



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	22-067
Appellant:	Andrew Carey
Respondent (Assessment manager):	Luke Owen-Jones
Co-respondent (Concurrence agency):	Noosa Shire Council
Site address:	53 Kestrel Crescent, Peregian Beach Qld 4573 described as Lot 16 on P93124

Appeal

Appeal under section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(a) of the *Planning Act 2016* ('the PA') against the refusal by the assessment manager, at the direction of the referral agency, of a development application for a development permit for building work for the construction of a new class 10a carport, on the subject site ('the application').

Date and time of hearing:	Monday 3 April 2023 at 10.30am
Place of hearing:	53 Kestrel Crescent, Peregian Beach (the Land)
Tribunal:	Kim Calio – Chair Markus Pye – Member
Present:	Marcus Brennan – Brennan Planning and Appellant Representative Brad Geaney – Council representative Jarrad Postle – Council representative Luke Owen-Jones – Earthcert – Certifier/Assessment Manager

Decision:

The Development Tribunal in accordance with section 254(2)(d) of the *Planning Act 2016*, sets aside the decision of the assessment manager to refuse the development application for a development permit for building work for the construction of a carport on land located 53 Kestrel Crescent, Peregian Beach, and orders the assessment manager to:

- a) remake the decision within 25 business days of the date of receiving this decision notice, as if the concurrence agency had no requirements; and
- b) in the event that the assessment manager then decides to approve the application, to include the following conditions in the resultant building works development permit:

- (i) The design and siting of the approved Class 10a carport is to be in accordance with Collins Building Designs plans dated 18 April 2023 subject to the carport being setback a minimum of 1.5m from the Kestrel Crescent property boundary and
- (ii) The carport is to remain open on all sides and not enclosed with walls, screens or a door.

Background

1. The appellant proposed to construct a new double carport on the Land with a setback from the road frontage to Kestrel Crescent varying from 120mm to 850mm and a setback to the northern side boundary of 100mm. The carport was proposed to be open on all sides and be connected to the existing dwelling. The width of the proposed carport at the road frontage was 6.408m.
2. The subject site is contained within the Medium Density Residential zone of the Noosa Plan 2020. The Medium Density Residential Zone code includes Acceptable Solution AO12.1 which states:

Buildings and structures meet the following minimum boundary setbacks:

- (a) *for frontages – 6m*
- (b) *for side boundaries –*
 - i. *1.5 metres setback up to 4.5 metres height;*
 - ii. *2 metres setback between 4.5metres and 7.5 metres height; and*
 - iii. *2.5 metres where above 7.5metres height*
 - iv.
- (c) *for rear boundaries – 6 metres*

3. The Tribunal notes that Acceptable Outcome 12.1 is an alternative provision to the Queensland Development Code (QDC).
4. The Medium Density Residential Zone Code Table 6.3.2.3, contains some alternative 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 450 m² 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 Medium Density Residential Zone code Table 6.3.2.3 PO12 provides some alternative siting provisions to the QDC A1 (a), and therefore the 6m setback provisions (for a garage or a carport) of the Medium Density Residential Zone code apply to the proposed development.
5. As the proposed carport did not meet AO12.1(a) and (b)(i), an application was triggered for referral to Council as a concurrence agency pursuant to Schedule 9, Part 3, Division 2, Table 3 Item 1(a) of the *Planning Regulation 2017 (Regulation)*.
6. An application for a Referral Agency Response was submitted to Noosa Council on 7 July 2022 by Brennan Planning.
7. On 27 October 2022, Council's delegate decided to issue a referral agency response (**RAR**) directing the assessment manager to refuse the Application due to non-compliance with Performance Outcome PO12(f), citing, amongst other things, the following reasons for refusal of the Application.

PO12 Buildings and Structures are designed and sited to:

(f) be consistent with the predominant character of the surrounding area:

It has been considered that the design and location of the proposed carport provides an insufficient road boundary setback and is not consistent with the predominant character of the surrounding area.

It is Council's view that the predominant character of the surrounding area consists of buildings and structures providing a greater road setback than (sic) that of the proposed carport.

8. Earthcert (Certifiers) issued a decision notice dated 30 November 2022, refusing the Application as required by section 62 of the *Planning Act 2016 (Act)*.
9. The owner of the Land, Mr Andrew Carey, filed this appeal effectively on 28 December 2022 in response to the refusal of the Application at the direction of the concurrence agency.
10. This appeal was dealt with by the Development Tribunal (**Tribunal**) at the hearing held on 6 December 2022, which was conducted at the Land.

Jurisdiction

11. Section 229(1) of the Act identifies that schedule 1 states the matters that may be appealed to the Tribunal.
12. Table 1 of schedule 1 of the Act states the matters that may be appealed to the Planning and Environment Court or the Tribunal subject to (in the case of the Tribunal) the pre-conditions stated in section 1(2) of schedule 1.
13. The Tribunal has jurisdiction to determine this appeal under section 229, schedule 1, section 1(2)(g) and schedule 1, section 1, table 1, item 1 of the Act.

Decision framework

14. The onus rests on the appellant to establish that the appeal should be upheld.¹
15. 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.²
16. 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 the Act.
17. Leave was given by the Tribunal pursuant to section 253(5)(a) of the Act to the parties to present the other evidence specifically identified in the list of 'material considered' below.
18. The Tribunal is required to decide the Appeal in one of the ways mentioned in section 254(2) of the Act.

¹ Section 253(2) of the Act.

² Section 253(4) of the Act

Material considered

19. The material considered by the Tribunal pursuant to section 253(4) and section 253(5) of the Act in arriving at this decision comprises:
- (b) Council's RAR (RAB22/0139) dated 22 November 2022, which directed the assessment manager to refuse the application. The RAR included plans A103 Proposed Site Plan (Rev A04), A202 Proposed Carport Floor Plan (Rev A04), A203 Proposed North/East Elevation (Rev A04), A204 Proposed South/West Elevation (Rev A04) prepared by Collins Building Designs and dated 1 September 2022
 - (d) The decision notice (220425) dated 30 November 2022 issued by Earthcert refusing the Application for the carport.
 - (e) Form 10 – Appeal Notice against the assessment manager's decision to refuse the Application for Building Works for a new carport, grounds for appeal and correspondence accompanying the Appeal lodged with the Registrar on 28 December 2022.
 - (f) Email received by the Registrar from the Tribunal on 4 April 2023 setting out directions for additional information to be provided by both the Appellant and Council.
 - (h) Email received by the Registrar from Council on 11 April 2023 providing the following information as directed by the Tribunal and requested by the Registrar by email on 4 April 2023:
 - (i) Excerpts of the Building Approvals for the existing dwelling and swimming pool.
 - (ii) Confirmation that Council's building records failed to identify a building permit for a gazebo or for any work to convert the existing garage to another use.
 - (iii) Confirmation of Council's records regarding approvals for 17 properties in the surrounding area (in Kestrel Crescent, Lowry Street and Lorilet Street) which appeared to exhibit front boundary setback for buildings and structures less than 6m. Of the 17 properties identified, Council records indicated nine properties with approvals for alternative setbacks and six where no building approval was found and two where an approval was not required. Council also noted that in their view, building works on five of the properties were not relevant to the streetscape applicable to 53 Kestrel Crescent.
 - (iv) A copy of the Brennan Planning request for Referral Agency Response emailed to Council 7 July 2022. The email included the form, five page cover letter and proposal plans being Coloured renders and Sheets A102 Rev A03 Existing & Demolition Site Plan, A103 Rev A03 Proposed Site Plan, A201 Rev A03 Existing & Demolition Carport Floor Plan, A202 Rev A03 Proposed Carport Floor Plan, A203 Rev A03 Proposed North/East Elevation, A204 Rev A03 Proposed South/West Elevation prepared by Collins Building Designs and dated 8 June 2022 (Application Plans).³
 - (v) A copy of Council email dated 20 July 2022 to Brennan Planning Pty drawing attention to the non-compliance of the front fencing proposal with Acceptable

³ It is noted the request refers to the Land being in the Low Density zone and the consultant report references the Low Density Residential Zone Code instead of the Medium Density Residential Zone Code.

Solution AO17 of the Medium Density Residential Zone Code and noting the proposed carport is unlikely to be supported as the location of the building work is not consistent with the predominant character of the streetscape.

- (vi) A copy of the Brennan Planning email dated 15 September 2022 responding to Council's email of 20 July 2022 including amended plans dated 1 September 2022 and requesting Council proceed with the assessment of the proposal.
- (vii) A copy of Council email dated 7 October 2022 acknowledging the revised plans and advising that the current design and location of the proposed carport is unlikely to be supported by Council. Further it was suggested by Council that revised plans of the proposed carport be submitted which provide for an increased road boundary setback and clearly identify building height from both natural and finished ground level. It was also requested that Council be advised in writing should the clients not wish to alter the design and location of the carport to show an increased road boundary setback, in which case a decision based on the current plans would be provided.
- (i) Email received by the Registrar from Brennan Planning on 19 April 2023 providing the following:
 - (i) Fully dimensioned revised plans prepared by Collins Building Designs dated 18 April 2023 (Colour render, A102 Existing and Demolition Plan Rev A06, A103 Proposed Site Plan Rev A06, A201 Existing and Demolition Carport Floor Plan Rev A06, A202 Proposed Carport Floor Plan Rev A06, A203 Proposed North & East Elevation Rev A06, A204 Proposed South & West Elevation Rev A06 and A205 Proposed Cross Sections S1 & S2 Rev A06.
 - (ii) Notes identifying that the proposed carport had been reduced to a maximum height of 3.15m presenting to the street frontage, the front setback had been increased to between 700mm and 1.558m and the pathway and pedestrian entry in the southwest corner of the site had been removed.
 - (iii) Confirmation that two Tuckeroo trees were to be removed for the construction of the proposed carport and that these trees could be removed at any time.
 - (iv) Further comment noting a carport at 36 Kestrel Crescent is within the 6m front setback, and that whether Council has a record of approval for a structure within the front setback is not a relevant consideration when assessing Performance Outcome PO12 of the Medium Density Residential Zone Code. The Appellant contends that '*all these structures exist, and form part of the character of the surrounding area, which is the relevant benchmark for consideration.*'
- (j) Noosa Plan 2020 – Medium Density Residential Zone Code
- (k) *Planning Act 2016.*
- (l) *Planning Regulation 2017.*

Findings of fact

The Tribunal makes the following findings of fact:

The Land and surrounding area

20. The Land is irregular in shape and approximately 758m² in area. It has a frontage of approximately 13.3m to Kestrel Crescent to the west and a frontage of 20.3m to David Low Way to the east.
21. It is generally rectangular in shape and is adjacent to five residential properties, located on the southern, eastern and western boundaries.
22. The Land generally slopes, with a gradient of approximately 6%, in an easterly direction from the Kestrel Crescent frontage to the David Low Way frontage.
23. Vehicle access to the Land is obtained via a concrete drive from Kestrel Crescent.
24. The Land contains a detached dwelling, a gazebo and an inground swimming pool.
25. The dwelling is two storey and of masonry and timber construction with a tiled roof. The double garage has been modified to render it unusable for car accommodation as the garage openings have been fully enclosed and high level windows have been installed.
26. Council failed to identify a building permit for either the gazebo or the conversion of the existing garage for another purpose.
27. Kestrel Crescent to the east of Lowry Street is approximately 480m long with approximately 25 driveways accessing existing properties on the eastern side of the crescent and approximately 16 driveways accessing existing properties on the western side of the crescent. The Land is situated in Kestrel Crescent at the southern entrance to the local area.
28. Lorilet Street between its southern intersection with Kestrel Crescent and northern intersection with Kestrel Crescent is approximately 277m long. This section of Lorilet Street has approximately 15 driveways accessing existing properties on the eastern side of the street and 10 properties accessing existing properties on the western side of the street.
29. Kestrel Crescent and Lorilet Street are characterised by mostly two storey dwellings with some single storey dwellings of a range of architectural styles. Other elements of the streetscape in this area include a range of hard and soft landscaping, street trees and setbacks. Concrete footpaths are not provided in either Kestrel Crescent or Lorilet Street.
30. Brennan Planning identified a number of properties in Kestrel Crescent, Lowry Street and Lorilet Street which appeared to exhibit reduced front boundary setbacks for buildings or structures in their request to Council for a Concurrence Agency Response dated 8 June 2023 for the proposed carport.
31. The Tribunal also noted a number of properties in this area which appeared to exhibit reduced front boundary setbacks for buildings or structures during the inspection of the Land and surrounding area on the day of the Hearing. The Tribunal does not purport to have identified all properties in the surrounding area with reduced front setbacks
32. The Tribunal issued directions for Council to provide clarity on the front setbacks of 17 properties in Kestrel Crescent, Lowry Street and Lorilet Street and confirmation as to which buildings/structures have been approved. Of the 17 properties identified, Council indicated:

- (a) nine properties have approved reduced setbacks for a range of buildings/structures including garages, open carports and roofed deck,
- (b) Council has no record of approvals for six properties;
- (c) two of the properties did not require approval as the structures comply with requirements;
- (d) in Council's view five of the properties (four with approvals and one without) are not relevant to the streetscape applicable to the building work under consideration in this appeal.

33. A table identifying the details of each of the 17 properties is contained in Council's email response of 11 April 2023 to the Tribunal's direction. However, the Tribunal specifically notes the following approvals in the area surrounding the Land

Front Setback	Structure	Address	Distance from the Land
1.79m	Open Carport	31 Kestrel Crescent	182m
2.05m	Double Garage	21 Kestrel Crescent	270m
4.5m	Garage	23 Kestrel Crescent	253m
4.4m	Dwelling	27 Kestrel Crescent	220m
3.8m	Roofed Deck	1 Lorilet Street (corner Kestrel Crescent)	144m
0.0m	Garage	3 Lorilet Street	176m
0.0m	Double Carport	11 Lorilet Street	228m
0.2m	Garage	17 Lorilet Street	280m

Proposal

34. The Application as submitted to Council sought approval for a proposed double carport on the Land with a setback from the road frontage to Kestrel Crescent varying from 120mm to 850mm and a setback to the northern side boundary of 100mm. The carport was proposed to be open on all sides and connected to the existing dwelling. The width of the proposed carport at the road frontage was 6.408m.
35. Amended plans were submitted to the Registrar by Brennan Planning on 19 April 2023. The proposed carport has been reduced to a maximum height of 3.15m presenting to the street frontage. The minimum front setback has been increased from 120mm to 700mm and the maximum front setback has been increased from 800mm to 1.558m. The side setback remains the same. In addition, the pathway and pedestrian entry in the southwest corner of the site has been removed.

The Hearing

36. The Appellant was not present at the Hearing and was represented by Marcus Brennan of Brennan Planning. During the hearing, the Appellant's representative advised:
- (a) the carport is slim line and would be located behind a 1.8m high fence.
 - (b) other alternatives such as a single carport had not been explored.
 - (c) he would confirm which vegetation would be removed as a result of the proposed carport and the arrangements for the bin storage.
 - (d) fully dimensioned plans would be provided.

- (e) he would consult with his client on any potential for any amendments to the proposal and incorporate any agreed amendments in the dimensioned plans.
- (f) of numerous other structures in the area located within the 6m front setback.

37. During the hearing Council's representatives advised:

- (a) Council considered that the carport complies with all aspects of the Medium Density Residential Zone Code except Performance Outcome PO12(f).
- (b) Council considered building location to be the aspect of character to be assessed under PO12 which states '*Buildings and structures are designed and site to:(f) be consistent with the predominant character of the surrounding area.*'
- (c) The height of the carport at the front boundary was a concern given the slope. Council had requested plans to indicate the height however the applicant had declined to provide this information and requested Council proceed with their assessment on the basis of the amended plans (dated 1 September 2022) provided in their email of 15 September 2022.
- (d) A 4–4.5m setback would have potential for support.
- (e) Council's assessment was confined to Performance Outcome 12 as provided for by *Planning Regulation 2017*. Therefore, the Overall Outcomes and Purpose of the Medium Density Residential Zone Code were not able to be considered in the assessment of the proposal.

38. The Tribunal accepts Council's assessment of the proposal being limited to the relevant Performance Outcome as required by the *Planning Act 2016* and *Planning Regulation 2017*, specifically Schedule 9 Part 3, Division 2 Table 3 item 1(b) and item 4.

39. The Tribunal noted the height of the carport as depicted on the Plans series dated 1 September 2022 was ambiguous. In addition, the property boundary on the plans in relation to the fence and bin storage area required clarification.

Post hearing

40. Additional information and documentation were received by the Registrar from the parties subsequent to the hearing, as previously described in the 'Material Considered'.

Reasons for the decision

41. The Tribunal notes that PO12(f) of the Medium Density Residential Zone code refers to the predominant character of the surrounding area as opposed to streetscape as follows:

PO12 Buildings and Structures are designed and sited to:

- (a)....
- (b)....
- (c).....
- (d)....
- (e)....
- (f) *be consistent with the predominant character of the surrounding area*
- (g)

42. The Tribunal finds that the use of the term 'surrounding area' provides a broader and wider proximity against which to determine consistency than the immediate streetscape. As illustrated above there are numerous incidences of a reduced front boundary setback in the surrounding area ranging from zero boundary setbacks to 4.5m for a variety of buildings and structures.
43. In considering the surrounding area the Tribunal notes the road pattern of this residential enclave with Kestrel Crescent (east of Lowry Street) providing the most convenient access to all residences in Kestrel Crescent and majority of residences in Lorilet Street. The street pattern is considered to contribute to Kestrel Crescent (east of Lowry Street) with Lorilet Street functioning as a discrete area.
44. The Tribunal does not accept Council's view that a number of the existing approved reduced front boundary setbacks are not relevant to the assessment of the proposal against PO12(f).
45. The Tribunal notes that within 280m of the Land there are a wide variety of examples of approved reduced front boundary setbacks.
46. The Tribunal does not agree with the suggestion by Brennan Planning that, whether Council has a record of approval for the structures within the front setback, is not relevant to the consideration against Performance Outcome PO12 of the Medium Density Residential Zone Code, as all of these structures exist, and form part of the character of the surrounding area. Accordingly, the Tribunal has not considered the reduced front setback examples, for which Council has no record of approval, as contributing to the predominant character of the surrounding area.
47. The Tribunal is of the opinion that the surrounding area demonstrates a varied character contributed to by a wide range of building styles, materials, setbacks and landscaping.
48. The Tribunal finds that the proposed carport, being an open structure of metal and weather board construction, if setback 1.5m from the front boundary, would not be imposing in terms of its height, bulk and scale or visually dominating in its location. It is considered that the proposed carport, designed and sited in accordance with the revised plans dated 18 April 2023, subject to an amended front boundary setback of 1.5m, will be consistent with the predominant character of the surrounding area.
49. For the reasons identified, the Tribunal has determined that the proposal as modified does comply with Performance Outcome PO12(f) of the Medium Density Residential Zone Code of the Noosa Plan 2020.
50. The Appellants have discharged their onus.
51. The Tribunal sets aside the decision of the assessment manager to refuse the Application and directs the assessment manager to remake the decision as if the concurrence agency had no requirements subject to conditions.

Kim Calio
Development Tribunal Chairperson

Date: 5 July 2023

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:

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