be reduced from 5.3 metres to 4.9 metres, thereby increasing the Croft St frontage setback from 806mm to 1206mm.
11. On 27 January 2021, this request was on-forwarded by the Tribunal to Council for its consideration.
12. On 1 February 2021, Council responded to the Tribunal, as follows –
 - *Council Officers support the increased (1.2m) setback of the structure from the front property boundary, which provides an increased width to provide landscape screening.*
 - *In terms of the proposed partial enclosure of the structure through the use of slats (or similar), Council Officers remain concerned that partial enclosure of the northern and western elevations of the structure will increase the apparent bulk of the carport and will adversely impact on its presentation to the street, noting the minimal setback to the property boundary and the overall dimensions (of the structure).*
13. These comments were referred by the Tribunal to the Appellants/Owners on 15 February 2021.
14. On 17 February 2021, the Appellants/Owners responded to the Tribunal, as follows –
 - *we have compromised with the height and setback of the structure and limited the vehicle we will be able to put there.*
 - *we don't consider it to be a partial enclosure, it is merely a few slats at the top of the structure that tie it in decoratively with the house and provide a small amount of weather and sun protection.*

Jurisdiction

The Tribunal has jurisdiction to hear this appeal under section 229 (1) (a) (i) and Schedule 1, section 1, Table 1, Item 1(a) of the PA. The precondition in section 1(2) of Schedule 1 for the application of Table 1 is satisfied in this instance because the matter relates to the *Building Act 1975* and accordingly paragraph (g) of section 1(2) applies.

Decision Framework

It is noted that:

1. In this matter the appellants must establish that the appeal should be upheld (s. 253(2) of the PA);
2. 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 (s. 253(4) of the PA);
3. The Tribunal may, but need not, consider other evidence presented by a party with leave of the Tribunal or any information provided to the Registrar (s. 253(5) of the PA); and
4. The Tribunal must decide the appeal by either confirming, changing, replacing or setting aside the appealed decision (s. 254(2) (a to d) of the PA).

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' and associated correspondence to grounds of appeal, received by the Tribunal Registrar on 19 September 2020
2. Request for concurrence agency assessment and associated drawings (for the original proposal) received by Council on 27 June 2019
3. Council's Referral Notice (pre-application response for the original proposal), dated 9 July 2019, advising conditional approval
4. Request for Concurrence Agency Assessment and associated drawings (for the current proposal) received by Council on 19 June 2020
5. Development Application (DA 3844/20) received by assessment manager (Burnett Country Certifiers) on 7 July 2020
6. Council's Referral Notice (pre-application response for the current proposal), dated 24 August 2020, advising the assessment manager that the development application must be refused.
7. Assessment manager's Decision Notice Refusal, dated 16 September 2020 (excluding pages 7 and 8)
8. *Appellants/Owners verbal representations to the Tribunal hearing on 9 December 2020*

These substantially restated the case as previously outlined in the Form 10 – Notice of Appeal' submission. Specific matters discussed included –

- That carports of similar height and road boundary setback had been constructed elsewhere in the immediate neighbourhood.
 - That proposed 'Lilly Pilly' hedge plantings could provide effective landscape screening to a substantial height within a narrow garden as evidenced by similar on-site examples.
 - That retention of horizontal battening below the roof on the street-facing side/end of the awning was considered important for both weather protection and as a visually unifying element with the existing residence.
 - That negotiations with Council during the design process had been a frustrating process (as outlined in correspondence from John Poulsen Building Design appended to the Form 10) – *'...there was no indication as to what the acceptable dimensions would be. It continued to be a process of guessing what would be acceptable.'*
9. The Assessment Manager did not seek to make any submissions to the appeal.
 10. *Co-Respondent/Council Officer verbal representations to the Tribunal hearing on 9 December 2020*

These were generally aimed at providing an overview as to the aims and objectives of Council's (Amenity and Aesthetics) Policy and an explanation of the specifics of its implementation in this instance. Specific matters discussed included –

- That Council does not reference other structures elsewhere in the immediate neighbourhood but assesses each application on its own merits. Notwithstanding, the other structures in question may pre-date the introduction of Council's Policy (adopted 31 October 2017).
- That in comparing the relative merits of the originally approved proposal with that now refused, Council recognised that the Croft St setback had been increased (from 206mm to 806mm) to offset the visual impact of the increased awnings height (from 3500mm to 4216mm). Notwithstanding, Council was of the opinion that provision of the high level

horizontal battening would accentuate the visual bulk of the proposed structure so as to become a dominant form and have an extremely adverse impact with respect to the requirements of Council Policy Table 5.1 '*Performance outcomes*' PO1.

- That Council did not seek to make the design/approval process unnecessarily onerous, but that its primary role as concurrence agency was to review and assess (with respect to Council Policy) the amenity and aesthetic merits of a design proposal prepared by others.
11. In conjunction with the Tribunal hearing an inspection of the Croft St frontage was conducted whereby a marker was erected approx 4.2 metres above ground height to allow all parties to reference that height relative to the existing residence.
 12. Submissions received by the Tribunal Registrar from the Appellants/Owners and Council, subsequent to the hearing.
 13. Bundaberg Regional Council Planning Scheme 2015.
 14. Bundaberg Regional Council 'Amenity and Aesthetics and Building Work involving Removal or Rebuilding Policy (November) 2017'.
 15. Queensland Development Code Mandatory Part – MP1.2.
 16. Planning Act 2016.
 17. Planning Regulation 2017.
 18. Building Act 1975.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The Owner was intending to acquire a caravan and engaged John Poulsen Building Design to design an unenclosed awning structure for onsite storage of the vehicle when not in use. The subject site is a corner allotment with an existing residence setback 6015mm (min) and 6106mm from the respective McCavanagh/Croft Sts frontages. The proposed structure (9.0L x 5.9W x 3.5H) was to be located between the existing residence and the Croft St frontage with vehicular access via an existing driveway. On 27 June 2019 this proposal was received with Council for concurrence agency assessment. On 9 July 2019 Council's Referral Notice (pre-application response) advised approval with conditions. This approval also required that a development application –
 - *is the same or is not substantially different from the proposed application considered as part of this referral; and*
 - *is made within 12 months from the date of this pre-application concurrence agency response.*
2. Subsequently the Owners' recreational vehicle requirements changed from caravan to motorhome. Undercover storage of this latter vehicle required additional height clearance. On 19 June 2020, an amended proposal was received by Council for concurrence agency assessment. The amended proposal was similar to that originally approved, except that –
 - Height of awning above ground level adjacent to the Croft St frontage was increased by 737mm (i.e. from 3500mm to 4237mm).
 - Width of awning was reduced from 5.9 metres to 5.3 metres, so that the setback to the Croft St frontages was increased by 600mm (i.e. from 206mm to 806mm).
 - High level horizontal battening from underside of roof to approx 3.4 metres above ground level was added to the street-facing side and end.
 - Landscape screening and solid fencing was added along the Croft St frontage adjacent to the proposed structure.

On 24 August 2020, Council's Referral Notice (pre-application response) was issued advising that a development application must be refused. Reasons for refusal related to the proposal's failure to meet the requirements of Council Policy Table 5.1 'Performance outcomes' PO1, specifically –

- '(a) The design of the proposed carport, specifically its height, width and roof pitch, adversely impacts on the built form and features of the existing Dwelling house on the land. The proposed carport cannot visually integrate with the design of the existing dwelling and is considered to have an extreme adverse impact on the dwelling's presentation to the Croft Street frontage.*
- (b) The proposed carport is to be located between the Croft Street property boundary and the western elevation of the existing Dwelling house. The height of the proposed carport is greater than a majority of the bulk of the existing dwelling whilst representing a third of the length of the western elevation of the existing dwelling. Due to the total visual bulk of the proposed carport, compared to the bulk of the existing dwelling, the proposed carport will have an extreme adverse impact on the dwelling's presentation to the street and will become the dominant built form on the site as seen from the street.*
- (c) The scale and bulk of the proposed carport is significantly larger than other carports in the locality that make up the prevailing character of the Croft Street streetscape. It is considered that the combination of the proposed width (9m) and height at the road boundary (4.237m) for the full width of the structure is a significant departure from the prevailing character of the streetscape and adversely impact on existing streetscape values.*
- (d) Due to the inability to setback the proposed structure any greater than 1m from the road frontage, there is insufficient room to plant landscaping treatments that would adequately screen the proposed structure to a level, and in a timeframe, that would resolve the noncompliance with Performance Outcome 1. The imposition of conditions requiring the removal of the proposed timber slats, although assisting in the reduction of the overall bulk of the structure, would be insufficient to resolve the noncompliance with Performance Outcome 1.'*

Council further advised that –

'The proposal will have an extreme adverse impact on the dwelling's presentations to the street, will become the dominant built form on the site as seen from the street and will have an extreme adverse impact on the prevailing or intended character of the streetscape.'

3. On 7 September 2020, a Development Application (DA3844/20) was received by Burnett Country Certifiers. On 16 September 2020, a Decision Notice Refusal was issued by Mr Rick Drew (Private Building Certifier, Burnett Country Certifiers) advising that –
'The assessment manager was directed to refuse the application by Bundaberg Regional Council in accordance with their referral agency role. The refusal is solely because of the direction of the referral agency.'
4. On 9 December 2020, the Tribunal hearing was conducted at the subject site.
5. Subsequent to the Tribunal hearing, the Appellants/Owners sought to amend the proposal by reducing the height and width of the proposed awning structure. Council considered that such amendments would make the current proposal comparable with that originally approved, provided that the underroof horizontal battening was also removed. This was not acceptable to the Appellants/Owners.

Reasons for the Decision

After reconsideration of the evidence that was before the person who made the decision appealed against, the Tribunal confirms the decision of the concurrence agency to instruct the assessment manager to refuse the application. The Tribunal commends both parties for their efforts in seeking to resolve respective differences of opinion and it is to be regretted that a mutually acceptable outcome could not be agreed.

The Tribunal's rationale for its decision is as follows –

1. The stated intent in Council Policy 1.0(1) references –
'particular types of Class 1a and Class 10 development where Council considers those types of development may have an extreme adverse effect on the amenity, likely amenity or may be in conflict with the character of a particular locality'

- 'Extreme' (as defined by Merriam-Webster, on line) is "existing in a very high degree; going to great or exaggerated lengths; exceeding the ordinary, usual, or expected".
- 'Adverse' (as defined by Merriam-Webster, on line) is "hostile; unfavourable; harmful".

The Tribunal considers that certain elements of the proposed development, in combination, may have a visual effect on the neighbourhood's existing character that is both extreme and adverse. These elements include –

- The fascia gutter height of the proposed awning would be substantially higher than that of the existing adjoining residence (approx 1.3 metres). When viewed from Croft St this height difference would be further accentuated by the awning fascia's closer proximity to that streets frontage. The resulting relationship between the respective roofs would be for that of the proposed awning to be visually dominant.
- The awning roof's profile (viewed from Croft St) would be 'blockish' because of its uniform height. This would contribute to its visual dominance.
- The provision of horizontal slats on the street-facing side/end of the awning roof would add to the visual 'bulkiness' of the structure. This would be further accentuated by the absence of roof overhangs beyond the line of battening.

2. The Tribunal considers that the proposed development would not comply with Council Policy Table 5.1 'Performance outcomes' PO1 (1, (2) and (3). These outcomes require that 'Carports within the Road Frontage Setback' (*as defined by QDC MP1.2, in this instance) –

- PO1(1) – *do not have an extremely adverse impact on the dwelling's presentation to the street.*

The Tribunal considers that proposal to be non-compliant in this matter because –

- The proposed awning (carport) height, length and proximity to the street frontage will create a roof form visually dominant to that of the existing single storey dwelling.
- Erection of a relevant height marker on the Croft St frontage in conjunction with the hearing confirmed that the fascia line of the proposed awning would visually cover the upper most ridgeline of the dwelling's roof when viewed from Croft St.

- PO1(2) – *do not have an extreme adverse impact on the prevailing or intended character of the streetscape.*

The Tribunal considers the proposal to be non-compliant in this matter because –

- The proposed awning (carport) height, length, roof configuration and proximity to the street frontage will present a high/long 'blockish' aspect to the Croft St streetscape which will be out of scale with existing onsite and neighbouring development.
- It is accepted that effective hedge screen planting could be propagated in the garden width available and that this in combination with the 'layering' effect of the fencing would 'soften' street aspect. Notwithstanding, these 'positives' would not sufficiently ameliorate the overall impact.

- PO1(3) – *are not the dominant built form on the site as seen from the street.*

The Tribunal considers that proposal to be non-compliant in this matter because –

- The provision of high level horizontal battening to the street-facing side/end of the awning will emphasise the visual impact of a high, long structure in close proximity to the street frontage.
- The absence of roof overhangs beyond the line of the battening will further accentuate the visual 'bulk' of the structure thereby further contributing to it being the dominant on-site built form as viewed from Croft St.

- PO1(4) – *will not increase the risk to the public by reducing sight lines of vehicles manoeuvring on and off the site.*

The Tribunal considers the proposal to be compliant in this matter, because –

- Vehicular access to the proposed development was to utilise the existing driveway crossover located well away from the McCavanagh/Croft street corner.

- Adjoining street footpaths are relatively wide thereby providing the opportunity for onsite/on road vehicles to 'see' and 'be seen'.
3. The Tribunal considers the reasons for refusal as advised by the concurrence agency Referral Notice to be properly considered and is in general agreement.
 4. After considering all of the evidence and submissions, the Tribunal is of the view that the Appellants have not discharged their onus of establishing that the assessment manager's decision, as directed by the Council in its role as a referral agency, ought to be altered in any way.

John Bright

Development Tribunal Chair
Date: 24 March 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