



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-006
Appellant:	Christopher McGarry and Rochelle McGarry
Respondent (Assessment Manager):	Luke Owen-Jones
Co-respondent (Concurrence Agency):	Noosa Shire Council
Site Address:	2233 David Low Way Peregian Beach – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the refusal of a Development Application for approval of Building Works being extensions to an existing class 1 dwelling and class 10a structure, being a carport. The decision followed a referral agency response by the Noosa Shire Council, recommending part approval subject to conditions and part refusal of the application. Council stated that the carport does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2006, Low Density Residential Zone Code 9.3.1, PO9 (f) *Building and structures are designed to be consistent with the predominant character of the streetscape*.

Date and time of hearing:	11.00am, 18 May 2021
Place of hearing:	The subject site
Tribunal:	Debbie Johnson – Chair Victor Feros – Member
Present:	Christopher and Rochelle McGarry – Appellants Luke Owen Jones EarthCert Pty Ltd – Assessment Manager Matthew Adamson and Bradley Geaney – Council representatives

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) replaces the decision of the Assessment Manager dated 12 February 2021 with another decision, namely to approve the siting of the proposed *open carport* on the subject land as shown on Dwg No A103 prepared by Collins Building Designs dated 5 December 2020 and the design of the *open carport* as shown on Dwg Nos A201, A202 and A204 prepared by Collins Building Designs dated 24 September 2020, subject to:

- the maximum height of the structure not exceeding 4.0m, measured from the finished slab level for the carport at 5.90; and
- the overall size not exceeding 6m x 6m with a zero front boundary setback at the northwest corner; and
- the development is subject to any additional conditions attached to the building approval by the building certifier to address the requirements of the *Building Act 1975*.

Background

1. The subject site is rectangular in shape, having an 18m wide frontage and a depth of 28m. This 510sq/m site falls 5m from the rear to the road boundary however the middle portion of the site has previously been cut and levelled to accommodate the original dwelling. The rear portion of the site was terraced with several retainment walls that ran across the width of the allotment. In the front 6m portion of the site there is a 1.5-2.0m fall between the dwelling and the road boundary.
2. The property is situated on a major connection road which is two lanes with a 60km speed limit. Directly in front of the site, parking is possible in a cycle lane, however the traffic is heavy and the shoulder is frequently used by cyclists. Vehicles that park in this area tend to mount the kerb and park partially across the footpath in an effort to maintain clearance from passing vehicles and cyclists along this strip.
3. The site has a western aspect that looks over the road to an expansive nature reserve area. Neighbouring residential sites either side of the property are heavily screened with established gardens seemingly to provide some privacy, reduce road noise and manage the western sun.
4. The original single storey, two bedroom, elevated home and those surrounding it were built in or around the early 1980's. Given the demand for property in recent times and that values are increasing many homes in this area have been significantly renovated and or extended.
5. The appellants purchased this property approximately 18 months ago with this in mind. They subsequently engaged Collins Building Designs to prepare drawings that included renovations and extensions to the rear front and side of the home.
6. The appellants approached Luke Owen-Jones of EarthCert to seek an approval for the proposed building works, although it appears he wasn't engaged as the assessment manager until the 12 February 2021. This date is derived from the Form 2 Building Application that was submitted with the appeal documents.
7. As the proposed works required assessment against the relevant performance criteria of the Noosa Plan 2020 and due to the siting of the double carport and other structures within the required boundary setbacks, EarthCert referred the application to Noosa Council on 29 September 2020. This date is derived from Council's e property records.
8. According to Council's e property records, Council issued an information request on 26 October 2020, and received a response on 9 December 2020. The appeal documents included an issue of Collins Building Design drawings which were issued on 5 December 2020. It was this issue of drawings that Council endorsed and provided with their Referral Agency Response.
9. Council issued the Referral Agency Response dated 9 December 2020 to Earthcert Pty Ltd. Council directed a part approval, subject to conditions and part refusal of the application. Council stated that the proposed carport did not comply and could not be conditioned to comply with the provisions of the Noosa Plan 2006, Low Density Residential Zone Code 9.3.1, PO9 (f) *Buildings and Structures are designed to be consistent with the predominant character of the streetscape.*
10. The assessment manager issued a Decision Notice refusing the carrying out of building works assessable under the *Building Act 1975* for an application involving a carport. The decision had been signed by the assessment manager on 1 February 2021 but the issue date on the cover page is noted as being 12 February 2021. The decision stated the following reason- *Directed to refuse as per Referral Agency Response.*
11. On 4 February 2021, the appellants paid the appeal fees to the Registrar.

12. On 22 February 2021, the appellants stated their grounds for appeal, completed and submitted the Form 10 – Notice of Appeal to the Registrar.

Jurisdiction

13. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
14. Schedule 1 of PA, section 1(2) however states Table 1 may apply to a tribunal only if the matter involves one of the circumstances set out in paragraphs (a) to (l) of that section. 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”.
15. The tribunal is satisfied that the application lodged with the Assessment Manager and the referral of the development application to Council satisfies that requirement being, a development application for approval of building works under the section 33 of the *Building Act 1975*, which allows alternative provisions to QDC boundary clearance and site cover provisions for particular buildings.
16. That application was subsequently refused by the assessment manager as directed by Council as the referral 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.
17. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

18. Section 246 of the PA provides as follows (omitting the examples contained in the section):

The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.

The person must give the information to the registrar within 10 business days after the registrar asks for the information.

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— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.

19. Section 254 of the PA deals with how an appeal such as this may be decided and the first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal (not relevant here) and 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) [not relevant].
- (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. Proposed building works plans prepared by Collins Building Designs identified as Sheets A101, A102, A103, A104, A105, A106, A201, A202, A203, A204 and A301 issued 5 December 2020.
2. Referral Agency Response dated 9 December 2020 being part approval and part refusal.
3. DA Form 2 building work application for building works described as alterations and additions to existing dwelling, the assessment manager being Luke Owen-Jones. Reference number 200247- dated 12 February 2021.
4. EarthCert Decision Notice refusing the application Reference number 200247 - dated 12 February 2021.
5. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 22 February 2021.
6. Detail survey plan of the subject site, prepared by Focus Survey Group and dated 8 April 2020.
7. Document titled ‘Other Points to be Considered’ submitted by the appellants to the Registrar and emailed 18 May 2021.
8. Unity Water DBYD search identifying existing sewer line inside subject site’s front boundary where it meets a manhole just within the northern neighbour’s site.
9. Registered plan for Lot 499 P931.16.
10. Noosa eProperty information for 2233 David Low Way Peregian Beach.
11. Google maps and street view images.
12. Nearmaps satellite images from 2010 to current date.
13. Planning and Development Online information for the subject site.
14. Queensland Building and Construction Commission Licence Search.
15. The Planning Act 2016 (PA).
16. The Planning Regulation 2017 (PR).
17. The Development Application Rules.
18. The Building Act 1975 (BA).
19. The Building Regulation 2006 (BR).

20. The Queensland Development Code (QDC) Part MP 1.2.
21. The Noosa Plan 2020.
22. The National Construction Code 2019 (NCC).
23. The verbal submissions made by the parties at the hearing and during the site inspection.

Findings of Fact

20. The hearing for the appeal was held at the appellant's home and therefore at the subject site, on 18 May 2021. It was evident that some building and landscape works had recently been undertaken.
21. The works included an in ground swimming pool along the northern side of the home. There were new retainment walls, fencing and landscaping. These works were previously approved by private certification (Council Ref: PC 20/0842) and not works which were the subject of the appeal.
22. The area at the front of the property, between the house and the front fence, was clear of any landscaping save an existing mature Pandanus tree that has been preserved in the centre. To the southern side of that tree the front yard had been excavated to meet the footpath grade, approximately 2.5m below the existing house floor level. Either side of the excavated area and at right angles to the front fence line, there were new sandstone retainment walls. Between those retainment walls was a large, relatively level concrete slab area. The concrete slab would be approximately 4.5m wide and 6.5m long and a sufficient size to accommodate a boat, car, trailer or the like. At the eastern end of this concrete pad there is a single car width garage door that provides access to a storage area under the house in the current Bed 2 area. The storeroom is not shown on any of the building design plans, therefore the size of this area is unknown.
23. Currently there is no driveway access from the road to this concrete pad. However, Nearmaps imagery shows that the timber fencing panels along the frontage can be removed for vehicular access (8 May 2021) and a boat can be parked there (30 May 2021).
24. There is an existing crossover and concrete driveway to the northern side of the Pandanus tree. The driveway curves and rises up and around the Pandanus tree to a single carport which is at the front corner of the dwelling and under the main gable roof. While this carport is lawfully setback from the street boundary the appellants intend to utilise this area for an additional bedroom. The existing house has only two bedrooms and they are needing four.
25. The appellants have two cars and a work trailer that they would like to secure and park within the property. Aside from their need for the additional bedrooms, the original single carport and curved driveway, which is quite steep, does not facilitate an acceptable solution for their family's needs.
26. It should be noted that properties either side of the subject lot are separated by existing timber paling fences that are at least 1.8m high. Similarly, existing landscaping along these fence lines provides complete privacy screening. It is the appellant's intention to re-fence their own property across the road frontage boundary, and landscape the front yard, just as soon as the matter of the proposed carport is resolved.
27. Despite the heavy landscape, it is evident that there is a substantial structure, shed, single garage or the like in the south western corner of the adjoining property. This structure can be seen with Nearmaps imagery as far back as 2010. This structure is directly alongside where the appellants seek to construct their carport. It is not known whether or not this building has previously been approved and is therefore lawful. Nonetheless, it would screen the proposed carport completely from the view of southbound traffic passing the site.

28. The two neighbouring residential properties immediately south of the subject site, (between Lorikeet Drive and the appellant's site) are well hidden. This is in part due to overgrown Melaleuca, Bamboo and Umbrella species along the nature strip and continuous fencing. The property immediately next door (south) of the subject site has a narrow access to David Low Way. The second property is a corner site and does not access this roadway.
29. The land across David Low Way, opposite the subject site, is a native reserve that stretches west to Lake Weyba and parallel to David Low Way for kilometres. While the speed limit for this section of David Low Way is 60km, traffic is heavy and constant. David Low Way is the main residential link between Coolum and Noosa.
30. Wherever possible residents and visitors are getting their cars off the street and within their front yard. This is due to the number of passing vehicles and the cycle lane that is shared with vehicles that parallel park adjacent to their properties. In many instances these cars mount the kerb to protect their vehicles and enable car doors to be accessed safely.
31. It is evident that several property owners have erected shade sails in the street setback area to protect their cars parked on their driveways. That is in the area between the garage/ carport and the property's front boundary. In other nearby examples, low profile double carport structures have also been erected in recent times.
32. The existing dwelling on the subject site is two bedroom one bathroom with a single carport. The home is typical of the design from the 1970-80's and reflects the social demands and land value of this era. However, today this site's position and proximity to shops, school, public transport and the beach places a significantly higher value on the land and with it the social expectations.
33. At the hearing the appellants explained that they'd purchased the home the previous year. It was always their intention to extend and renovate the original home as quickly as possible given their young family's needs. They were particularly concerned about the parking arrangements as their car, work vehicle and trailer couldn't be secured and parked within the fence line. The car parking became an integral component of their overall plans. They identified not only the constraints of the area available for parking but also the slope of the land as the existing driveway rises in excess of 2.5m from the level at the kerb to the current carport's slab level.
34. The Noosa Plan 2020 Low Density Housing Code sets out the Design Criteria for low density residential development within Part 9.3.1.3. Acceptable Outcome AO7 states that car parking is to be provided in accordance with Table 9.4.1.4 of the Driveways and Parking Code. Under the provisions of Table 9.4.1.4, a dwelling house should be provided with two covered car parking spaces.
35. At the hearing, the Council's representatives reiterated the reasons for their decision as being outlined in the Referral Agency Response Advice that stated: *It has been considered that the design of the carport provides for a location and building form that is not consistent with the predominate character of the street. Furthermore, due to the large majority of dwellings and structures complying with the prescribed 6.0m setback requirements the proposed carport is recommended for refusal.*

The Queensland Development Code (QDC)

The Low Density Residential Zone Code Table 6.3.1.3, 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 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 Low Density Residential Zone code Table 6.3.1.3 PO9 provides some alternative siting provisions to the QDC A1 (a), therefore the 6m setback provisions (for a garage or a carport) of the Low Density Residential Zone code apply to the proposed development.

The Noosa Plan 2020

The Low Density Residential Zone Code Table 6.3.1.3, contains some alternate provisions to the QDC.

Acceptable outcome AO9.1 states

Buildings and structures have a setback of 6m from the road frontage, provided that the setback may be reduced to 4.5m where the lot:

- (a) has frontage to more than one road;
- (b) is less than 600sq/m in area; or
- (c) is less than 15m in width.

The proposed double carport is 6m deep and 6m wide with a zero setback (in part) to the road frontage. The site has a single road frontage, is 510sq/m with a frontage width which is approximately 18m wide.

As the proposal does not meet the acceptable outcomes of AO9.1, assessment is made against the performance outcomes stated at PO9 which states:

Buildings and structures are designed and sited to:

- (d) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual privacy and acoustic privacy and access to sunlight;
- (e) not unreasonably obstruct views or cause overlooking of private open space or habitable areas of adjoining premises;
- (f) provide adequate distance from adjoining land uses;
- (g) preserve existing vegetation that will help buffer development;
- (h) allow for space and landscaping to be provided between buildings including adequate area at ground level for landscaping with trees, shrubs and outdoor living;
- (i) be consistent with the predominate character of the streetscape; and
- (j) protect the natural character and avoid adverse impacts on ecologically important areas such as national parks, waterways and wetlands.

Council's referral agency response directed the assessment manager to refuse the building application stating the proposal didn't comply and couldn't be conditioned to comply with Noosa Plan 2020 – Low Density Residential Zone Code:

PO9 Buildings and structures are designed and sited to:

- (f) be consistent with the predominant character of the streetscape;

Reasons for the Decision

36. The tribunal found that the subject site does not currently provide adequate covered car parking opportunity given there is only a single carport at the top of a steep driveway. The Noosa Plan Table 9.4.1.4, states: *a dwelling house should be provided with two covered car parking spaces.* Due to the siting of the original home there is no other location for a second covered car park except within the 6m setback area.
37. Given the steepness of the slope from the kerb it is difficult to park on the existing driveway in this 6m setback area. The appellants intend to excavate and retain approximately 1m at the rear of the driveway to level an area within the front setback, sufficient to park two cars in this area.
38. The design of the proposed open carport is in keeping with the existing house in that it will have a gable roof pitched to suit. The proposed carport would offer significant amenity to the users of the subject site.

39. The tribunal finds the amenity on adjoining properties would not be adversely affected as neither property can see into the subject site due to their respective orientations and the landscaping between the three properties.
40. The tribunal finds that visual streetscape on the opposite side of the road is shaded and very natural, being an expansive nature reserve. However, the character and streetscape of the subject site and other properties on their side of the road was entirely different. Further to this, the nature of the roadway past the subject site needs to be considered. It is desirable to enable and encourage residents to park within their own properties.
41. The tribunal is satisfied that the proposed development meets all of the relevant performance criteria stipulated in the Noosa Plan 2020, Low Density Residential Zone Code Table 6.3.1.3 at PO9.

Debbie Johnson

Development Tribunal Chair
Date: 12 July 2021

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