



## Development Tribunal – Decision Notice

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

<b>Appeal Number:</b>	<b>22-046</b>
<b>Appellant:</b>	Sam Ackers
<b>Respondent (Assessment Manager):</b>	Cairns Regional Council (Council)
<b>Site Address:</b>	279 Draper Street, Parramatta Park, Cairns Qld 4870 described as Lot 2 on RP701396 (the subject site)

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### **Appeal:**

Appeal made under Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(a) of the *Planning Act 2016* (PA) against refusal by the assessment manager, in accordance with the requirements of CairnsPlan 2016, v3.0 (planning scheme) and the provisions of Schedule 9, Division 2, Table 1 of the Planning Regulation 2017 (CairnsPlan 2016, Section 1.6, Table 1.6(b) Building assessment provisions – alternative provisions to the Queensland Development Code).

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<b>Date and time of hearing:</b>	10.00am on 18 November 2022
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	John Bright – Chair Heath Bussell – Member
<b>Present:</b>	Sam Ackers – Appellant Ian Elliott-Smith – Council Representative Hannah Dayes – Council Representative

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### **Decision:**

The Development Tribunal (Tribunal) in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) confirms the decision of the Assessment Manager to refuse the development application.

### **Background**

#### The Proposal

1. The subject site is located about 20 metres from the corner of Draper and Loeven Streets in a rectangular shaped inner city block, bounded by Draper, Loeven, Severin and Victoria Streets. Under the current planning scheme, the subject site and all others within that block are zoned 'Mixed use precinct 3 – Residential', with the exception of the large site at the corner of Draper and Victoria Streets, which is zoned 'Mixed use precinct 1 – Commercial'.
2. Draper Street, adjacent to the subject site, has a road reserve width of about 40 metres. It is configured with a central two-way carriageway (approx. 7 metres) and with cycleway (approx.

1.5 metres), 90° on-street car parking (approx. 10 metres) and kerbed footpath (approx. 5 metres), along each side.

3. The existing streetscape along the SW side of Draper Street (containing the subject site) appears of a less residential character than that opposite. This is possibly due to there being a number of existing two-storey buildings constructed with nil setbacks to site frontage.
4. The subject site has an area of 405sqm and is long and narrow in configuration with a 10.058 metre frontage to Draper Street. It is located in a designated flood and inundation hazard area and has topography that is essentially flat. A sewer main runs across the back of the site, located 2-4 metres inside the rear boundary.
5. The subject site is currently developed with a highset timber building (circa 1920's) with an attached slab on ground covered area at the rear. Boundary setbacks to external walls are currently 6 metres (approx.) to the frontage, 0.6 metres and 1.2 metres (approx.) to NW/SE sides respectively and 19.5 metres (approx.) to the rear. Total existing roofed area is about 135sqm (approx. 33% site coverage).
6. A DA Form 2 (undated) was originally lodged to Council for building works approval for modifications to the existing premises and provision of a new freestanding Class 10a garage. This application assumed the classification of the existing premises was Class 1a (dwelling), whereas it was Class 5 (Offices). A DA Form 1 (undated) was subsequently lodged to Council for material change of use of the existing premises from Class 5 to Class 1a.
7. The scope of the development application (DA 8/7/5299) as assessed by Council comprised—
  - a) Material change of use for the existing premises from Class 5 (Office) to Class 1a (Single detached house)
  - b) Development approval for building works for relocation/modifications to the existing premises
  - c) Development approval for building works for a new Class 10a freestanding private garage sited with minimal setbacks to front and SE side boundaries

#### Refusal of the application and appeal

8. On 07 September 2022, Council issued a decision notice confirming refusal of the Development Application (as decided on 05 September 2022) and advised both the required Statement of Reasons and Appeal Rights.
9. On 12 September 2022, the Tribunal Registrar received a duly completed 'Form 10 – Notice of Appeal', dated 08 September 2022, stating the Appellant's grounds for appeal.
10. On 18 November 2022, the Tribunal conducted a hearing at the subject site.

#### **Jurisdiction**

11. The Tribunal has jurisdiction to hear this appeal under Section 229 (1) (a) (i) and Schedule 1, Section 1, Table 1, Item 1(a) of the Planning Act 2016 (PA).
12. The precondition in section 1(2) of Schedule 1 for the application of Table 1 is satisfied, in this instance, because the matter concerns –
  - a) refusal of a material change of use for a classified building (PA Schedule 1 section 1(2)(a)(i)), and
  - b) the Building Act 1975 (PA Schedule 1 section 1(2)(g))

#### **Decision framework**

13. The Appellant, in this instance, must establish that the appeal should be upheld (PA section 253(2)).

14. 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 (PA section 253(4)).
15. The Tribunal may, but need not, consider –
  - a) other evidence presented by a party to the appeal with leave of the Tribunal (PA section 253(5)(a)), or
  - b) any information provided to the Registrar (PA section 253(5)(b))
16. The Tribunal must decide the appeal by either confirming, changing, replacing or setting aside the decision appealed against (PA section 254(2)(a)(b)(c) and (d))

**Material considered**

17. The Tribunal considered the following material:
  - a) Form 10 – Notice of Appeal (dated 08 September 2022) containing Appellant’s stated grounds for appeal and attached related documentation including –
    - o Council’s Decision Notice (Refusal) dated 07 September 2022, including associated Statement of Reasons and Referral Agency Assessment
    - o Appellant’s DA Form 1 (undated) including associated drawings 22023/01B, 02A, 03A, 04, 05A, 06, 07A, 08A, 09A, 10, 11A, 12, 13A and 14A.

(Note, other material provided, which related to an earlier 2006 approval for the subject site, was not considered, being viewed by the Tribunal not relevant to this Appeal.)
  - b) Appellant’s email response (04 November 2022) to the Tribunal’s request for clarification as to the existing and proposed Classifications of on-site buildings and structures.
  - c) Appellant’s verbal representations at the hearing—
 

These substantially restated matters previously contained in the Form 10 ‘grounds for appeal’. Without specific reference to the requirements of the current planning scheme, the case was put that a substantial number of other developments existed within close proximity to the subject site, that were similar to the proposed development with respect to site coverage, building setbacks from front and side boundaries and/or building height and bulk adjacent to front boundaries and consequent impact on streetscape. The Appellant also re-confirmed that the proposed usage of the premises was as a single detached dwelling (Class 1a). The additional bedrooms (5N<sup>o</sup>/8 in total), bathrooms (2N<sup>o</sup>/3 in total) and Kitchens (1N<sup>o</sup>/2 in total) were required to accommodate family when visiting from overseas. A written precis of the Appellant’s representations to the hearing was subsequently provided to the Tribunal Registrar.
  - d) Council’s verbal representations at the hearing—
 

These substantially restated matters contained in the Statement of Reasons provided with the Decision Notice – Refusal. Council sought to further explain the decision with respect to the specific requirements of the planning scheme especially in relation to Part 6.2.14 ‘Mixed use zone code’ and Table 1.6.b – ‘Building assessment provisions - alternative provisions to the Queensland Development Code’ (Qualitative statement 8). Council also advised that—

    - The assessment process had been initiated by lodgement of a ‘DA Form 2 – Building work details’ development application to Council. Noting that the proposal also required a material change of use, Council required lodgement of a ‘DA Form 1 – Development application details’, which was subsequently received. A copy of both the original\* DA Form 1 and DA Form 2 were provided to the Tribunal Registry subsequent to the hearing. (\*Note – the original DA Form 1 is different from that lodged with the ‘Form 10 – Notice of appeal’, but not materially so)
    - The reason for the prevalence of apparently ‘non-conforming’ developments within close proximity of the subject site was because, under a previous planning scheme, the area had been zoned ‘Commercial’.

- The proposed driveway width, relative to the width of site frontage, was considered dangerous especially because of the subject site's proximity to schools.
  - The refusal was not because of any single issue. Council considered refusal to be the only option because the proposed overall development offered no compensating offsets to its multiple instances of non-compliance with the requirements of the planning scheme.
- e) The parties' submissions provided subsequent to the Hearing in response to the Tribunal's request for submissions on whether specific elements of the appeal should be decided individually or jointly. The parties submitted as follows –
- Council advised a preference that the matters be decided as a whole because the elements were all considered to be integral components required for a Dwelling House.
  - Appellant advised uncertainty, but that the material change of use and dwelling modifications might be considered separately to the new garage.
- f) Cairns Plan 2016, v3.0  
g) Planning Act 2016  
h) Planning Regulation 2017  
i) Building Act 1975

## Findings of fact

The Tribunal makes the following findings of fact:

18. The Applicant/Appellant's proposal was to –
- a) change the classification of the existing building from Class 5 (Office) to Class 1a (single detached Dwelling), and
  - b) modify the existing building by raising and repositioning it on site, extending to include provision of a new lower storey with floor height above designated flood level, and
  - c) construct a new free-standing, fully enclosed, three-bay, slab on ground garage sited with approx. 200mm/100mm setbacks to the front/SE side boundaries respectively.
19. Outcomes of the proposal were to include –
- a) Site coverage increase from approx. 33% to approx. 60%
  - b) Maximum dwelling height increase from approx. 6.5m to approx. 8.5 metres
  - c) Front boundary setback of approx. 8.9 metres to new front patios relocated and extended dwelling
  - d) Minimum setbacks of  $\geq 900\text{mm}/840\text{mm}$  to SE/NW side boundaries respectively from outside face of external walls of relocated and extended dwelling. Note, drawings indicate removal of existing roof overhangs along sides of dwelling (approx. 300mm)
  - e) Garage construction immediately adjacent to the site frontage to a height of 3.6 metres across approx. 85% (8.6/10.058) of the site width
20. The planning scheme identifies current zoning of the subject site as 'Mixed use precinct 3 – Residential'. The stated purpose of the "Mixed use" zone is to—
- ....provide for a variety of uses and activities, including, for example, business, residential, retail, service industry, tourist accommodation or low impact industrial uses or activities.*
21. Overall outcomes of 'Mixed use zone code', specific to 'precinct 3 – Residential' are stated as—
- a) Development within the precinct provides a mix of land uses where the predominant land use is for residential purposes;
  - b) Development is provided through the adaptive reuse of existing buildings;
  - c) Development maintains the residential scale and character of the area;
  - d) A range of accommodation activities are established;
  - e) Development provides a high level of amenity taking into account impacts such as traffic, noise, dust, odour and lighting;
  - f) Industry activities are not established

22. Table 6.2.14.3.a of the planning scheme identifies benchmarks and requirements for assessable development within the Mixed use zone. Associated Acceptable outcomes applicable within the Mixed use precinct 3 – Residential zone, include—
- AO1.3 Buildings and structures are not more than 11 metres and 2 storeys in height
  - AO2.2 Site coverage is not more than 50%
  - AO3.2(a) Buildings and structures are setback not less than 6 metres from the primary road frontage
  - AO4.2 Buildings and structures are setback not less than 3 metres from the side and rear boundaries
  - AO10.1 Development provides for the retention and/or adaptive re-use of buildings
  - AO10.2 Development complements the traditional residential scale and character of the area
23. Table 1.6b of the planning scheme identifies building assessment provisions, being alternative to those of the Queensland Development Code. Quantifiable standards applicable within the Mixed use precinct 3 – Residential zone, include—
- Statement 8—site cover for a single detached class 1 building or an associated class 10 building is not more than 50%
  - Statement 9—for a single detached class 1 building or an associated class 10 building—
    - where located within the nominated setback to a road frontage, buildings are not more than 4.5 metres in height
    - where not located within the nominated setback to a road frontage, buildings and structures are not more than 8.5 metres and 2 storeys in height

### Reasons for the decision

24. The Tribunal formed its decision based on—
- a) reconsideration of the evidence before the assessment manager who made the decision being appealed against
  - b) review as to the appropriateness (or otherwise) of the assessment manager's three (3) 'Reasons for Decision - Refusal' (RFD) as advised.
25. The assessment manager's RFD-3 stated—
- 3. *There are no matters of discretion which favour approval of the proposed development despite the identified non-compliances.*
26. The Tribunal considered whether the assessment manager might have assessed the application based on its individual components, rather than as a whole. The following scenarios were considered –
- a) If the Garage was refused, then the modifications to the existing premises might have been based on the following criteria –
    - 44% site coverage (maximum 50% allowed)
    - 8.5 metres (approx.) maximum building height (maximum 11 metres allowed)
    - 8.5 metres (approx.) setback from road frontage (minimum 6 metres allowed)
    - 900mm (approx.) minimum side boundary setbacks to outside face of external walls
  - b) If the Garage was refused and it remained the applicant's intention that the building classification become Class 1a, then the material change of use might have been approved.
27. Accordingly, the Tribunal sought submissions from the parties on this matter.
28. The Tribunal decided that although the assessment manager might have considered the application on the basis of its individual elements, there was no requirement to do so. Accordingly the Tribunal accepted Council's proposition that '...(The individual elements) are all integral components required for a Dwelling House, therefore they all form part of the application'.
29. The assessment manager's RFD1 and RFD2, stated—

1. *The development proposed, in part, an enclosed triple garage along the site frontage and built to the southern side boundary in conjunction with extensive modification to the existing building on the site. The proposed additions and modifications are considered to result in unacceptable impacts on the character and amenity of the streetscape and safety of pedestrian footpaths and as a result, the proposed development results in critical non-compliance with the following assessment benchmarks:*

*In respect of the Material Change of Use:*

- i. *Mixed Use Zone Code:*
  - a. *Overall Outcomes 6.2.14.2.6(c) and (e)*
  - b. *Performance Outcome 2*
  - c. *Performance Outcome 3*
  - d. *Performance Outcome 4*
- ii. *Parking and Access Code:*
  - a. *Performance Outcome 3*

*In respect of the Early Referral Agency Response*

- iii. *Table 1.6.b*
  - a. *Qualitative Statement 8*

2. *While the proposed development may comply with or be able to be conditioned to comply with some of the assessment benchmarks, as a result of the non-compliance with critical assessment benchmarks identified above, it is appropriate to refuse the development application as lawful development conditions are unable to be imposed to resolve the identified non-compliance.*

30. In reviewing the scope of the application as a whole, the Tribunal considered the reasons for refusal, as advised by the assessment manager, to have been properly considered with respect to the various outcomes and requirements of the planning scheme. The Tribunal is in general agreement especially with regard to the following—
  - a) that, within the context of proposed (0.9 metres) and compliant (3 metres) side boundary setbacks, the raised premises would overlook and overshadow adjoining residential properties and create potential for privacy issues
  - b) that the proposed garage setback and driveway width, relative to the narrow site width, would create safety risks to pedestrians and cyclists particularly given the close proximity of the site to neighbourhood schools
31. After consideration of the evidence and submissions, the Tribunal formed the view that the Appellant had not discharged the onus to establish that the assessment manager's decision ought to be altered in any way.

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**John Bright**  
**Development Tribunal Chair**  
**Date: 12 January 2023**

## **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 Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone: 1800 804 833 Facsimile (07) 3237 1248**

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