



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-024
Appellant:	Adaptit Cairns Pty Ltd
Respondent (Assessment Manager):	Harald Walter Weber
Co-respondent (Concurrence Agency):	Cairns Regional Council
Site Address:	56 Piccone Drive, Edmonton and described as Lot No. 303 on SP 182884 – the subject site

Appeal

Appeal under section 229 and schedule 1 (Appeals), section 1, item 1, table 1 of the *Planning Act 2016* against the Assessment Manager's decision dated 17 May 2019 to refuse the developmental approval for a carport at 56 Piccone Drive, Edmonton

Date and time of hearing:	10:00 am on 16 August 2019
Place of hearing:	56 Piccone Drive, Edmonton Queensland
Tribunal:	John Eylander– Chair Bruce Shephard – Member
Present:	Dennis Maude of Adaptit Cairns Pty Ltd – Appellant Russell and Nicole Davey – Home Owners Harold Weber – Assessment Manager Jayne Proberts and Teresa Schmidt - Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(d) of the *Planning Act 2016* (PA), sets the decision aside, and orders the Assessment Manager to remake the decision by 11 November 2019, allowing for the minor change mentioned below and accepting the Tribunal's view that the proposed development complies with the performance criteria specified in QDC MP 1.2.

The minor change referred to above is that the carport's side panelling is to be constructed to a height of not more than 1.8 metres above the finished driveway level and the gateway on elevation A.05 is to be left open.

Background:

1. Piccone Drive, Edmonton is on the easterly side of the Bruce Highway south of Cairns. It is in a residential area. Nearby are small shopping centres and a Council facility "Sugarworld" a water park treasured by the Cairns community. The suburb is open and green. The street is at the bottom of the World Heritage hill slope that rises up to the Atherton Tablelands and forms part of the Great Dividing Range. The views and outlook to the street and the hill slope give character and beauty to the neighbourhood.
2. The homeowners engaged Adaptit Cairns to build a carport within the front setback at the subject site. The Carport design incorporates a roof and 2 posts being a Stratco Kit "Outback Deck" in the colour "Desert". The rear of the structure is attached to the front of the existing double garage of the lowset bungalow style home made from rendered block and includes a colorbond hipped roof. This style of house dominates the neighbourhood. The design includes 65mm Duraslat panels in the colour "Thunder" to the 2 sides of the carport together with a door, to ceiling height of over 2 metres. The carport design has a 6 metre opening (2 car width) within the front setback to the street, and is 5.2 metres deep with a height of 2.75 metres at the existing house with the roof falling towards the road.
3. The tribunal was concerned a subsequent owner may enclose the front of the carport with a gate or roller door. This is not in character to the neighbourhood.
4. On 15 May 2019 the concurrence agency, Cairns Regional Council gave its response to the development application to refuse the application for variation to the siting requirements outlined in the Queensland Development Code MP1.2 for the reasons –
 - I. *The proposed carport has been assessed against the performance criteria stated in MP1.2 of the Queensland Development Code.*
 - II. *The proposed carport is proposed to be situated up to the front boundary line of the allotment and up to 1.1 metres from the outermost projections to the left side boundary and is considered to compromise the character of the streetscape and neighbourhood area.*
 - III. *The proposed carport is therefore considered to compromise the achievement of the performance criteria stated in MP1.2, with specific reference to Performance Criteria P1 – The location of building or structure facilitates an acceptable streetscape appropriate for (front boundary setback encroachment) –*
 - a. *(b) the road boundary setbacks of the neighbouring buildings or structures.*
 - b. *The streetscape is characterised by single storey rendered masonry block dwellings with varying setbacks from the front boundary line, with no garages or carports constructed up to the front boundary line. The proposed carport has a low pitched roof and is proposed to be enclosed with metal slats on both sides. The proposed setback from the front boundary, the construction materials and built form are not consistent with the boundary setbacks of the lawful neighbouring buildings and structures in the immediate streetscape visible from the site.*

5. The representatives from the Council submitted the only ground for refusal was QDC MP 1.2 P1.

The applicant submitted –

- I. the inclusion of the 65mm Duraslat panels was sympathetic to front horizontal slat fences in the neighbourhood;
- II. The rear of the carport would be attached to the garage block wall, below the existing gutterline;
- III. The roof had a 2 degree pitch so would not dominate the outlook or view.

The homeowners submitted –

- I. They could not incorporate vehicular side access to the property because of services at the other side of the front yard;
- II. There is a large side entry pit in the kerbing and channel in front of the services box;
- III. The delay in the assessment process and appeal was taking too long and stressful for them and their marriage;
- IV. Their garage housed 2 classic cars;
- V. Their daily drive vehicle was being damaged by the sun and elements whilst parked on the driveway;
- VI. Many neighbours had shade sail structures above their driveways;
- VII. They had the consent of their neighbours and many other residents on the street.

6. The Council confirmed that a second driveway would need to be assessed against the traffic flow and usage of the street and doubted it would be approved due to the side entry pit location and services. They also noted there were many shade sail structures in Piccone Drive that had been erected without development approval.

The Assessment Manager sought and was granted leave to attend and made submissions that –

- I. The neighbour's existing block fence was self assessable;
- II. The height of the carport was about 60 cm above the neighbour's fence;
- III. The block fence was in front of the proposed carport on the bend of Piccone Drive and would conceal much of the proposed carport when traveling from the westerly direction;
- IV. The block fence gave bulk to the outlook as persons travelled from the easterly direction;
- V. The 65mm Duraslat panels to the side of the carport softened the bulk of the blockwork, with the appearance of a horizontal slat fence;
- VI. The Duraslat panels could be reduced to the height of fences in the neighbourhood, from over 2 metres to not more than 1.8 metres;
- VII. The Council had on other occasions of refusal, engaged in dialogue about remedies to the Council's concerns, but did not do so with this refusal.

7. The tribunal encourages the Council to engage in dialogue about remedies, before issuing concurrence agency advice for refusal.
8. The homeowners agreed to a minor variation reducing the height of the Duraslat panels.
9. The Applicant agreed the carport could be constructed with Duraslat panels to a height of 1.5 or 1.8 metres.
10. The Council submitted a change in design could be submitted for assessment.

Jurisdiction:

1. The tribunal's jurisdiction for this appeal arises under section 229 and schedule 1 (Appeals), section 1, item 1, table 1 of the PA.
2. Section 1(2) of schedule 1 imposes a pre-condition for the operation of table 1 in relation to a tribunal. The matter must involve one of the things mentioned in paragraphs (a) to (l) of section 1(2). In this instance, the development application is for construction of a carport and the tribunal is satisfied that paragraph (g) of section 1(2) applies.

Decision Framework:

1. The onus rests on the appellant 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 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 22 May 2019;
2. Authority to Act authorising Dennis Maude to act for Adaptit Cairns;
3. Grounds for Appeal;
4. Decision Notice Refusal by All Construction Approvals;
5. Neighbourhood consent to the carport by the owners of 63, 43, 52, 47, 48, 42, 53, 36, 121, 38, 54, 61, 50, 60, 55, 62, 57, 65, 59, 71, 69, 73, 64, 68, 83, 58 Piccone Drive and 6, 8 Gates Close;
6. Cairns Regional Council Concurrence Agency Response dated 15 May 2019;
7. DA Form 2 – Building Work details

Findings of Fact:

1. The homeowners cannot incorporate side access for vehicles due to utilities and a large side entry pit in the kerb and channel.
2. The home is positioned at an outside bend of the street, tucking the carport behind the neighbour's front boundary. The proposed carport is alongside the neighbour's block retaining wall and fence. The height of the carport would be about 60 cm above the fence height. This block retaining wall and fence has greater bulk than the proposed carport. As such, the proposed carport softens the view of the block retaining wall and fence.
3. The incorporation of the horizontal 65mm Duraslat panels is within character of the horizontal slat fences in the neighbourhood.
4. The proposed carport does not affect the outlook and views of neighbouring residents.
5. However, the inclusion of Duraslat panels to ceiling height is greater than neighbourhood front fences, and creates a cage like structure. This is not in accordance with the character of the neighbourhood.
6. Whilst not included in the design, the attachment of a roller door or gates to the front elevation seems likely in the future. Gates to the carport would infringe the footpath and pose a nuisance and safety risk to pedestrians and infringe performance criteria P1(a), being the bulk of the structure. A roller door would be out of character in the neighbourhood and infringe performance criteria P1(a), being the bulk of the structure.

Reasons for the Decision:

1. The Tribunal agrees with the Concurrence Agency's decision to refuse the DA and considers the Duraslat panels to the ceiling gives too much bulk to the proposed carport, is cage like, and out of character in the neighbourhood.
2. Whilst the applicant submitted consent from 26 neighbours on Piccone Drive to the carport, the tribunal notes that –
3. At least 3 times this number of neighbours on Piccone Drive have not expressed a view;
4. The Council must consider not only the neighbour's views, but also those of the community, together with the PA and Regulations forming the Laws of the State.
5. The homeowners proposed a minor variation to the height of the panels to either 1.5 metres or 1.8 metres.
6. The tribunal cannot consider a change to the development approval unless the change is only a minor change to the approval pursuant to s254(3) of the PA. A "*minor change*" is defined in Schedule 2 of the PA and relevantly states:

*"minor change means a change that— ...
(a) for a development application—*

(i) does not result in substantially difference 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, other than to the chief executive, if there were no referral agencies for the development application; or*
- (C) *referral to extra referral agencies; or*
- (D) *a referral agency, in assessing the application under section 55(2), to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application as made; or*
- (E) *public notification if public notification was not required for the development application.”*

7. Schedule 1 of the Development Assessment Rules, promulgated by the Minister under s68 of the PA provides for consideration what would result in substantially different development and relevantly at section 4 –

A change may be considered to result in a substantially different development if 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;⁴ 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.*

8. In *GWB Investments Pty Ltd v Brisbane City Council* [2018] QPEC 33 at [48] – [49], Kefford DCJ said when considering “*minor change*” to a development approval:

There is no stated legislative requirement to consider these matters. They are also not an exhaustive statement of the circumstances that might be relevant to the determination of whether something is substantially different development. Nevertheless, applying a purposive approach to the reading of the planning legislation, both parties accepted that it was appropriate to have regard to them. I accept that it is appropriate that I do so.

Whether the proposed change is a 'minor change' is a matter of fact and degree. It should be considered broadly and fairly, with guidance found in Schedule 1 of the Development Assessment Rules.

9. The proposed minor change reduces the open 65mm slat panels to the sides of the carport from over 2 metres to not more than 1.8 metres with the gate way shown on elevation A.05 Perspective View of the Adaptit Plans attached to the Concurrence Agency Response, be left open and the carport is not to be further enclosed at a later date. This does not result in substantially different development or cause or trigger any of those things set out in the definition for minor change (Schedule 2 of the PA 'minor change' (a) (ii)).
10. The reduced height of the panels would reduce the bulk and cage like appearance of the carport. This minor change is sympathetic to the neighbourhood's horizontal slat fences.
11. There are no new impacts, nor does the minor change increase the severity of known impacts, nor those things in "Schedule 1: Substantially different development" of the Development Assessment Rules. The Tribunal agrees with this minor change, that addresses the Council's concerns forming the refusal.
12. This decision should not be used as a precedent for further developments within the front setbacks along Piccone Drive Edmonton as the Council (Concurrence Agency) and Building Certifier (Assessment Manager) should assess each project on its own merit, as specific site conditions were factors in this appeal.
13. Accordingly, the tribunal makes the orders set out on page 1 of this decision.

John Eylander

Development Tribunal Chair
Date: 10 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:

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