



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-040
Appellant:	Gregory Spence
Respondent (Assessment Manager):	Don Grehan of Pacific BCQ Building Certification Queensland
Co-respondent (Concurrence Agency):	Noosa Council
Site Address:	Lot 1046 CP899846 13 Comet Drive Sunrise Beach – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the refusal of a Development Application for Building Works being additions to a dwelling house for a carport and entry portico. The decision followed a concurrence agency response by the Noosa Council, directing refusal of the application. Council stated in part, that the proposal did not comply and could not be conditioned to comply with Performance Outcome PO9 of the Low Density Residential Design Code, Noosa Plan 2020.

Date and time of hearing:	10 December 2021 at 10.30am
Place of hearing:	The subject site
Tribunal:	Debbie Johnson - Chair Elisa Knowlman - Member Warren Rowe – Member
Present:	Appellant - Gregory Spence Don Grehan - Assessment Manager representative Brad Geaney - Council representative Matt Adamson - Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA), changes the decision of the assessment manager dated 30 July 2021 namely, to approve the siting of an *open carport* and entry portico on the subject land situated as detailed on Collins Building Design Drawing titled Concept Sheet A101-A107 issue A06 dated 17 April 2021, subject to the following conditions:

1. The street boundary setback is 600mm as measured to the outermost projection of the carport, and 4.5m to the outermost project of the entry portico;
2. At least two sides of the structure (including the front side) or more are open, noting a side is also considered open where the roof covering adjacent to that side is not less than 500mm from another building or a side or rear allotment boundary; and
3. Such further conditions as the assessment manager sees fit to impose to ensure compliance with the building assessment provisions under the *Building Act 1975*.

Background

1. The subject site is a rectangular residential property having a frontage of approximately 20m and area of 600sq/m. The property shares its rear boundary with the expansive Girraween Sports Complex and conservation areas. It is situated on the western fringe of an established coastal residential community. This estate was originally developed over a 20 year period commencing in the 1980's.
2. The appellant's property is located one allotment north of Comet Park recreational area. The park features along the entire southern extent of Comet Drive. Comet Drive then curves around a bend to run north pass by the subject site. The dwelling located between the subject site and the park is angled to align with the bend or the corner in the road at that point. This alignment has the effect of setting that dwelling forward of the home on the subject site.
3. Two allotments to the north of the appellant's property, a neighbouring dwelling features an open carport situated in the street setback area. Their carport is approximately 2.5m from the street setback. Directly across the road from this home and diagonally opposite the subject site, there is a dwelling with a double garage set back 3m from the street.
4. The road reserve in the immediate vicinity of these few homes is well shaded, featuring established native trees. This landscaping is in line with the endemic species (Banksia, Tuckeroo and Melaleuca) that are prolific in Comet Park and the conservation reserve to the rear of the appellant's allotment.
5. The original home on the subject site was built around 1997-2000 and is typical of that period. The dwelling is a single storey building constructed on a concrete slab, with brick veneer external walls and a gable sheet roof. When built, the home comprised three bedrooms, living kitchen area and a double width enclosed garage. The structure was 'T' shaped with the predominate length of the building being parallel to the side boundary. There is a minimal (1.5m) setback to the southern side boundary and approximately 4m setback currently clear to the northern side boundary. The front building line is maintained at 6m. The dwelling is situated 300mm below the road level in keeping with the natural ground fall.
6. The property has had several owners since it was established and it is evident that some minor aesthetic and structural changes have been made over the years. In addition, to the rear of the home a low pitched skillion metal sheet roof shed has been constructed and a separate 'flyover' roof provides a covered patio area on the northern side of the home.
7. The current owner, purchased this property in May 2007. At that time, the double lock up garage was fit for purpose and remained this way until it was converted to living area in 2020. Since this time, resident and visitor cars can only be parked in the open, either on the driveway or in the street. The appellant purchased the home with long term intentions. In recent times he has sought to increase the living areas and generally renovated to suit his changing need and circumstance.
8. On 14 September 2020, the appellant made application to Council seeking to gain a development approval to permit the construction of a double carport in the street setback area. Council refused this application on 28 October 2020, stating in part that the development did not meet PO9 (a) of the Low Density Residential Zone Code: *PO9 (a) provides for a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight.*
9. In 2021, the appellant resolved to make a new application to the Pacific BCQ Certifiers (assessment manager) for building works associated with a carport (with sliding gate) and front roof entry.
10. On 26 May 2021, the assessment manager issued a Confirmation Notice for building works to the appellant in accordance with Part 2 of the Development Assessment Rules. The development application needed to be referred to Council as the concurrence agency, to assess the design and siting of the proposed carport and front entry roof within the prescribed 6m street setback.

11. On 26 May 2021, the assessment manger referred the application to Council for consideration and advice in respect to the proposed carport and front entry roof, given they were to be built within the 6m road setback area.
12. On 30 June 2021, Council responded to the assessment manager directing him to refuse the development application.
13. On 30 July 2021, the assessment manager issued a Decision Notice of Refusal to the appellants stating that the application was refused due to the direction from the concurrence agency.
14. On 2 August 2021, the appellants stated their grounds for appeal, and completed and submitted the Form 10 – Notice of Appeal to the Registrar.

Jurisdiction

15. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
16. Section 1(2) of schedule 1 of the PA states Table 1 applies to a tribunal only if the matter involves one of the circumstances set out in paragraphs (a) to (l) of that section. Paragraph (g) of section 1(2) states: “a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under the Act that may or must be decided by the Queensland Building and Construction Commission”.
17. The tribunal is satisfied that the application lodged with the Assessment Manager and the referral of the development application to Council satisfies that requirement, being a development application for approval of building works under the *Building Act 1975* which is assessed against the Queensland Development Code (QDC) side boundary setback provisions for structures.
18. Similarly, under the *Building Act 1975*, section 33, the local planning scheme may impose alternative siting provisions as is the case in this instance. The Local Government is a concurrence agency as per Schedule 9, Table 3 of the Planning Regulation 2017.
19. That application was subsequently refused by the Assessment Manager as directed by Council as the referral agency. Table 1 item 1(a) in Schedule 1 of the PA states that for a development application an appeal may be made to a tribunal against the refusal of all or part of the development application.
20. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

21. Section 246 of the PA provides as follows (omitting the examples contained in the section):
22. The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.
23. The person must give the information to the registrar within 10 business days after the registrar asks for the information.
24. 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.
25. 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.

Material Considered

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

- (1) Collins Building Design Drawing titled Concept Sheet A101-A107 issue A06 dated 17 April 2021.
- (2) Referral Agency Response RAB 21/0103 dated 30 June 2021.
- (3) Pacific BCQ Decision Notice refusing the application 20200431 - dated 30 July 2021.
- (4) Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 2 August 2021.
- (5) Noosa Council's Interactive Mapping and DA History for 13 Comet Dr Sunshine Beach Maroochydore.
- (6) Google maps and street view images of the subject site and local vicinity.
- (7) Nearthmaps satellite images from 2010 to current date of the subject site and local vicinity.
- (8) CoreLogic Property Data pertaining to 13 Comet Drive Sunshine Beach.
- (9) The Planning Act 2016 (PA).
- (10) The Planning Regulation 2017 (PR).
- (11) The Development Application Rules.
- (12) The Building Act 1975 (BA).
- (13) The Building Regulation 2006 (BR) being effective for this matter.
- (14) The Queensland Development Code (QDC) Part MP 1.2, 2010.

- (15) The Noosa Plan 2020.
- (16) The National Construction Code 2019 (NCC).
- (17) The verbal submissions made by the parties at the hearing and during the site inspection.
- (18) The written submissions by four neighbouring property owners providing support for the development which is the subject of this appeal.
- (19) The written submission (which included numerous photographs of homes nearby) by the appellant as provided to the Registrar upon lodging the appeal.
- (20) Development Tribunal Appeal Decision Notice 21-002 for 3 Stardust Court Sunrise Beach submitted by the appellant by way of example.
- (21) Referral Agency Response RAB 20/0176 dated 26 October 2020 relating to a previous application for a carport and roof entry structure at 13 Comet Drive Sunshine Beach.
- (22) Emailed correspondence from the appellant, submitted via the Registrar and distributed to all parties post hearing. Documents included:
 - Cover Letter dated 20 December 2021;
 - Post Hearing Submission (pages 1-11/11)
 - Four photographs of the subject site; and
 - Four written submissions from adjacent property owners.

Findings of Fact

27. The hearing for the appeal was held at the appellants' home and therefore at the subject site, on 10 December 2021. The Tribunal had the opportunity to view the location for the proposed structures, which are the subject of this appeal, from both the subject property and neighbouring properties.
28. The property is very tidy and the house that is relatively neutral in colour, presents well when viewed from the street. There is a continuous front fence comprising rendered masonry columns with slated infill panels of powder coated aluminium. There are several access gates within the fence to provide access and security.
29. The front yard and footpath pertaining to the subject site, is well landscaped with established native plants. The house is set lower than the footpath due to the natural fall of the land. The appellant's car was parked in the driveway of the property and the driveway gate was open. The proposed carport is intended to be constructed in this area over the driveway between the dwelling and the front fence.
30. While there is currently no roof cover available to park a vehicle on the site, options were explored at the hearing. The Tribunal looked to see if access could be achieved to the side or the rear of the site, enabling the appellant to consider alternative locations for a carport. There is an area to the north of the living room, between the dwelling and the side boundary fence. This part of the property is wide enough to enable a vehicle to park or drive through to the rear. However, street access is not possible due to a concrete stormwater culvert precisely where a driveway crossover would need to be located.
31. The subject site on Comet Drive, can be approached from the south or from the north. Approach from the south is past Comet Park and then around the bend rising gently past the site. Approach from the north is a straight run coming down the slope. Visibility of the site is screened substantially by the mature landscaping in this area. The property itself cannot be seen until you are within 1-2 properties of the site's frontage.

32. The *Building Regulation 2021* Schedule 7, nominates the Queensland Development Code, as setting out the standard siting requirements for buildings and structures. Similarly, Part 3 Section 6 Clause 2 (c) states:
A local government planning scheme may provide for the following matters— a qualitative statement for a matter provided for under the performance criteria mentioned in paragraph (a) or some of performance criteria 4, 5, 7, 8 or 9 under QDC part 1.1 and the acceptable solutions for the performance criteria apply for the building work; or (b) all or some of performance criteria 4, 5, 7 or 8 under QDC part 1.2 and the acceptable solutions for the performance criteria apply for the building work; for the building work, if the scheme also provides for quantifiable standards for the statements.
33. Relevant to the subject building development application, the council's jurisdiction is limited to its Referral Agency functions under section 33 of the *Building Act 1975* in relation to assessing whether the proposed building or structure complies with the quantifiable standards under the planning scheme in respect of boundary clearances.

Noosa Plan 2020

34. Noosa Plan 2020 (NP2020) – Low Density Residential Zone Code (LDRZ Code) Acceptable Outcome states:
AO9.1
Buildings and structures have a setback of 6 metres from the road frontage provided that setback to one frontage may be reduced to 4.5 metres where the lot:
1. *has frontage to more than one road; and*
 2. *is less than 600m² in area; or*
 3. *is less than 15 metres in width.*
35. NP2020 also stipulates that AO9.1 Acceptable Outcomes are alternative provisions to the Queensland Development Code (QDC).
36. No.13 Comet Drive Sunshine Beach does not have more than one road frontage. The site area is 599.54sq/m (600sq/m) and the frontage width is not less than 15m, therefore a 6m setback applies to buildings and structures on this site.
37. As the proposed development does not meet the 6m setback provisions stipulated at AO9.1, assessment must be considered against the relevant Performance Outcomes at PO9 stated below.

PO9

Buildings and structures are designed and sited to:

- (a) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight;*
- (b) not unreasonably obstruct views or cause overlooking of private open space or habitable areas of adjoining premises;*
- (c) provide adequate distance from adjoining land uses;*
- (d) preserve existing vegetation that will help buffer development;*
- (e) allow for space and landscaping to be provided between buildings including adequate area at ground level for landscaping with trees, shrubs and outdoor living;*
- (f) be consistent with the predominant character of the streetscape; and*
- (g) protect the natural character and avoid adverse impacts on ecologically important such as national parks, waterways and wetlands.*

The Referral Agency Response from Council stipulated: *The application is refused as the 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 proposed carport is not consistent with the predominate character of the streetscape. It is to be noted that existing buildings and structures within the streetscape have considerably greater road boundary setback than that of the proposed carport.

38. The Referral Agency Response did not raise any concerns in respect to the remaining outcomes listed under PO9, nor did the response raise any concerns in respect to the proposed roof entry structure.

The Queensland Development Code (QDC)

39. The Low Density Residential Zone Code contains some alternate provisions to the QDC. The QDC Part MP1.2 is the standard for the Design and Siting requirements applicable to Class 1 Dwellings and Class 10 structures on residential sites over 450m² in area. The provisions of the QDC apply to the extent that a local planning scheme does not opt to provide alternative provisions. In this instance the Low Density Residential Zone Code AO9.1 provides some alternative siting provisions to the QDC A1 (a), therefore the 6m benchmark (for a garage or a carport) of the Low Density Residential Zone Code apply to the proposed development. Where alternative outcomes benchmarks cannot be met (in this instance the 6m frontage setback) the performance outcomes of that code apply.

Reasons for the Decision

40. The Tribunal found the predominate character of the street is not determined solely by the road setback dimensions for various dwellings and associated structures. Rather the residential coastal character in this instance is by virtue of the era in which these homes were built and their gardens established.
41. While some homes in this vicinity have erected carports or shade sails within the street setback areas, these structures do little to change the predominate character of the street.
42. The Tribunal decided that the construction of the proposed carport with its low pitch design and the modest entry roof structure will not affect the predominate character of this street. These new roof lines will be barely discernible, given the slope of the land and the predominance of landscaping. The proposed works will not detract from the attractive character of this neighbourhood.

Debbie Johnson

Development Tribunal Chair

Date: 19 April 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:

The Registrar of Development Tribunals
Department of Energy and Public Works
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Brisbane QLD 4001

Telephone 1800 804 833

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