



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>21-059</b>
<b>Appellant:</b>	Ian James Lydiard
<b>Respondent (Assessment Manager):</b>	Michael Kunze, The Building Approval Company
<b>Co-respondent (Concurrence Agency):</b>	Cairns Regional Council (“Council”)
<b>Site Address:</b>	85 Moore Road, Kewarra Beach, formally described as Lot 3 on RP862225 (‘the subject site’)

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### **Appeal**

Appeal under section 229 and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1, of the *Planning Act 2016* (“the PA”) against the assessment manager’s decision to refuse the appellant’s application for a building works development permit for a Class 10 building on the subject site (“the application”).

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<b>Date and time of hearing and site inspection:</b>	Wednesday, 15 December 2021 at 11.30am
<b>Tribunal:</b>	Neil de Bruyn – Chairperson Angela Hanson – Member
<b>Present</b>	Ian Lydiard – appellant Harald Weber – All Construction Approvals (representing the appellant) Michael Kunze – The Building Approval Company (assessment manager) Ryan Wagemaker – The Building Approval Company Ian Elliot-Smith – Council Representative Ben Santagiuliana – Council Representative

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### **Decision:**

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

### **Background:**

1. The subject site is a corner lot, with its primary frontage to Moore Road and a secondary frontage to Isaac Smith Close. The subject site is 962m<sup>2</sup> in extent and is included within the Low Density Residential Zone under the Cairns Plan 2016, being the current planning scheme for the subject site. The site contains a detached dwelling house with associated outbuildings, with its main vehicular access being from Moore Road.

2. From the tribunal's observation at the site inspection, the appellant has commenced works on the subject site for the erection of a Class 10a building, for the purposes of a shed/workshop/garage, by way of:
  - a) the completion of a new concrete driveway, that directly adjoins, and is in addition to, a pre-existing double-width concrete driveway servicing an existing two-bay carport, and
  - b) having arranged the delivery and storage of construction materials to/upon the subject site.
3. Based upon the rudimentary plans of the proposed building, as provided to the tribunal, the proposed building will be 5m wide and long and will have a height of 3m to the eaves and 3.67m to the roof ridge. Significantly, the proposed building will be set back 3.15m from the frontage of the subject site at the south-eastern corner of the proposed building, and possibly slightly less at the opposing north-eastern corner (due to the relationship between the proposed building alignment and the alignment of the frontage). The proposed building will also be set back a minimum of 0.5m from the northern, side boundary of the subject site.
4. The proposed building will adjoin an existing two-bay (approximately 6.5m wide) carport that is set back a similar distance from the frontage to the proposed building. The resultant concrete driveway that is intended to serve both structures is thus estimated to be a total of approximately 11.5m wide.
5. The appellant made the application to the assessment manager for a building works development permit for the proposed building. There is no evidence before the tribunal as to the date upon which this application was made; however, the absence of this information is not considered to be significant.
6. Pursuant to Section 54(1) and (2)(a) of the PA, Section 33(1)(a) of the Planning Regulation 2017 ("the PR") and Schedule 9, Part 3, Division 2, Table 3, Item 1 of the PR, the application was referred to Council as a concurrence agency for design and siting in relation to the proposed development.
7. This referral was triggered as Part MP1.2 (Design and siting standards for single, detached housing on lots 450m<sup>2</sup> and over) ("Part MP1.2") of the Queensland Development Code ("the QDC") is applicable to the proposed building work, and as the proposed setback to the frontage of the subject site is not consistent with the relevant acceptable solution under Part MP1.2. Under Part MP1.2, the acceptable solution for the road setback (to the subject site's frontage) of the proposed building is 6m (Acceptable Solution A1(a)(i)).
8. The proposed setback to the northern side boundary of the subject site (0.5m) is taken to be consistent with Acceptable Solution A2(d) of Part MP1.2, as:
  - a) the height of the proposed building within the side setback will be less than 4.5m and an average of 3.5m;
  - b) the total length of the proposed building will be less than 9m; and
  - c) based upon the tribunal's observations at the site inspection, the part of the proposed building within the setback will not be within 1.5m of a window to a habitable room of the affected neighbouring dwelling.
9. On 3 June 2021, Council, as a concurrence agency, decided to direct the assessment manager to refuse the application and issued a concurrence agency response of the same date. The central ground for this decision was essentially that, having regard to the proposed front setback of 3.15m, as opposed to the acceptable solution of 6m, and the height and width of the proposed building, the character of the streetscape would be compromised and Performance Outcome P1 of Part MP1.2 would not be achieved.

10. Performance Outcome P1 provides as follows:

*The location of a building or structure facilitates an acceptable streetscape, appropriate for*

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*(a) the bulk of the building or structure; and*

*(b) the road boundary setbacks of neighbouring buildings or structures; and*

*(c) the outlook and views of neighbouring residents; and*

*(d) nuisance and safety to the public.*

11. The stated grounds underpinning the concurrence agency's decision are essentially that Performance Outcome P1 will not be met as:

a) The combined bulk of the proposed building and the existing two-bay carport that would immediately adjoin it would result in a continuous, unbroken and visually prominent built form within a substantially reduced front setback, and would be inappropriate for the Moore Road streetscape.

b) The additional extent of hardstand driveway (as constructed) further reduces the area of the site frontage available for landscaping and deep planting to act as a visual buffer or to soften the resultant visual impact upon the streetscape.

c) Local examples within Moore Road of buildings and structures sited to reduced front setbacks are considered commensurate with the visual values of the streetscape, with greater visual integration, breaks in built form and visually less dominant driveway hardstand areas.

12. Following receipt of the concurrence agency response, the assessment manager issued a decision notice dated 28 September 2021, refusing the application. The only ground for refusal stated in the decision notice is the direction given by the concurrence agency response.

13. The appellant duly lodged this appeal on 21 October 2021. The grounds of appeal are set out in a report by All Construction Approvals, dated 15 October 2021. The grounds of appeal are summarised below:

a) The proposed building will be relatively small and consistent with associated buildings, and therefore not appear bulky,

b) the proposed building will be screened from the south-east, by dense vegetation,

c) the reduced front setback will be consistent with other buildings and structures in Moore Road,

d) the proposed building will be visually consistent with other buildings and structures in Moore Road,

e) the wider driveway combination will be consistent with No. 74 Moore Road, which has two (separate) driveway entrances,

f) provision has been made for trees to be planted within and adjacent to the driveway,

g) there will be no impact upon neighbours' views or outlooks,

h) certain neighbours have signified their support for the proposed development,

i) the existing situation, in which vehicles are not able to be parked in front of the existing two-bay carport, will not be changed by the proposed development,

- j) the existing footpath within Moore Road is located on the opposite side of the street and the proposed building will not interfere with safe pedestrian movement, and
- k) there will be no loss of natural light or ventilation to any habitable rooms and also no loss of (visual) privacy.

14. As the material included with the appeal as lodged did not include copies of the plans that formed part of the application, the tribunal directed the parties, in an email dated 17 December 2021, to provide a full set and details of the plans the subject of the assessment manager's and the concurrence agency's assessments. Both parties responded by submitting identical copies of the relevant plans, and within the timeframe provided in the tribunal's directions.

#### **Jurisdiction:**

15. Section 229(1) of the PA provides that Schedule 1 ("the schedule") of the PA states the matters that may be appealed to a tribunal.
16. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule ("Table 1") are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in section 1(2).
17. Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the Building Act 1975, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
18. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

#### **Decision Framework:**

19. For this appeal, the onus rests on the appellant to establish that the appeal should be upheld (section 253(2) of PA).
20. The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under section 246 of PA.
21. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA and the tribunal's decision takes the place of the decision appealed against (section 254(4)).

#### **Material Considered:**

22. The following material has been considered by the tribunal in this appeal:
- a) 'Form 10 – Notice of Appeal' lodged by the appellant with the tribunal's registrar on 21 October 2021, including the appellant's grounds for appeal, as set out in the report and attachments dated 15 October 2021 by All Construction Approvals ("grounds for appeal");
  - b) a copy of the assessment manager's decision notice dated 28 September 2021;
  - c) a copy of the Cairns Regional Council concurrence agency response dated 3 June 2021.

- i. plans showing the proposed building, as provided by both parties in response to the tribunals directions of 17 December Photographs taken by the chairperson at the inspection on 11 June 2021, of the structure and surrounds.

d) The *Planning Act 2016* and the *Planning Regulation 2017*.

e) The Cairns Plan 2016.

#### **Findings of Fact:**

23. The tribunal finds that the application was correctly assessed against the QDC Part MP1.2, as no alternative provisions for the building work apply in this case under section 33 of the Building Act 1975.

24. The applicable acceptable solution under Part MP1.2 for the road boundary clearance (setback to the road frontage of the subject site) of the proposed building is set out in Acceptable Solution A1(a)(i) of Part MP1.2 and is 6m. As the road boundary clearance of the proposed building will be 3.15m, it will not comply with the acceptable solution. Accordingly, the application was to be assessed against the applicable Performance Outcome, being Performance Outcome P1 (as quoted in paragraph 10 above).

25. The tribunal finds that the proposed building will not achieve this performance outcome, as it will not facilitate an acceptable streetscape within Moore Road, for the following reasons:

a) The bulk of the proposed building, taken together with the bulk of the existing two-bay carport, will present an excessively bulky and visually unbroken built form to the Moore Road streetscape.

b) The significantly reduced front setback, again taken together with the similarly reduced front setback of the existing two-bay carport, will have a significantly greater visual impact upon the streetscape than that associated with other buildings in Moore Road that involve single buildings with reduced front setbacks.

c) The excessively wide concrete driveway (as already constructed) to provide individual vehicular access to both the existing two-bay carport and the proposed building:

- i. impacts adversely on the visual environment of the Moore Road streetscape, both in itself and by way of reducing opportunities for soft landscaping, and
- ii. presents a safety hazard to the public, in the form of three separate vehicle access/egress points, and therefore potential traffic conflict points, within the frontage of a single lot and with no separation between each such access/egress point.

26. The tribunal also finds that ample space exists elsewhere within the subject site for the proposed building to be sited in full compliance with Acceptable Outcome A1(a)(i) of Part MP1.2, and without any of the impacts outlined above in paragraph 25. By way of example, this could be achieved in the rear yard of the subject site, with vehicular access provided from Isaac Smith Close.

27. The tribunal finds that the siting of proposed building relative to the northern side boundary of the subject site complies with Acceptable Outcome A2(d)(i) to (iii) of Part MP1.2.

#### **Reasons for the Decision:**

28. The tribunal, in accordance with section 254(2)(a) of the PA, has decided this appeal as set out under the heading 'Decision' at the beginning of this decision notice.

29. The reasons for this decision are that:

- a) The siting of the proposed building does not comply with Performance Outcome P1 of Part MP1.2, for the reasons set out in paragraph 25 above, and therefore fails to comply with the QDC; and that
- b) ample space exists elsewhere within the subject site for the proposed building to be sited in full compliance with Part MP1.2.

30. For above reasons, the tribunal finds that appellant has not established that the appeal should be upheld, as required by section 253(2) of the PA.

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**Neil de Bruyn**

**Development Tribunal Chair**

**Date: 19 January 2022**

## **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 Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone 1800 804 833**

**Email: [registrar@hpw.qld.gov.au](mailto:registrar@hpw.qld.gov.au)**