



## Development Tribunal – Decision Notice

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### **Planning Act 2016, section 255**

<b>Appeal Number:</b>	19- 025
<b>Appellant:</b>	Marlken Pty Ltd T/A The Australian Garage Supermarket
<b>Assessment Manager:</b>	Luke Neller of Project BA
<b>Concurrence Agency:</b>	Sunshine Coast Regional Council
<b>Site Address:</b>	1 Oxleigh Crescent, Nambour (corner of Oxleigh Crescent and Donaldson Road, Nambour) and described as Lot 9 on RP 63774 – the subject site

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### **Appeal**

Appeal made under section 229 and schedule 1, section 1, table 1, Item 1(a) of the *Planning Act 2016* against the refusal of a preliminary development application for siting associated with building work for the construction of a garage. Sunshine Coast Regional Council as the concurrence agency directed the assessment manager to refuse the application stating it did not satisfy the requirements of the Sunshine Coast Planning Scheme's Dwelling House Code.

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<b>Date and time of hearing:</b>	20 September at 11.00am
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Debbie Johnson – Chair Lisa Lambie – Member
<b>Present:</b>	Luke Neller Project BA - Appellant's representative Daniel Eichhorn Project BA - Appellant's representative Ioannis Dandoulakis - Property owner Peter Chamberlain - Council representative

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### **Decision:**

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) replaces the assessment manager's decision, as directed by the concurrence agency, with a decision approving the siting of the garage with the following conditions:

1. The minimum street boundary *setback* to Donaldson Road (secondary road) is 500mm;
2. The minimum street boundary *setback* to Oxleigh Crescent (frontage) is 6M;
3. The maximum *building height* is 3.1M *above natural ground*;
4. The existing driveway and crossover is to be maintained for access to the new garage;
5. The garage roof and wall material is colorbond 'monument' or similar; and
6. Prior to any works commencing, the appellant is to obtain a development approval for building works for the assessable building works.

The conditions mentioned above are to be referred to and checked by the assessment manager, prior to the issue of the final inspection certificate.

## Background:

1. The subject lot is rectangular in shape and has a site area of 840 sq/m. It is a corner site bounded by two streets along the southern and western boundaries. There is a natural cross fall of 6M from the north eastern corner of the site to the south western corner and the the street below. The building pad for the existing dwelling is set approximately 4m higher than the level at the nature strip on the corner.
2. Given the slope, the nature strip along both street frontages has been significantly battered, landscaped and retained using stone wall construction. It is evident from the maturity of the landscape and the extent and condition of the stone wall, that this has been a feature and in place for many years. As the stone wall extends past several other adjoining properties it is likely that it was built at the time these lots were created. This is further evidenced by the fact that the walls step back to retain the embankments alongside all of the driveway crossovers and concrete pedestrian stair ways cut back in to access the properties.
3. Under the provisions of the local planning scheme, the subject site and many others surrounding it are zoned medium density residential, however there is little evidence yet of new or infill development. The majority of homes in this area (including the dwelling on the subject site) are between 50 and 60 years old. The subject lot is affected by a railway corridor overlay as there is a railway line to the south west and a major road corridor buffer due to National Park Road to the north.
4. The existing dwelling is of a light weight, timber framed construction, it is elevated across the sloping site and fronts Oxleigh Crescent. The living areas address the higher level on the north eastern corner of the yard ensuring there is minimal step down required to access the garden. This north eastern corner also provides ideal climatic conditions and maximum privacy being furthest from the street corner. The south western corner of the dwelling sits over the lowest portion of the site providing some limited sub floor storage opportunity. This portion of the dwelling is directly aligned with the existing, somewhat steep, driveway and the crossover from Oxleigh Crescent. It is unlikely though that even a small car could be adequately accommodated in this area under the dwelling. It is barely wide enough, does not have sufficient length and is only 1.8M high. There is an existing single width carport structure situated between the existing dwelling and the secondary street frontage. The carport appears to have been in place for many years however there is no evidence of whether or not the structure has ever been lawfully approved. The appellant proposes to remove the existing carport and construct a new garage in its place.
5. The proposed garage is a steel framed, steel clad gable structure, 4.5M wide and 7M long on a level concrete slab. The front gable end allows for a 3M wide rolladour and the rear gable end allows for a small window and personnel door. The length of the garage is shown as being parallel to and set 500mm inside the secondary street frontage. The garage has been sized to allow a further 900mm strip of landscaping between the alternate length of the new structure and the existing dwelling.

## **Jurisdiction:**

6. This appeal to the tribunal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal. In Schedule 1 of PA, section 1(2) states Table 1 may apply to a tribunal but only if the matter involves the circumstances set out in paragraphs (a) to (l). 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".
7. The tribunal is satisfied that the development application made to Council satisfies that requirement being, a development application for building works approval under the section 33 Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings of the Building Act 1975.
8. That application was subsequently refused by the assessment manager as directed by council as the concurrence 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 or all or part of the development application.

## **Decision Framework:**

9. Section 246 of the PA provides as follows (omitting the examples contained in the section):
  - (1) The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.
  - (2) The person must give the information to the registrar within 10 business days after the registrar asks for the information.
10. 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—
    - (a) other evidence presented by a party to the appeal with leave of the tribunal; or
    - (b) any information provided under section 246 [not relevant for this appeal].
11. Section 254 of the PA deals with how this appeal may be decided and the first three subsections of that subsection are as follows:
  - (1) This section applies to an appeal to a tribunal against a decision.
  - (2) The tribunal must decide the appeal by—
    - (c) confirming the decision; or
    - (d) changing the decision; or

- (e) replacing the decision with another decision; or
  - (f) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time; or
- (3) However, the tribunal must not make a change, other than a minor change, to a development application.

**Material Considered:**

*The material considered in arriving at this decision comprises:*

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 10 May 2019.
2. Preliminary Approval Decision Notice issued by the assessment manager on 8 May 2019.
3. Referral Agency Response issued by council to the assessment manager on 2 April 2019.
4. DA Form 2 Building work details as completed by Marlken Pty Ltd dated 8 March 2019.
5. Council's Request for Concurrence Agency Response (Building Work) and supporting written correspondence from the assessment manager dated 12 March 2019.
6. Site Plan and Building Plan of proposed garage as prepared by Australian Garage Supermarket.
7. Emailed correspondence between the council and the assessment manager dated 21 March 2019.
8. Owner's consent dated 1 May 2019, appointing the assessment manager as his representative for the appeal.
9. Appellant's consent dated 8 May 2019, appointing the assessment manager as his representative to the appeal.
10. Planning and Development Online information for the subject site
11. The Planning Act 2016 (PA)
12. The Planning Regulation 2017 (PR)
13. The Development Application Rules
14. The Building Act 1975 (BA)
15. The Building Regulation 2006 (BR)
16. The Queensland Development Code (QDC) Part MP 1.2
17. The Sunshine Coast Planning Scheme
18. The National Construction Code 2016 (NCC)

## Findings of Fact:

1. The subject site and adjoining residential properties are long established with very little evidence of contemporary building activity in the area.
2. Due to the topographical constraints, both vehicular and pedestrian access has been built into the stone retainment walls surrounding the site.
3. Given the position of the existing dwelling which currently has no garage, there are only two areas available and large enough to accommodate a garage. They are the north eastern corner adjacent to the living areas and the south eastern corner currently occupied by an existing carport. The existing driveway provides direct access to the location of the existing carport and it is therefore the preferred garage position. It became obvious when the Tribunal was on site for the hearing, that car parking has always been accommodated on this part of the site.
4. It was noted that the proposed garage could be situated in the north eastern corner without compromising the street setback. Access to this part of the allotment would require significant work due to the existing stone retainment wall on the boundary to the street and the location of an existing electric pole on the nature strip. There is also significant mature vegetation on the affected nature strip and available area within the north eastern garden area. Loss of this vegetation would negatively impact on the amenity enjoyed by all residents in this area.
5. The appellant engaged Marlken Pty Ltd, trading as the Australian Garage Supermarket to design and erect the proposed new garage. On 8 March 2019, Marlken Pty Ltd engaged the assessment manager to provide the required development approval for building works. The assessment manager referred the application to council as the concurrence agency for assessment against the provisions of the local planning scheme's Dwelling House Code, specifically road boundary setback requirements. On 2 April 2019, council directed the assessment manager to refuse the development application stating the proposed works did not satisfy the requirements of performance outcome PO2(d) of the Dwelling House Code.  
*PO2(d) Maintain the visual continuity and pattern of buildings and landscape elements within the street*
6. 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.
7. The *Building Regulation 2006* in Part 3, nominates the Queensland Development Code, as setting out the standard siting requirements for buildings and structures, except where the planning scheme identifies an alternative siting provision.

## Sunshine Coast Planning Scheme 2014

8. A dwelling house is a defined use in Schedule 1 of the Sunshine Coast Planning Scheme 2014 which states: A residential use of premises for one household that contains a single dwelling. The use includes out-buildings and works normally associated with a dwelling house and may include a secondary dwelling. Therefore by definition, any building application for a garage is interpreted as a building application pertaining to a dwelling house.
9. The subject lot is zoned Medium Density Residential which inherently provides opportunity for increased density through infill or urban renewal development.
10. Under Part 5, Material Change of Use tables of assessment, Table 5.5.2 states: within the Medium Density Residential zone, a dwelling house is accepted development provided it meets the acceptable outcomes of the Dwelling house code. Where proposed development does not meet the acceptable outcomes for the use code, the development becomes code assessable.
11. Under Part 5 Building Works Tables of assessment, Table 5.7.1 states: building works (for all zones) is accepted development if the applicable use code (Dwelling House code in this instance) and the Transport and Parking code identifies acceptable outcomes applicable to accepted development.
12. Section 5.3.3 (2) of the Scheme, states: Accepted development that does not comply with one or more of the relevant acceptable outcomes in the relevant parts of the applicable code(s) becomes assessable development requiring code assessment unless otherwise specified. In this matter, development for a Dwelling House becomes code assessable. The building works are subject to the provisions of the Dwelling house code, the Nambour local plan code and the Transport and parking code.
13. Section 9.3.6.2 Purpose and overall outcomes of the Dwelling House Code states in part: The purpose of the Dwelling house code is to ensure dwelling houses achieve a high level of comfort and amenity for occupants, maintain the amenity and privacy of neighbouring residential premises and are compatible with the character and streetscape of the local area.
14. Part 9.3.6.1 sets out the application of the Dwelling house Code provisions stating as follows:

This code applies to accepted development and assessable development identified as requiring assessment against the Dwelling house code by the tables of assessment in Part 5. The acceptable outcomes in Table 9.3.6.3.1 are requirements for applicable accepted development. Where accepted development does not meet the prescribed acceptable outcomes, the development becomes assessable development and can be assessed against the corresponding performance outcomes. Council becomes the referral agency in this situation.

15. Table 9.3.6.3.1 sets out Performance outcomes and acceptable outcomes for the Dwelling House Code, the relevant assessment criteria are listed below.

Acceptable outcome AO2.1 states in part:

Where located on a lot in a residential zone, a garage, carport or shed:-

- (a) is setback at least 6m from any road frontage;
- (b) does not exceed a height of 3.6m;

Note AO2.1 (a) is an alternative provision to the Queensland Development Code (QDC)

The corresponding performance outcome PO2 states:

Garages, carports and sheds:-

- (a) preserve the amenity of adjacent land and dwelling houses;
- (b) do not dominate the streetscape;
- (c) maintain an adequate area suitable for landscapes adjacent to the road frontage; and
- (d) maintain the visual continuity and pattern of buildings and landscape elements within the street.

16. In this matter assessment must be considered against the performance outcomes set out in PO2 as AO2.1 provisions are not being met. In addition, as is noted, AO2.1 (a) is an alternative provision to the Queensland Development Code, therefore no consideration can be given to front setback provisions of the QDC.

17. Part 9 Developments: 9.1 Preliminary (2) of the Scheme states: Use Codes and other Development codes are specific to each planning scheme area. Thus, the Nambour local plan performance outcomes and acceptable outcomes are given precedence to the provisions of the Dwelling house code and the Transport and parking code in this matter. However there is only one specific reference to development in the medium density zone development in the Nambour local plan area and it does not contradict and therefore does not override the outcomes sought in the Dwelling House Code or The Transport and Parking code pertaining to this matter. This is found under 7.2.22.3 (n).

18. Under 7.2.22.3(n) Purpose and overall outcomes for the local plan of Nambour, the medium density residential zone is to provide for a mix of housing types and densities with dwellings that are generally of a domestic scale or are provided in small groups so as to reduce the perceived scale and mass of development relative to its surrounds. This outcome is not yet evident in that part of Oxleigh Crescent, which is the focus of our consideration.

#### The Queensland Development Code (QDC)

19. The Dwelling House 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 450 m<sup>2</sup> 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 Dwelling House Code AO2.1 (a) provides some alternative siting provisions to the QDC A1 (a), therefore the 6m setback provisions (for a garage or a carport) of the Dwelling House Code apply to the proposed development.

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

1. The Tribunal finds that onsite residential car parking has long been established in the specific location as proposed by the appellant. This has transpired for two reasons, the location of the driveway which is channelled through a bounding stone wall and the lack of height and space underneath the dwelling which may have originally been considered suitable.
2. The proposed location of the garage will have negligible impact on the site and more importantly on neighbouring sites given that it will replace the existing carport without the removal of significant established vegetation.
3. While the building line setback to the secondary street will be 500mm, the location is approximately 4M higher than the street and almost completely screened from view by mature vegetation on the nature strip. The house will remain visible above the ridge of the garage from the street. The appellant has been conditioned to construct the garage in a dark colorbond colour to further disguise the structure upon completion.
4. The Tribunal finds that the proposed garage will therefore meet the requirements of PO2(d) that is: *maintain the visual continuity and pattern of buildings and landscape elements within the street.*, whilst PO2 (a), (b) and (c) were not in contention.

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**Debbie Johnson**

**Development Tribunal Chair**

**Date: 15 October 2019**



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