



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 22-019

Appellants: Scott Graham - Applicant
Lorraine Graham - Applicant

Respondent/Responsible entity: Brisbane City Council

Site Address: 15 Cavell Terrace, Ashgrove, Queensland and described as Lot 167 on RP 42949 – the subject site

Appeal

This is an appeal under section 229, section 1(2)(f) of Schedule 1 and item 2 of Table 1 of the Planning Act 2016 (**PA**) against the assessment manager's decision dated 3 May 2022 to refuse a change application requesting a minor change to a development permit, at the direction of the referral agency, Brisbane City Council (Council)

Date and time of the site inspection: Monday 22 August 2022 at 2.00 pm

Present: Henk Mulder - Tribunal Chair
Julie Brook - Tribunal Member
Mark Duffy - Building Certifier, for the Appellant
Hubert Tos - Brisbane City Council, for the Respondent

Date and time of hearing: Tuesday 30 August 2022 at 11.00 am

Place of hearing: Online

Present: Henk Mulder - Tribunal Chair
Julie Brook - Tribunal Member
Scott Graham - Appellant
Mark Duffy - Certifier, for the Appellant
Hubert Tos - Brisbane City Council, for the Respondent

Decision

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the PA **replaces** the decision of the Assessment Manager as directed by Council as a concurrence agency to refuse the development application for Minor Change to a Site variation approval, with a decision to allow the development application in accordance with the Plans submitted as a part of the application.

Background

1. The allotment is a regular rectangular shaped allotment with a North-Eastern aspect, on land that has significant fall from front-to back of just over 6.0 metres. There is also a noticeable crossfall at the street boundary of approximately 1.5 metres to the downhill side toward the East and where the carport, the subject of the appeal, is located.
2. The allotment contains a two-storey residence built pre-1947, with a projecting front entry area approximately 4.5 metres from the street boundary. A double bay carport structure the subject of the appeal has been completed at the lower eastern corner of the site.
3. A Development application no A005564337 for extensions to the property, was approved on the 13 November 2020, which excluded the carport as shown within the front boundary setback.
4. As a part of this approval, an early referral agency response under section 57 of the PA established that no further referral agency response for any decision based on amenity and aesthetics is required for the building work development permit under City Plan 2014 (**City Plan**).
5. A referral agency decision (**Original Referral Decision**) from Council was approved for a carport on 27 May 2021. The approval described an open carport with a setback variation of 20mm to the street boundary, and 250mm to the side boundary shared with 17 Cavell Avenue.
6. The Original Referral Decision established the height at the rear of the carport as 4200mm, the height at the front of the carport as 3562mm and a median height of 3881mm.
7. In response to a request for details based on QDC MP1.2 P1 regarding how the structure facilitates an acceptable streetscape appropriate for the bulk of the structure, the Original Referral Decision confirms “the proposed carport is open style [sic] will not pose a bulk appearance”
8. In response to a request for details in the Original Referral Decision as based on QDC MP1.2 P1 regarding how the structure facilitates an acceptable streetscape appropriate for the outlook and views of neighbouring residents, the applicant for the application and the current Appellant confirms “the proposed carport will not affect the outlook and views of neighbours (and) residents” [sic].
9. The Original Referral Decision gained a building development application approval for the work (reference No 471/21) on 3 June 2021 from Apex Certification and Consulting.

10. A Change application was subsequently made by the Appellant for a Minor Change to the Original Referral Decision being the Site Variation approval for the carport as set out in an undated PA Change application Form 5, accompanied by drawn documentation dated 31 January 2022.
11. On 22 April 2022, Council confirmed their direction for a refusal of the minor change application to the certifier as the assessment manager, who in turn on or about 3 May 2022, issued the Decision Notice (**Decision Notice**) to the appellant.
12. Council, in its direction, advised the design and siting variation did not comply with the purpose of Queensland Development Code (QDC) and the performance criteria MP1.2. P2:

'The proposed as-constructed double carport does not address the purpose of the QDC, by providing good residential design and acceptable amenity to residents. The carport adversely impacts the amenity of the adjoining property, with its built form, design and significant height from natural ground level resulting in a building bulk and scale which is overbearing to the adjoining residents and impacts their amenity, access to daylight and ventilation.

The proposed maximum height of 4.9m from natural ground level, with a measured mean height of 4.35m does not provide an acceptable amenity to the adjoining property at 17 Cavell Terrace. The box-façade structure with the concrete slab measures 4.9m from the maximum point that creates a dominating and overbearing appearance resulting in an unacceptable amenity to the adjoining residents.

Subsequently, in accordance with s56 for the Planning Act 2016, the application is to be **refused** for the following reason(s):

P2 – Building and Structures

- (c) Do not adversely impact on the amenity and privacy of residents on adjoining lots.

The carport has a bulk and scale which is overbearing to the adjoining property, adversely impacting the amenity of the residents. The structure presents a wall 3.8m to 4.9m in height, 6.5m in length with a boundary setback of 230mm in lieu of the prescribed 2000mm. The scale of the structure is not appropriate at the proposed/existing side boundary setback, with a design which does not mitigate impacts of its bulk presenting to the adjoining dwelling house which is located downslope. The design has not considered the adjoining property being located downslope of the proposed structure, having a siting and design well within the prescribed 2000mm side setback and a height substantially exceeding the maximum allowable height for class 10a structure.'

13. The Appellant filed a Form 10 – Notice of Appeal on 5 May 2022 with the following description for the grounds for appeal:

A request for a minor change to the building approval was applied for due to a drafting error (sic) that incorrectly indicated the ground level. The original building approval had sought a concurrence approval from BCC (Council) and the request for a minor change required other concurrence approval from BCC due to the increased carport wall height.

The BCC did not support the concurrence application for the increased height on the grounds that it was non-compliant with QDC MP1.2 part P2. The request to change the approval was subsequently refused.

The grounds for the appeal are on the basis that the concurrence application should have been supported by the BCC as it is believed that the proposal does satisfy Part 2 of the QDC MP1.2. Primarily if the original concurrence application was able to be supported, so should the subsequent application as the light and ventilation to adjoining lots and the amenity and privacy of residents on adjoining lots remains unchanged (top of carport approximately top of window level of existing dwelling indicated on original and amended drawings). The carport design provides a high level of amenity.

Jurisdiction and Decision framework

14. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.¹
15. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in subsection (2).
16. Section 1(2)(f) of Schedule 1 of the PA, relevantly refers to “a decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use of a classified building”.
17. A “classified building” is defined in Schedule 2 of the PA to mean a “class 1 building”.
18. The Building Code of Australia defines a “class 1 building” to include a single dwelling, being a detached house.
19. In this appeal, the change application was with respect to a development permit for a material change of use of premises – detached house.
20. So, Table 1 of Schedule 1 of the PA applies to the Tribunal.
21. Under item 2 of table 1 of Schedule 1 of the PA, an appeal may be made against the responsible entity’s decision on the change application. The Appellant in this case is the owner.
22. In circumstances where the Decision Notice was issued on or about 3 May 2022, and the Appellant filed a Form 10 – Notice of Appeal on 5 May 2022, the timing has been satisfied.
23. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.
24. Under Section 253(2) of the PA, the Appellant, being the recipient of the Decision Notice, must establish that the appeal should be upheld.
25. Under Section 253(4) of the PA, the Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Respondent which decided to give the Decision Notice the subject of this appeal.
26. Under Section 253(5)(a) of the PA the Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal.
27. Under Section 249 of the PA, the Tribunal has broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person.

¹ Section 229(1)(a) of the PA.

28. Under Section 253 and section 246 of the PA, the Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.
29. Under Section 254(2) of the PA, the Tribunal is required to decide the appeal in one of the following ways:
- (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 to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
 - (ii) *deciding the application.*

Material considered

45. The material considered in arriving at this decision comprises:
- (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on or about 5 May 2022.
 - (b) The Appellant's written submissions provided by email dated 22 July 2022, in response to the Directions comprising: (**Appellant's Submissions**).
 - i. The plans dated 19 May 2021 as approved for the Original Referral Decision
 - ii. The Form 5 establishing the Minor Change application, undated.
 - iii. The plans dated 31 January 2022 as applied for in the Minor Change application
 - iv. The Refusal letter from the Assessment Manager dated 3 May 2022
 - (c) The Respondent's written submissions provided by email dated 22 August 2022, in response to the Directions from the Hearing on site (**Respondent's Submissions**).
 - i. The Council planning application A005564337 Approval Plans dated 13 November 2020 comprising the residential extensions excluding the carport
 - ii. The Council planning application A005564337 Conditions dated 13 November 2020
 - iii. The Council planning application A005564337 Decision Notice dated 13 November 2020
 - iv. The Referral Agency Response Approval letter A005729060 dated 27 May 2021 being the approval for the Original Referral Decision
 - v. The Referral Agency Response Approval Plans A005729060 with accompanying details dated 27 May 2021 being the approval for the Original Referral Decision
 - vi. The Neighbour's Comments from 17 Cavell Tce, dated 21 March 2022 for the Minor Change application
 - (d) The Appellant's further submissions provided by email with accompanying notes dated 25 August 2022, (**Appellant's Further Submissions**).
 - i. The Council planning application A005675273 Decision notice for the approval of extensions for works to the neighbouring property at 17 Cavell Tce dated 24 March 2021

- ii. The Council planning application A005675273 Plans for the approval of extensions for works to the neighbouring property at 17 Cavell Tce dated 24 March 2021
 - iii. A Site Plan with aerial overlay for a carport to the neighbouring property at 17 Cavell Tce
- (e) The Respondent's response to the Appellant's Further Submissions provided by email dated 26 August 2022 (**Respondent's Further Submissions**).
 - (f) Brisbane City Council City Plan 2014 (City Plan).
 - (g) Planning Act 2016 (PA).
 - (h) Planning Regulation 2017 (PR).
 - (i) Building Act 1975 (BA).
 - (j) Building Code of Australia (BCA).
 - (k) Queensland Development Code Part MP1.2 (QDC).
 - (l) Brisbane City Council BiMap (BiMap)
 - (m) The verbal submissions made by the parties at the hearing and during the site inspection as referred to in the body of the decision.

Findings of Fact

The Tribunal makes the following findings of fact:

- 46. The Appeal is seeking to change the decision of a refusal of a Minor Change to an existing Siting Variation approval, undertaken as a part of a Building development application.
- 47. The Siting variation application is a minor change as set out in PA Schedule 2, Dictionary
 - 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, 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 was made; or
 - (E) public notification if public notification was not required for the development application;
- 60. In the PA Chapter 3, Subdivision 2, section 78A establishes that for changes after the appeal period, the responsible entity for the application is Council as the referral agency.
- 61. From the following sections 81 and 81A contained in the PA, the referral agency, in assessing the minor change application must consider an array of information available to it in the form

of application materials and separate submissions. As well, an assessment of the application can also consider:

s81(2)(e) another matter that the responsible entity considers relevant.

62. The subject site is zoned CR1 Character (Character) under the City Plan, and the carport is subject to the QDC MP1.2 as the applicable assessment benchmark for initial consideration by Council.
63. The adjoining lot at 17 Cavell Terrace (**adjoining lot**) is by contrast a long and narrow lot, with non-parallel side boundaries and a smaller street boundary than the subject site, albeit the widest point of the adjoining lot.
64. The residence at the adjoining lot appears as a single storey residence as viewed from the road frontage, though the Appellant's Further Submissions confirm a lower ground level at the rear of the residence. With an increase in setback and a floor level further downhill, the residence is reduced in character and scale in comparison to its uphill neighbours.
65. At the site inspection, the parties were in agreement that the eaves and gutter of the residence at the adjoining lot was in principle in line with the floor level of the carport, the subject of the appeal.
66. No major works appear to have been undertaken to the main residence of the adjoining lot, as it exhibits an original character from the street. The front yard appears well landscaped.
67. The Certifier, for the Appellant, also identified at the site inspection that the casement windows facing a view to the sloping front yard are side-hung, and use obscure glass, which, irrespective of the habitable nature of the rooms within, do not afford a ready view to the carport structure.
68. The minor change sought in the Change application is for a recently constructed carport, located at the common corner junction facing the street with the adjoining lot. There are three sets of drawings provided over the course of older and successful applications for the carport.
69. The minimum 20mm setback to the road frontage and the 250mm setback to the side boundary of the proposed carport does not comply with the Acceptable solutions A2(d) of the QDC MP1.2 for height, and mean height.
70. The Performance criteria P2 is then applied, and Council have conveyed that the amenity and privacy of the residents at the adjoining lot is adversely impacted.
71. Council has refused changes described in the application on the basis of QDC MP1.2 P2, which provides:
 - P2 – Building and Structures
 - (c) Do not adversely impact on the amenity and privacy of residents on adjoining lots.
72. Council have also iterated the Purpose of the QDC MP1.2 as having not been met, namely
 - Purpose
 - To provide good residential design that promotes the efficient use of a lot, an acceptable amenity to residents, and to facilitate off street parking.
73. The privacy of the residents at the adjoining lot was de-emphasised at the hearing, and the issue for an adverse amenity was constituted as a core determinant.
74. Amenity is not defined in the QDC MP1.2, however City Plan contains the following definition in Schedules SC1.2 Administrative Terms:

The qualities of a location in regard to noise, vibration, dust, odour, air quality, lighting, daylight, glare, breezes and shade, freedom from hazard or risk of threats to health and well-being of occupants, and the uninterrupted ability to use and enjoy the land for the purpose it was designed, that may be affected by the level, time and duration of activities on nearby sites or the impacts of natural hazards, including spatial and temporal impacts.

The Tribunal noted that views and vistas do not form part of the definition of amenity in the City Plan.

75. The circumstances of the site conditions include distinct and relevant features. The land falls steeply downhill from the front boundary to the rear boundary. The land fall is also distinct between the subject site and the adjoining lot, as the adjoining lot falls away at a reflex angle from the common corner where the carport the subject of the application is located.
76. From the site inspection, a review of the street indicates similar site uses for carports at the high side street corner to an adjoining lot which is also down slope from the carport site. The heights to the low side at the adjoining lot boundary are less.
77. The Appellant's further submissions demonstrate an equivalent application under the City Plan for the adjoining lot, effectively a matching carport scheme adjacent to the carport the subject of the application. The Respondent's further submissions are also noted regarding their stated view that the Tribunal should attach no weight to this development permit approval, including for the adjacent carport, given the permit has not been implemented and it may never be.

The issues

The issue for the effect on the adjoining lot.

78. Council stated the amenity and privacy of residents at the adjoining lot have been adversely affected, triggering the direction for the refusal of the building development application.
79. The adversity ascribed by Council is now different in effect from the scheme as originally approved to the extent that the Change application is unsuited for approval.
80. The extent of the effect for the amenity of the residents at the adjoining lot is distinct in that an unmistakably large structure lies at the highest corner of their street frontage. The effect of the structure is accentuated by the slope of the land. Council have described the structure of the carport as 'dominating', 'overbearing' and that 'The design has not considered the adjoining property being located downslope of the proposed structure'.
81. The effect to the owners of the adjoining lot has been compounded on the basis that the carport is required to establish a fire separation to the boundary, due to its proximity to the main dwelling. The subsequently solid materials applied are distinct from what had originally been described to the owners of the adjoining lots, and as shown in the drawings of the original planning application A005564337 for the residential extensions approval excluding the carport proposal dated 1 October 2020.
82. Council nonetheless approved the subsequent application for a Site Variation in their Referral Agency Response Approval letter A005729060 dated 27 May 2021 which did include a solid wall facing the side boundary.
83. In accordance with s81 and s81A of the PA, Council can describe the amenity issues for the adjoining lot as if the proposal were a new proposal, with the advantage of viewing the work as completed in contrast with a drawn interpretation.
84. The additional issues that Council ascribe to the refusal include the height of the wall for its length and proximity to the side and street boundaries.

85. The Appellant has appealed with the view that the work is a minor change to an existing approval, where the streetscape is essentially unchanged as the eaves of the carport is for all intents and purposes still aligned and proximate with the eaves of the existing residence at the subject site.

The issue for the adjoining lot planning permit for a similar carport

86. The Tribunal has been made aware of a planning approval for the adjoining lot with a carport adjacent to the subject site in a manner that matches the subject of the Change application, the subject of this Appeal.
87. The Tribunal have elected to not place any particular weight on this approval, insofar as the work has not been undertaken and it would be presumptuous in the circumstances to form any assessment on the basis of a building development that may or may not be realised.
88. It is sufficient for the Tribunal to appreciate, irrespective of the existing approval, that the owner of the adjoining lot is able to undertake a similar development in maximising their own amenity.
89. The Respondent's additional submissions also provide for clarifying the views held by the owners of the adjoining lot in regard to carport structure.

The issue for the actual changes sought between the Original Referral Decision and the new referral application

90. A number of changes exist
- i) The 200mm increase of the carport floor level to Australian Height Datum (AHD)
 - ii) The increase in height of 700mm at the rear of the carport to 4.9 metres from 4.2 metres above natural ground at the side boundary.
 - iii) The increase in height from floor to peak at the front of the carport of 265mm
 - iv) An increase in Council estimation of the mean height from 3881mm to 4350mm, to the side boundary.
 - v) The increase in depth of the carport by 150mm to 6.5 metres
 - vi) The increase in length of the fire rated wall at the side boundary despite the battened gate extent being reduced, as constructed.
 - vii) The overall length reduced by 150mm which appears as a greater setback at the street
90. The Appellant has set out that the changes for the heights and the consequent bulk and scale of the carport have been brought about due to a drafting error which incorrectly labelled the ground level.
91. In addition, the Tribunal consider a change in the roof pitch and an increase in the depth of parapet at the street front has contributed to the change in the mean height.
92. The QDC MP1.2 Acceptable solution A2(d) sets out that a carport may be within the boundary clearance of 1.5 metres where the height of a part within the boundary clearance is not more than 4.5 metres and has a mean height of not more than 3.5 metres.
93. These acceptable solutions were in effect at the time of the original site variation application as approved, where one of the critical dimensions - the mean height - was already in excess of an acceptable solution and required a performance criteria assessment.
94. With the application for the change to the earlier approval decision, both the height and the mean height necessitate assessment against the Performance criteria.

Reasons for the Decision

95. In accordance with sections 249, 253 and 246 of the PA, the Tribunal has considered all the Material noted above and available to the Tribunal in forming the Decision.
96. The carport is not unique in the street for its location and for the effect on an adjoining lot where the land falls steeply away. The extent of variation between structures on different lots will necessarily form a part of the consequences of the distinct topography in the street.
97. Whilst larger in scale than existing examples in the same street for a carport located at a street boundary corner with an adjoining lot, the sloping land not only falls downhill from front to rear at the adjoining lot, but it also falls away from the subject site at a reflex angle from the corner to further create significant topographic effect.
98. At the site inspection it was clear that the residence at the adjoining lot does not suffer from loss of daylighting or privacy, based on its separation from the carport at the subject site, irrespective of the topography.
99. While the height of 4.9 metres on the boundary at the rear of the carport exceeds the QDC height provisions, it does not offend the amenity and privacy of the residents at the adjoining lot given paragraph 98 above, and the Tribunal has noted that the definition of amenity in the City Plan (see para 74) does not include views and vistas which may be experienced from the adjoining lot.
100. The criteria from QDC MP1.2 P2 was originally acceptable to Council with an assessment of the mean height in excess of MP1.2 A2(d) yet compliant using the Performance criteria P2. In consideration of the changes between the applications, the effect of the change is not considered to add any higher level of adversity to the amenity of the adjoining lot.
101. The Tribunal is satisfied that the structure, dimensions and boundary clearances do not
 - (a) obstruct daylight and ventilation to the adjoining lot; or
 - (b) adversely impact the amenity (as defined in City Plan) or privacy of residents on adjoining lots.
102. The approval from the Original Referral Decision has informed the current Appeal to the extent that the change proposed is of a minor nature and does not modify the earlier evaluation for the amenity and privacy of residents at the adjoining lot to not be adversely affected by the bulk and scale of the carport.

Henk Mulder

Development Tribunal Chair

Date: 19 October 2022

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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