



## Development Tribunal – Decision Notice

---

### **Planning Act 2016 Section 255**

<b>Appeal number:</b>	<b>23-049</b>
<b>Appellant:</b>	Russell and Robyn Kiemann
<b>Respondent (Assessment manager):</b>	Gus Schultz of Core Building Certification
<b>Co-respondent (Concurrence agency):</b>	Noosa Shire Council
<b>Site address:</b>	10 Wollomia Way Sunrise Beach Qld 4567 and described as Lot 518 on N21869 – the subject site

---

### **Appeal**

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the Planning Act 2016 against the refusal of a Development Application for Building Work for a Class 10a structure, being a carport within the road boundary setback on a residential site. The decision followed a referral agency response by the Noosa Shire Council directing refusal of the application on the grounds that the proposed carport does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2020, Low Density Residential Zone Code PO9 (a) *provide a high level of amenity to users of the subject site and adjoining premises including provision of visual and acoustic privacy and access to sunlight and (f) be consistent with the predominant character of the streetscape.*

---

<b>Date and time of hearing:</b>	12 November 2023 at 11.30 am
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Anthony Roberts – Chair Lisa Lambie – Member
<b>Present:</b>	Russell and Robyn Kiemann – Appellants Gus Schullz – Building Certifier (Core Building Certification) John Demetriou – Core Building Certification Pual Schultz – Builder (Builder Direct) Jarrad Postle – Council representatives

---

### **Decision:**

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the Planning Act 2016 replaces the decision of the Assessment Manager on 12 September 2023 with another decision, namely to approve the design and siting of the proposed carport on the subject land as shown on Drawings No. A001; A002; A003 prepared by Builder Direct and dated 27 July 2023, subject to the following conditions:

1. The carport is to remain open to the road frontage and not enclosed with a carport gate or door;
2. The area immediately adjacent to the eastern side of the carport (to a minimum width of 1m) to be landscaped with appropriate vegetation to provide effective screening to the full height of the carport roof.

## Background

1. The subject site is:
  - a. a flat allotment located at the corner of Wollomia Way and Comet Drive, Sunrise Beach with vehicular access from Comet Drive;
  - b. 621m<sup>2</sup> in area containing a two-storey dwelling house set in well landscaped grounds containing mature trees;
  - c. zoned Low Density Residential under the Noosa Plan 2020.
2. The proposed carport is:
  - a. attached to the side of the existing dwelling house and located 0.8m minimum from the Comet Drive boundary;
  - b. 6.0m long and 7.1 m wide with an area of 42m<sup>2</sup>;
  - c. 2.6m in height to the Comet Drive frontage;
  - d. lightweight in design with slatted walls, natural wood posts a skillion colorbond roof sloping towards the street.
3. As the proposed structure triggers assessment against the relevant performance criteria of the Noosa Plan 2020 due to the proposed siting within the required 6m road boundary setback, the Assessment Manager on 7 August 2023 lodged with the Noosa Shire Council a Request for a Concurrence Agency Response for the design and siting of a carport within the front setback (under Schedule 9, Division 2, Table 3 of the Planning Regulation 2017).
4. On 11 September 2023, Council issued a Referral Agency Response directing the Assessment Manager to refuse the application for the reasons stated as follows:

'The application is refused as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:

Noosa Plan 2020 – Low Density Residential Zone Code

**PO9** Buildings and structures are designed and sited to:

- a) *provide a high level of amenity to users of the subject site and adjoining premises including provision of visual and acoustic privacy and access to sunlight;*

It has been considered that there are alternative design options available for which the carport may be located that will not adversely impact the amenity of the users of the subject site, while also complying with the acceptable solutions listed in the Low Density Residential Zone Code.

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

It has been considered that the design and location of the proposed carport is not consistent with the predominant character of the streetscape. It is Council's view that the predominant character of the streetscape consists of buildings and structures providing greater road boundary setback than that of the current proposal.'

5. The Assessment Manager subsequently issued a Decision Notice on 12 September 2023 refusing the proposed development based exclusively on the Referral Agency Response from Council directing refusal.
6. The hearing for the appeal was held at the subject site on 12 November 2023 at 11.30 am. The Tribunal had the opportunity to view the positioning of the proposed structure from the subject site, neighbouring properties, and the streetscape more generally.

### **Material considered**

7. The Tribunal considered the following material:
  - a. 'Form 10 – Appeal Notice', grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar 25 September 2023;
  - b. The Planning Act 2016 (PA);
  - c. The Planning Regulation 2017 (PR);
  - d. The Queensland Development Code 2020 (QDC);
  - e. The Building Act 1975 (BA);
  - f. The Building Regulation 2006 (BR);
  - g. The Noosa Plan 2020 (Noosa Plan);
  - h. Noosa Plan 2020 – Low Density Residential Zone Code (the Code);
  - i. Post-hearing submissions made by the Appellant's agent on 17 November 2023 and by Council on 20 November 2023;
  - j. The verbal submissions made by the parties at the hearing and site inspection;
  - k. Development Tribunal Decisions 21-040 dated 19 April 2022 and 23-014 dated 15 August 2023.

### **Jurisdiction**

8. The Tribunal has jurisdiction to hear the appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(1)(b), 1(2)(g) and Table 1, item 1(a) being an appeal by the Appellants against the refusal of the development application by the Assessment Manager on the direction of the Referral Agency.

### **Decision framework**

9. 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.*
10. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and is not relevant here) 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.*

11. Section 33 of the BA (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) allows a planning scheme to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover.
12. The Low Density Residential Zone Code Table 6.3.1.3 contains alternative provisions to the QDC. As the proposal does not meet the acceptable outcomes set out in Acceptable Outcome AO 9.1, which as applied to the subject site requires buildings and structures have a setback of 6m from the road frontage, assessment is made against the list of Performance Outcomes stated at PO9 of the Code.
13. For the purposes of this appeal only PO9 *(a) provide a high level of amenity to users of the subject site and adjoining premises including provision of visual and acoustic privacy and access to sunlight and (f) be consistent with the predominant character of the streetscape* are applicable.

### **Matters in dispute**

14. PO9 of the Code specifically applies to the design and siting of building and structures. PO9(a), which deals with amenity considerations has a focus both on the amenity of the 'users' and 'adjoining premises'. At the hearing, it was established that only the amenity impacts of the development on the users of the site were in contention due to the separation of the proposed carport from adjoining neighbours.

### **Findings of fact**

15. The Tribunal makes the following findings of fact:

#### PO9(a) amenity

16. In relation to the grounds for refusal pertinent to the PO9(a) amenity considerations, the Appellants contend that:
  - a. The proposed carport will provide enhanced amenity to the users of the premises as no covered carparking or paved driveway currently exists and the proposed positioning will maximise convenience of access and weather protection;
  - b. The proposed carport is of lightweight design with features such as natural wood slats and posts and colorbond roof to enhance visual appeal of the premises;
  - c. The two rooms in the existing dwelling below the roofline of the proposed carport are non-habitable;
  - d. The proposed siting will have no impact on neighbouring properties;

- e. The existence of a bus stop on the Wollomia Way frontage prevents locating a carport to the north side of the dwelling;
  - f. Locating the carport in the backyard of the property would result in difficult access to the dwelling and necessitate removal of established gardens and mature trees (including a street tree) that would reduce amenity of the subject site and streetscape.
17. In relation to the grounds for refusal pertinent to the PO9(a) amenity considerations, Council contends that:
- a. There are alternative design options available to locate the carport so that it will not adversely impact the amenity of the users of the subject site and also comply with the acceptable solutions set out in the Code;
  - b. The carport could be located in the backyard of the premises and be set back sufficiently to better comply with the requirements of the Code;
  - c. The proposed location of the carport necessitates removal of mature trees on the subject site along the street alignment;
  - d. The previous removal of the existing garage underneath the house has required the provision of external covered carparking creating potential amenity impacts.
18. Based upon the site inspection conducted at the hearing, the Tribunal finds that, in contrast to the alternative option suggested by Council, the intended design and siting of the carport would have no detrimental impact on neighbouring properties and would likely enhance the amenity of the users of the dwelling particularly in terms of vehicle protection and convenience of dwelling access.

#### PO9(f) streetscape

19. In relation to the grounds for refusal pertinent to the PO9(f) streetscape considerations, the Appellants contend that:
- a. The design and location of the proposed carport is consistent with the predominant character of the streetscape which includes buildings and structures within the required 6m setback;
  - b. The carport would make a positive contribution to the streetscape by better articulating the existing house from the Comet Drive frontage;
  - c. There are several examples both in the immediate vicinity of the subject site (eg 7 and 8 Wollomia Way and 45 Comet Drive) and in the neighbouring area (eg 13 Comet Drive - the subject of tribunal decision 21-040 approving a carport at minimal front setback) where buildings and structure intrude into the front setback;
  - d. The alternative location in the backyard of the property, which requires removal of the existing screen fence, on-site trees and a mature street tree, would result in greater visual disruption to the streetscape;
  - e. Supplementary landscaping could help visually obscure the proposed structure.
20. In relation to the grounds for refusal pertinent to the PO9(f) streetscape considerations, Council contends that:
- a. The carport represents a substantial structure located only 0.8m from the property boundary;
  - b. The design and location of the proposed carport is not consistent with the predominant character of the streetscape which consists of buildings and structures 'providing greater road boundary setback than that of the current proposal';

- c. The alternative location in the backyard of the property would allow for a more compliant setback with less impact on the streetscape. Council would favourably consider a relaxation from the required 6m setback at that location;
  - d. Examples of other properties in the vicinity of the site where buildings and structure are within the required setback are not a valid precedent as they are variously: approved under the previous planning scheme: not Council approved structures, or not within the streetscape considered by Council to be applicable to the subject site;
  - e. Council considers the term 'streetscape', although undefined in the Noosa Plan, to be what can be seen standing in front of the property and looking up and down the street. Tribunal decision 23-014 of 15 August 2023 accepted this interpretation of streetscape.
21. Based upon the site inspection conducted at the hearing, the Tribunal finds that, even utilising Council's interpretation of the applicable streetscape, Comet Drive presents as a varied streetscape comprising mixed architectural styles and landscape elements with instances where buildings and structures already intrude into the required 6m setback. Notably, numbers 45 and 49 Comet Drive have carports positioned 0m and 3.0m from the front boundary respectively and which are readily within view while standing in front of the subject site.
  22. The Tribunal noted that if a slightly broader interpretation of the applicable streetscape were taken and premises within immediate view of the property from the Wollomia Way frontage were considered (eg 7 and 8 Wollomia Way and 39 Newfield Street) there are several clear examples on adjoining properties and immediately across the road (ie 7, 8 and 9 Wollomia Way and 39 Newfield Street) where garages and carports are built with minimum front setback and even built to boundary. Further afield, at 13 Comet Drive, the Tribunal notes a similar proposal approved by a tribunal decision of 19 April 2022 (21-040).
  23. With respect to these examples Council contends that any unapproved structure or approved structures that pre-date the requirements of the current Noosa Plan should be disregarded for the purposes of consideration of the subject site. While the Tribunal is inclined to agree with Council in relation to un-approved structures, no evidence of compliance and enforcement action on allegedly unlawful development was presented by Council in relation to rectifying this situation and removing these unlawful developments from the streetscape. Further, in relation to carports approved under the previous planning instrument, the Tribunal concurs with the Appellant's view that the relevant provisions of the previous Noosa Plan are substantially the same as the current plan. From an overall streetscape appearance perspective, the presence of these structures approved or otherwise do in reality form an integral component of the established streetscape.
  24. It is also evident that the pattern of buildings and structures is characterised by considerable 'visual clutter' in the streetscape generally attributed to the presence of assorted structures such as solid rendered block or colorbond fences (up to 1.8m high) and solid driveway gates. These structures detract from the Council's apparent design intention of an 'open landscaped front yard' streetscape character with visual continuity of buildings and structures substantially set back from the street.
  25. Given this, the prevailing pattern of buildings and structures in the streetscape framing the subject site (and within the broader neighbourhood), does not exhibit a pattern of buildings and structures 'providing greater road boundary setback than that of the current proposal'.
  26. The Tribunal finds that the proposed carport, as intended to be designed and sited, would likely enhance the amenity of the users of the dwelling particularly in terms of vehicle

protection and convenience of dwelling access and potentially make a positive contribution to the streetscape.

27. In relation to the alternative location of the carport proposed by Council, being the backyard, the Tribunal agrees with the Appellants' position that while relocation may be an 'on paper' possibility, it would result in comparatively diminished amenity to the dwelling users due to the loss of useable landscaped open space, removal of mature trees and result in disjointed and un-sheltered access to the dwelling.

### **Reasons for the decision**

28. In this Appeal, the Tribunal considers the Appellants have satisfied the onus of demonstrating the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision of the Assessment Manager for the reasons identified below.
29. The Tribunal found that Comet Drive presents as a varied streetscape comprising mixed architectural styles and landscape elements with a pattern of built form that includes instances where buildings and structures already intrude into the required 6m setback. It is also evident that the pattern of buildings and structures is characterised by considerable 'visual clutter' in the streetscape generally attributed to the presence of assorted structures such as solid rendered block or colorbond fences and solid driveway gates that tend to visually dominate the streetscape.
30. The Tribunal finds that, in contrast to the alternative option proposed by Council, the proposed carport - as designed and sited - would likely enhance the amenity of the users of the dwelling particularly in terms of vehicle protection and convenience of dwelling access and potentially make a positive contribution to the streetscape.
31. The Tribunal therefore considers Performance Outcomes PO9(a) and (f) have been satisfied. However, to ensure that the structure does not, through alteration, become more visually dominant in future and to enhance the existing vegetative buffers, a condition preventing enclosure of the front of the structure and a condition requiring supplementary landscaping are considered appropriate by the Tribunal.

---

**Anthony Roberts**

**Development Tribunal Chair**

**Date: 22 December 2023**

## **Appeal rights**

Schedule 1, Table 2, item 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, Local Government, Planning and Public Works  
GPO Box 2457  
Brisbane Qld 4001

Telephone 1800 804 833

Email: [registrar@epw.qld.gov.au](mailto:registrar@epw.qld.gov.au)