



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19 – 003
Appellant:	Colin Brockwell
Respondent (Assessment Manager):	Neil Lockett of Sunshine Coast Inspection Services
Co-respondent (Concurrence agency):	Sunshine Coast Regional Council.
Site Address:	15 Ocean View Avenue, Mooloolaba, Q 4577 described as Lot 55 on RP 115937 – the subject site.

Appeal

Appeal under section 229 and Schedule 1, Section 1, Table 1, Item 1 of the *Planning Act 2016* against a decision to refuse a development permit for construction of an 'as built' class 10a carport, being building works assessable against the planning scheme (works associated with a dwelling house). The application was refused on the basis that the structure, did not comply with the Dwelling House Code of the Sunshine Coast Planning Scheme 2014, and could not be conditioned to comply with the assessment benchmarks.

Date and time of hearing:	10.00am on Wednesday 13 May 2019.
Place of hearing:	15 Ocean View Avenue, Mooloolaba, Q 4577
Tribunal:	Don Grehan – Chair Victor Feros – Member
Present:	Anita Garton – Member Colin Brockwell – Appellant Peter Chamberlain – Council representative

Decision:

The Development Tribunal, in accordance with section 254(2)(c) of the *Planning Act 2016*, **replaces** the Decision of the Assessment Manager with a decision approving the development permit, subject to such conditions as the assessment manager sees fit to impose.

Background:

1. The Council, as the Assessment Manager, refused an Application for a Development permit for building works assessable against the planning scheme (works associated with a dwelling house) in relation to a retrospective development permit for building works for an existing Class 10a attached double carport the siting of which was contrary to the road boundary setbacks and building height provision identified as Acceptable Outcomes in Part AO2.1 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014, as the relevant assessment benchmark.
2. The Council, in refusing the application, considered that the road boundary setbacks and building height of the existing Class 10a attached double carport did not comply with the Dwelling house code and could not be conditioned to enable compliance with the relevant assessment benchmarks.
3. The Appellant, dissatisfied with the refusal, lodged an appeal with the Development Tribunal Registry against the Decision of the Assessment Manager.

Jurisdiction:

4. Appeal made under the *Planning Act 2016* (PA), section 229(1)(a)(i) and Schedule 1, section 1(2)(g) and Table 1, item 1(a) being an appeal by the Appellant (the Appellant) against the refusal of all or part of the development application by the Assessment manager (The Respondent).

Decision Framework:

5. Section 252 of the PA sets out matters relevant to deciding jurisdiction of appeal proceedings with subsections 252(1) (a) & (b), 252 (2), 252(3) and 252 (4) confirming specific aspects.
6. Section 253 of the PA sets out matters relevant to the conduct of this appeal with subsections 253(2), 253(4) and 253(5) confirming specific aspects.
7. Section 253(2) of the PA confirms that generally, the appellant must establish the appeal should be upheld.
8. Section 253(4) of the PA confirms that 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.
9. Section 253(5) of the PA however confirms that 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.
10. Section 246 of the PA provides that the Registrar may, at any time, ask a person to give the registrar any information that the registrar reasonably requires for the proceedings.

Material Considered:

The material considered in arriving at this decision comprises:

11. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on the 23rd of January 2019.
12. Plans and Specification for the proposed carport.
13. Sunshine Coast Regional Council's Decision Notice dated the 14th of December 2018, Reference Number DBW18/0193.
14. Sunshine Coast Regional Council's compliance advice letter, Reference Number COM18/1657 dated the 9th of October 2018.
15. The *Planning Act 2016* (PA).
16. The *Planning Regulation 2017*(PR).
17. The *Building Act 1975* (BA).
18. The *Building Regulation 2006* (BR).
19. The Sunshine Coast Planning Scheme 2014.
20. The Dwelling House Code of the Sunshine Coast Planning Scheme 2014.
21. Queensland Development Code Mandatory Part 1.2 - Design and Siting Standard for Single Detached Housing – On Lots 450m² and over (QDC MP 1.2).
22. Verbal submissions from the Appellant at the hearing.
23. Verbal submissions from Council's representative at the hearing.
24. Email correspondence from Council and the Appellant.

Findings of Fact:

25. The subject site is a 587m² uniformly rectangular shaped allotment situated on the south eastern side of Ocean View Avenue in an established residential area of Mooloolaba. Topographically, the allotment is located below the crown of the Ocean View Avenue and falls away towards the rear at an approximate slope of 6%.
26. A single storey dwelling with appurtenant outdoor living spaces and attached double carport are located on the subject site.
27. The subject site is zoned Low Density Residential under the Sunshine Coast Planning Scheme 2014 and is subject to the Airport Environs Overlay and Height of Buildings and Structures Overlay.
28. The Appellant purchased the subject site in June 2015 and at the time of settlement the single storey dwelling and appurtenant attached double carport were fixed buildings and structures attached to the land. Notwithstanding having made enquiries with the Sunshine Coast Regional Council (Council) the Appellant was unaware that the attached double carport has been constructed in the absence of a development permit for building work.

29. On the 9th of October 2018, as a result of general area compliance activities, Council issued a compliance letter to the Appellant, Ref. No. COM18/1657, advising that the attached double carport did not have the required approvals or consent for its location within the front boundary setback and further advising of the requirement to engage a Private Building Certifier with a view to obtaining a retrospective development permit for building works in order to legitimize the structure.
30. On the 13th of November 2018, the Appellant engaged a Private Building Certifier (Mr Neil Luckett, Sunshine Coast Inspection Services) as the Assessment Manager for a retrospective application for development permit for building works for the attached double carport. The Private Building Certifier has not elected to be a party to this appeal.
31. The attached double carport is a gabled end structure constructed up to (approximately) the road frontage boundary and setback 1500mm from the south western side boundary. It is 7275mm in width, 5560mm in length and 3897mm in height to its ridge.
32. The Tables of Assessment with Part 5 the Sunshine Coast Planning Scheme 2014 confirm that neither the Airport Environs nor Height of Buildings and Structures Overlays change the category of assessment for the attached double carport from that stated in the relevant requirements for accepted development and assessment benchmarks for assessable development.
33. To qualify as Accepted Development, Acceptable Outcome AO2.1 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 requires:

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

 - (a) is setback at least 6 metres from any road frontage;
 - (b) does not exceed a height of 3.6 metres; and
 - (c) has a total floor area that does not exceed 56m².
34. The setback to road frontage boundary and the height of the attached double carport are contrary to the Acceptable Outcome AO2.1 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 as an applicable assessment benchmark.
35. Performance Outcome P2 and Acceptable Outcome AO2.1 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 is identified as an alternative provision to the QDC.
36. Section 83 of the BA sets out general restrictions Private Building Certifier granting the building development permit with subsections 83(1)(a), 83(1)(c) and 83(1)(d) confirming specific restrictions on granting a building development before all necessary development permits, preliminary approvals or referral agency's response have been obtained and are in effect.
37. On the 15th of November 2018, Council received an Application from the Private Building Certifier for a Development permit for building works assessable against the planning scheme (works associated with a dwelling house).
38. The DA Form 2 submitted as part of the application for a Development Permit for Building Works Assessable against the Planning Scheme identified the following :
 - (1) The Applicant being Private Building Certifier, Mr Neil Luckett, Sunshine Coast Inspection Services;
 - (2) The Assessment Manager being Sunshine Coast Regional Council,
 - (3) The type of approval sought being a Development permit; and

- (4) That that development application did not include any building work aspects that had any referral requirements.
39. On the 14th of December, Council issued a Decision Notice advising that on the 12th of December Council decided to refuse the application stating the appurtenant Statement of Reasons that the reasons for the refusal were:
- (1) The development does not comply with the Dwelling house code. And
 - (2) The development cannot be conditioned to enable compliance with the assessment benchmarks identified as not being complied with.
40. On the 10th of January 2019, Private Building Certifier, Mr Neil Lockett, Sunshine Coast Inspection Services, issued a Decision Notice - Refusal in deciding the retrospective application for development permit for building works for the attached double carport. There were no reasons for refusal documented in the Decision Notice.
41. Section 30 of the BA defines the building assessment provisions against which the compliance of a building development application must be assessed with Subsections 30(e) and 30(g) confirming specific aspects.
42. Section 30(e) of the BA confirms that any relevant local law, local planning instrument or resolution made under section 32 of the BA or any relevant provision under section 33 of the BA are building assessment provisions.
43. Section 30(g) of the BA confirms that the Mandatory Parts of the Queensland Development Code (inclusive), subject to section 33 of the BA, are building assessment provisions.
44. Section 31 of the BA sets out that Building assessment provisions are assessment benchmarks for the PA with subsections 31(4) and 31(6) confirming that the building assessment provisions cannot be changed under a local law, local planning instrument or local government resolution other than where allowed by sections 32 and 33 of the BA.
45. Building height is a Building Assessment Provision regulated by Performance Criteria P4 of QDC MP1.2 via either compliance with the Acceptable Solution A4 or by the formulation of an alternate solution that addresses the relevant criteria.
46. Road Boundary Setbacks are a Building Assessment Provision regulated by Performance Criteria P1 of QDC MP1.2 via either compliance with the Acceptable Solution A1 or by the formulation of an alternate solution that addresses the relevant criteria.
47. Section 32(b) of the BA confirms that a local government may make or amend a provision of a planning scheme about an aspect of, or matter related or incidental to, building work prescribed under a regulation.
48. Section 10 of the BR confirms that, for a single detached class 1 building or a Class 10 building or structure located on the same allotment as a single detached Class 1 building a local government planning scheme may provide that all or some of performance criteria 4 (building height) of QDC Part 1.2 and the relevant acceptable solutions under the part for the performance criteria apply, or may, provide for qualitative statements for matters provided for under all or some of the performance criteria if the scheme also provides for quantifiable standards for the statements.
49. Section 32(c) of the BA confirms that a local government may make or amend alternative provisions under section 33 of the BA.

50. Section 33 of the BA confirms that a Planning Scheme may include provisions (alternative provisions) that are alternative or different to the QDC boundary clearance subject to those alternative provisions being a qualitative statement or quantifiable standard.
51. Part 3, Division 2, Table 3 (Design & Siting), Column 2 Section (b) of Schedule 9 of the PR confirms that where, under the Building Act, section 33, an alternative provision applies for the building work and, under the provision, the proposed building or structure is not of the quantifiable standard for a relevant qualitative statement under the provision, the Local Government is the referral agency for the assessment of whether the proposed building or structure complies with the qualitative statement stated in the paragraph.
52. Part 3, Division 2, Table 3 (Design & Siting), Column 2 Section (c) of Schedule 9 of the PR confirms that:
- (i) where, under the Building Regulation, section 10, the planning scheme includes a provision about a matter provided for under performance criteria P4, P5, P7, P8 or P9 of the Queensland Development Code, part 1.1 or 1.2; and
 - (ii) the provision applies for building work; and
 - (iii) under the provision, the proposed building or structure is not of the quantifiable standard for a relevant qualitative statement under the provision.

The Local Government is the referral agency for the assessment of whether the proposed building or structure complies with the qualitative statement stated in the paragraph.

53. On the 18th of October 2019, the Tribunal, in accordance with Section 250 of the Planning Act 2016 and having regard to Sections 30, 31 and 32 of the Building Act 1975 and Section 10 of the Building Regulation 2006 directed Council, via correspondence from the Registrar, to reassess the originating application (Council Reference: DBW18/0193) as a Referral Agency (Concurrence) pursuant to Table 3 (Design & Siting), Column 2 Section (b) of Schedule 9 of the Planning Regulation 2017 and requiring the referral agency response arising from this reassessment be given by 5pm on Monday 4 November 2019.
54. Council did not to comply with the directions of the Tribunal by the stated time and, via email correspondence received by the Registrar on the 7th of November 2019, offered a contrary view to that the Tribunal namely:
- “The Sunshine Coast Planning Scheme 2014 – Dwelling House Code contains express provisions regarding maximum carport height and set-back to front property boundaries.*
- Council agrees the front boundary set-back component of the carport is a building assessment provision to be assessed via the concurrence agency referral process as an alternate siting provision to the Queensland Development Code (“QDC”).*
- Council does not agree that the height component can be lawfully assessed via the concurrence agency referral process. Council’s opinion is that the over height component of the carport requires code assessment against council’s Dwelling House Code as a development permit for building works assessable against the planning scheme. Council has obtained legal advice corroborating this position.”*
55. In an attempt to better understand Council’s position and noting that Council’s response of the 7th of November was not supported by legislative references, the Tribunal, via email correspondence through the Registrar of the 20th of December 2019, requested Council provide a further submission in support of their position (*i.e.* the correctness of

the role adopted by the Council) including all pertinent legislative references be given by 5pm on Friday 17 January 2020.

56. On the 7th of January 2020 Council submitted email correspondence to the Tribunal the relevant parts of which states:

“Council believes the correct assessment process for this Residential carport exceeding 3.6 m in height (express Council Planning Scheme provision) and located closer than 6.0 m to the front boundary (express Council Planning Scheme provision) is via a Council development application for the assessment of non-conforming aspects of building work against the Performance Outcomes of the Council Planning Scheme (a DBW application). The following legislative justification is provided for your consideration—

- a) *Council is an assessment manager for the building work and must assess the development against PO2 (as it relates to the subject matter of AO2.1(b)) of the Dwelling house code, having regard to Schedule 8, Table 1A, Item 1 of the Planning Regulation, because:*
- *AO2.1(b) and PO2 of the Dwelling house code cannot be classified as building assessment provisions relating to P4 of part 1.1 of the QDC included in the Planning Scheme pursuant to section 32(b) of the Building Act and section 10(2)(b) of the Building Regulation; and*
 - *AO2.1(b) and PO2 seek to regulate the height of carports (amongst other buildings) to ensure the amenity of adjacent land and dwelling houses is preserved, the carports do not dominate the streetscape, an adequate area suitable for landscapes adjacent to the road frontage is maintained and the visual continuity and patter of building and landscape elements within the street are maintained; and*
 - *whereas, PO4 of part 1.1 of the QDC regulates the height of carports (amongst other buildings) to ensure adjoining houses are not unduly overshadowed and the outlook from adjoining lots is not obstructed; and*
 - *the above distinction is supported by the fact the planning scheme limits carports to 3.6m, whereas the QDC limits carports to 8.5-10 m depending on the slope.”*

Reasons for the Decision:

57. The Tribunal having considered the relevant legislative provisions and the contrary justifications of Council, is of the view that the matters of Road Boundary Setback and Building Height in relation to single detached class 1 buildings or a class 10 buildings or structure located on the same allotment as a single detached class 1 building are building assessment provisions.

58. The Tribunal considers that as a building assessment provision, the matter of Road Boundary Setback in relation to single detached class 1 buildings or a class 10 building may be varied by a Planning Scheme subject to the provisions of Section 33 of the BA.

59. As a building assessment provision, the matter of Building Height in relation to single detached class 1 buildings or a class 10 building may be varied by a local law, local planning instrument or local government resolution subject to the provisions of Section 32(b) of the BA in conjunction with Section 10 of the BR.

60. Regarding the height and road boundary setback of the carport, Performance Outcome P2 and Acceptable Outcome AO2.1 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 are qualitative statements and quantifiable standards and are alternate provisions to the QDC MP 1.2 for Design and Siting purposes pursuant to Sections 32(b) and 33 of the BA.
61. The Tribunal considers that, in relation to road boundary setback of the carport, in accordance with Part 3, Division 2, Table 3 (Design & Siting), Column 2 Section (b) of Schedule 9 of the PR, Council was a Referral Agency for the assessment of whether the attached double carport complies with the Performance Outcome P2 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 and were not the Assessment Manager.
62. The Tribunal considers that, in relation to the height of the carport, in accordance with Part 3, Division 2, Table 3 (Design & Siting), Column 2 Section (c) of Schedule 9 of the PR, Council was a Referral Agency for the assessment of whether the attached double carport complies with the Performance Outcome P2 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 and were not the Assessment Manager.
63. The Tribunal is of the view that the Appellant should not be disadvantaged by the procedural error of Council. Accordingly, the tribunal treats the purported decision notice by the Council as a referral agency response to the building certifier Mr Lockett, who in the tribunal's view was in fact the assessment manager.
64. The Tribunal is satisfied that Performance Outcome PO2 has been met in in relation to the height and road boundary setback of the existing Class 10A carport, built to the road boundary and 1500mm from the south western side boundary, 7275mm in width, 5560mm in length and 3897mm in height to its ridge as:
- (a) The carport does not detrimentally affect the amenity of adjacent land and dwelling houses given the relatively benign nature of its intended use as car accommodation;
 - (b) The carport is no more or less dominant in terms of the streetscape than other Class 10A carports with similar reduced road boundary setbacks along Ocean View Avenue;
 - (c) The carport's location leaves sufficient space on the subject site area suitable for landscaping adjacent to the road; and
 - (d) The carport is not inconsistent with the visual continuity and pattern of buildings and landscape elements within the street given six other similar structures exist along Ocean View Avenue.

Don Grehan

Development Tribunal Chair

Date: 19 February 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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GPO Box 2457
Brisbane QLD 4001

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