



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-008
Appellant:	Andrew and Linda Jones
Respondent: (Assessment Manager)	Sunshine Coast Regional Council
Site Address:	18 Pakenham Street, Aroona and described as Lot 17 on RP 185530 – the subject site

Appeal

Appeal under section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1 of the Planning Act 2016 (PA), against the part refusal of a development application for construction of a fence and deck on residential premises

Date and time of hearing:	Friday 24 July 2020 at 11.30am
Place of hearing:	18 Pakenham Street, Aroona (the subject site)
Tribunal:	Kim Calio– Chair Lisa Lambie- Member
Present:	Andrew and Linda Jones – Land owners and Appellants Tracey Douglas, Senior Development Planner - Council representative Peter Chamberlain Council Certifier - Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 (2)(c) of the *Planning Act 2016* (PA) **replaces** the assessment manager's decision with the following decision:

1. The deck and COLORBOND® (Colorbond) fence are approved subject to the below modifications and such other reasonable and relevant condition or conditions as the assessment manager sees fit provided that such condition is (or such conditions are) not inconsistent with the below modifications:
 - a. The deck and Colorbond fencing panels located above the deck are relocated 1 metre in from the western property boundary for a distance of approximately 4.7m equivalent to the two existing Colorbond panels at the rear southern end of the deck; and
 - b. Fast growing, low maintenance screening vegetation is established in the 1 metre space between the relocated deck and fence and the western property.

2. The assessment manager is to notify to the parties of such other reasonable and relevant condition or conditions as the assessment manager sees fit that is (or are) not inconsistent with the described modifications.

Background:

1. The original dwelling was constructed in 1985. The backyard had been filled and retained with hardwood sleepers when the appellants purchased the property in 2001.
2. The appellants undertook renovations including the construction of an inground pool and timber deck in 2001. On the western property boundary adjoining the neighbours at 20 Pakenham Street, Aroona, a sleeper retaining wall with a 6 foot high timber paling fence had been constructed.
3. Due to safety concerns, in late 2019 the appellants replaced the deck, sleeper retaining wall and fencing on the western boundary due to dry rot in the deck, termite damage to the sleepers and some subsidence of the filled land.
4. The appellants did not obtain the necessary approvals for the building work as they assumed approval would not be required given they were effectively replacing existing structures.
5. On 12/02/20 the appellants lodged a development application for Building Works Assessable against the Planning Scheme in response to Council compliance action triggered by a complaint about the works.
6. Council in its role as assessment manager approved the development application in part with conditions on 20 March 2020. The approval included the works associated with a Dwelling House - Retaining Wall only. However, the approval excluded works associated with the Colorbond fence and deck due to non-compliance with Dwelling House Code of the Sunshine Coast Regional Council Planning Scheme and the Queensland Development Code Part MP1.2 (QDC MP1.2).
7. The land owners, Andrew and Linda Jones, lodged a Notice of Appeal with the Development Tribunal on 17 April 2020.

Jurisdiction:

1. Section 229(1) of the PA identifies that schedule 1 of the PA states the matters that may be appealed to the tribunal.
2. Table 1 of schedule 1 states the matters that may be appealed to the Planning and Environment Court or the tribunal (subject, in the case of the tribunal, to the pre-conditions stated in section 1(2) of Schedule 1).
3. The tribunal has jurisdiction under section 229 and schedule 1, section 1, table 1, item 1 of the PA.
4. The pre-condition in section 1 sub-section (2) of schedule 1 for the application of table 1 to the tribunal is satisfied in this instance because of paragraph (g) in that the development application is a matter under the PA that relates to the Building Act 1975 (BA). The appellants seek approval for certain building work that is assessable against the building assessment provisions in the BA.

Decision Framework:

1. The onus rests on the appellants to establish that the appeal should be upheld (s. 253(2) of the PA).
2. 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 (s. 253(4) of the PA).
3. The tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under s.246 of the PA.
4. The tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

Material Considered:

The material (*Material Item*) 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 17 April 2020. Documents accompanying the Form 10 included:
 - a. Notice about the Decision – Statement of Reasons identifying the development application was approved in part subject to condition 20 March 2020 by the assessment manager Sunshine Coast Regional Council;
 - b. Proposed Plan set approved by the assessment manager 20/3/2020:
 - i. Retainer Plan DWG:S02 dated 20/1/2020 prepared by C & A Doherty Building Consultants
 - ii. Retainer Details DWG:S03 dated 20/1/2020 prepared by C & A Doherty Building Consultants
 - c. Grounds of appeal attachment which included:
 - i. 2 page statement with photographs prepared by the appellant
 - ii. Letter of support from Sunshine Coast Regional Council Division 3 Councillor Peter Cox
 - iii. Site Plan DWG:S04 dated 20/1/2020 prepared by C & A Doherty Building Consultants
 - iv. Elevation DWG:S05 dated 20/1/2020 prepared by C & A Doherty Building Consultants
 - v. Bearer & Joists DWG:S06 dated 20/1/2020 prepared by C & A Doherty Building Consultants; and
2. Application submitted by Kawana Building Approvals Building Certifiers to the Council 12 February 2020 (properly made 13 February 2020) illustrating the height of the fence and deck at its highest point along the western boundary as 3.5m (deck 1.7m high with a 1.8m high fence located on top).
3. Council's Information Request dated 21 February 2020.
4. The appellant's letter, dated 23 February 2020, submitted to Council by Kawana Building Approvals Building Certifiers 24 February 2020 in response to the Council Information Request.

5. Further response from Kawana Building Approvals Building Certifiers to the Council dated 11 March 2020 including revised plans which reduced the height of the fence and deck at its highest point along the western boundary from 3.5m to 2.9m.
6. The Council's Assessment Report for the application DBW20/0017 where in the Council's Delegate approved the recommendation of an approval in part with conditions on 20 March 2020.
7. Planning Act 2016 (PA).
8. Planning Regulation 2017.
9. Building Act 1975 (BA).
10. Building Regulation 2006.
11. Development Code (QDC) MP 1.2 – Design and Siting Standard for Single Detached Housing – on Lots 450m2 and Over publication date 11 March 2010.
12. Sunshine Coast Regional Council Planning Scheme 2014 Part 9 - 9.3.6 - Dwelling House Code.
13. 2 coloured photographs of the fence, deck and retaining structure taken from the back yard of 20 Pakenham Street, Aroona 18 January 2020 provided to the Registrar by Sunshine Coast Regional Council by email dated 24 July 2020, subsequent to the tribunal Hearing.
14. Aerial photo and contours illustrating the subject site and 20 Pakenham Street Aroona sourced from Sunshine Coast Regional Council online Development.i Maps

Findings of Fact:

The tribunal makes the following findings of fact:

Subject Site

1. The subject site is located at 18 Pakenham Street, Aroona and is generally rectangular in shape and generally slopes from north to south from the front of the site to the rear of the site. The site is 808m² and is 22.5m wide and 35.93m long. The contours indicate a change in level of approximately 5m across the site (*Material Item 15 refers*).
2. The subject site contains a single level detached dwelling, a shed, an out-house building, retaining walls and an inground pool with an adjoining deck. The dwelling is located towards the front of the site approximately 6m from the Pakenham Street frontage.
3. Adjoining the subject site to the west is a 2 storey dwelling located towards the front of the property with a varying set back of approximately 3m – 6m from the Pakenham Street road frontage
4. At the rear of the subject site a deck has been constructed adjacent to the western end of the inground pool. The deck is approximately 7.3m long, 1.8m wide and 1.6m high above the ground at its highest point. Above the deck a 1.8m high Colorbond fence has been constructed. Both structures are unapproved and combined at the highest point are 3.5m high. The deck and fence are constructed along the western property boundary of the subject site.

The Hearing

The Appellants

1. The appellants advised during the hearing that the works undertaken were in response to safety concerns due to the deterioration of the previous timber retaining wall and deck caused by termites and dry rot. The appellants also advised that a retaining wall and 6 foot high timber paling fence were in place at the time they purchased the property in 2001 and that they had not changed the excavation and retainment that had been carried out by the previous owners. The appellants built the inground pool in 2001 and at the time they constructed the timber deck adjacent to the pool together with an additional screening fence.
2. Building approval was not obtained for the new deck and fence and it was the Appellants' understanding that as they were replacing existing structures that an approval would not be required.
3. The appellants also expressed surprise that the Council had received a complaint about the works given they were a replacement of structures that had been in place for the last 18 years during which time the current neighbours have owned and lived at the property.
4. Due the compliance action taken by Council in response to a complaint, Kawana Building Approvals Building Certifiers submitted a development application for preliminary approval for a deck and fence on behalf of the Appellants on 12 February 2020 (*Material Item 2 refers*).
5. It is the appellant's view as expressed in their response to the Council's Information Request that the new fence and deck do not impact on the amenity of the neighbouring property (*Material Item 4 refers*). Further the 1.8m high Colorbond fence provide for privacy for both themselves and the neighbours.
6. The appellants also reinforced their advice to Council in the Information Response that the relationship with the neighbours had soured and they were not in a position to obtain the agreement of the neighbours for the structures.
7. Notwithstanding this view the appellants authorised Kawana Building Approvals Building Certifiers to submit revised plans which tapered the Colorbond fence from 1.8m at its northern end (adjacent to the house) to 1.2m at the southern end (at the rear of the property). This proposal did not mitigate Council's concerns resulting in a refusal of this part of the development application.
8. Options to mitigate the existing structure were canvassed with the appellants including landscaping on the neighbouring property however it was indicated by the appellants that this was not an available option. Other options canvassed included reducing the size of the deck to conform to the minimum setback of 1.5m or increasing the setback of the structures in order to provide for landscaping on the appellants property. The appellants noted the impracticalities of reducing the deck width by 1.5m to achieve the minimum setback. The appellants advised that they wished to retain the structures as they had been constructed.

The Council

9. Council in its role assessment manager approved the development application in part with conditions on 20 March 2020. The approval excluded works associated with the fence and deck due to non-compliance with the:
 - a. Dwelling House Code of the Sunshine Coast Regional Council Planning Scheme specifically AO15, PO15 and the purpose of the code and overall outcome 2(b) and
 - b. Queensland Development Code Part MP1.2 (QDC MP1.2) specifically A2 and performance outcome P2
10. During the hearing the tribunal noted that the Dwelling House Code provisions relate to Filling or Excavation however the main concern is the impact of the deck and Colorbond fencing particularly the height (for the section >2m to the maximum 3.5m) and length on the boundary (7.3m).
11. The Council Representatives noted their main concern related to QDC MP1.2 PO2 (b) and (c). From the site inspection undertaken by all parties at the Hearing Council Representatives were in agreement that QDC MP1.2 PO2 (b), which states "*Building and structures ... (c) do not adversely impact on the amenity and privacy of the residents on adjoining lots.*" was the core issue. It was also evident that the Colorbond material contributed to improved privacy for both the appellants and their neighbour by being a solid fence and if it was tapered to 1.2m at the southern end undesirable privacy outcomes would result. Council's concern related to how the structures impacted the amenity of the neighbours noting that at its highest point the combined deck and Colorbond fence was approximately 3.6m high.
12. Council agreed to provide photographs previously taken by Council from the neighbour's property to the Registrar to indicate the impact of the structures from the adjoining property (*Material Item 14 refers*).

Post Hearing

13. Photos of the fence, deck and retaining structure were received by the Registrar on 24/7/2020 (*Material Item 14 refers*) which illustrate the scale of the structures on the western boundary of the subject site adjoining 20 Pakenham Street Aroona. These photographs confirmed the observations at the tribunal site meeting that the current scale and location of the combined deck and Colorbond fencing, particularly at the southern most point, has the potential to impact on the amenity of the back yard of the neighbouring property at 20 Pakenham Street, Aroona.

Queensland Development Code (QDC) MP 1.2 – Design and Siting Standard for Single Detached Housing – on Lots 450m² and Over publication date 11 March 2010

14. The section of MP1.2 which Council determined that the structure did not comply with is stated below:

"PO2 Buildings and structures - facilitates an acceptable streetscape, appropriate for-

 - (a)*
 - (b)*
 - (c) do not adversely impact on the amenity and privacy of residents on adjoining lots."*
15. It was observed during the Hearing that the combined deck and fence structures were particularly imposing from the neighbours' perspective from the last 2 southern rear fencing panels. This was confirmed from the photographs provide by the Council (*Material Item 14 refers*).

16. It was also observed the subject site and surrounding properties were of a consistently large size all being in the order of 800m² and that the higher parts of the combined deck and fence structures were located away and to the rear of the house on the neighbouring property. Further it was noted there was a garden located along the common boundary on the neighbours' property (*Material Item 13 refers*).

Reasons for the Decision:

1. The tribunal considers that the present form of the combined deck and Colorbond fence structures do not meet Queensland Development Code (QDC) MP 1.2 – Design and Siting Standard for Single Detached Housing – on Lots 450m² and Over - Performance Criteria P2(c) as they are likely to have an adverse impact on the amenity of residents on the adjoining property when in the rear of the property. The main cause of this likely impact is scale and height of the structures located on the common boundary particularly in the location of the two existing Colorbond panels at the rear southern end of the deck.
2. Therefore the tribunal has determined that:
 - a. the deck and Colorbond fencing panels located above the deck are to be relocated 1 metre in from the western property boundary for a distance of approximately 4.7m equivalent to the two existing Colorbond panels at the rear southern end of the deck; and
 - b. fast growing, low maintenance screening vegetation is to be established in the 1 metre space between the relocated deck and fence and the western property.
3. This increase in side setback for approximately 65% of the length of the deck combined with the provision of screening vegetation along the property boundary within the setback area would facilitate an acceptable amenity outcome as it will reduce the dominance and appearance of bulk when viewed from neighbouring property. In coming to this conclusion the tribunal noted the general indications from Council at the Hearing that relocating the deck and fencing to enable landscaping to be provided on the subject site to soften the impact of the structure would assist in alleviating their concerns.

Minor Change

4. The tribunal has decided to approve the development application subject to the following 'minor changes':
 - a. the deck and Colorbond fencing panels located above the deck are to be relocated 1 metre in from the western property boundary for a distance of approximately 4.7m equivalent to the two existing Colorbond panels at the rear southern end of the deck; and
 - b. fast growing, low maintenance screening vegetation is to be established in the 1 metre space between the relocated deck and fence and the western property.
5. As the PA does not permit a tribunal to make any change other than a minor change, the tribunal considered the relevant provisions of the PA and Development Assessment Rules to ensure the change meets the legislative test for being a minor change.

6. Section 254 of the PA deals with how this appeal may be decided and the first three subsections of that section 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) *for a deemed refusal of an application—*
 - (i) *ordering the entity responsible for deciding the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
 - (ii) *deciding the application.*
- (3) *However, the tribunal must not make a change, other than a minor change, to a development application.*

7. Section 254(3) refers to 'minor change' which is defined in schedule 2 of the PA as follows:

Minor change means a change that—

- (a) *for a development application—*
 - (i) *does not result in substantially different development; and*
 - (ii) *if the application, including the change, were made when the change is made— would not cause—*
 - (A) *the inclusion of prohibited development in the application; or*
 - (B) *referral to a referral agency if there were no referral agencies for the development application; or*
 - (C) *referral to extra referral agencies; or*
 - (D) *a referral agency to assess the application against, or have regard to, matters prescribed by regulation under section 55(2), other than matters the referral agency must have assessed the application against, or have had regard to, when the application was made; or*
 - (E) *public notification if public notification was not required for the development application;*

8. Schedule 1 of the Development Assessment Rules addresses the meaning of 'substantially different development'. A change may be considered to result in a substantially different development if any of the following apply to the proposed change:

- (a) *involves a new use; or*
- (b) *results in the application applying to a new parcel of land; or*
- (c) *dramatically changes the built form in terms of scale, bulk and appearance; or*
- (d) *changes the ability of the proposed development to operate as intended; or*
- (e) *removes a component that is integral to the operation of the development; or*
- (f) *significantly impacts on traffic flow and the transport network, such as increasing traffic to the site; or*
- (g) *introduces new impacts or increase the severity of known impacts; or*
- (h) *removes an incentive or offset component that would have balanced a negative impact of the development; or*
- (i) *impacts on infrastructure provisions.*

9. The tribunal finds that the identified amendments to the structures together with the provision of landscaping whereby the existing deck and Colorbond fence is relocated 1m in from the western boundary of the subject site for a distance equivalent to the last two rear southern fence panels and this setback is landscaped with fast growing screening vegetation meets the test for being a minor change as it would not result in substantially different development. Further if the application, including the change, were remade it would not cause the development to be prohibited development, referral to any referral agencies or public notification.

Kim Calio

Development Tribunal Chair

Date: 9 September 2020

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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