



## Development Tribunal – Decision Notice

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

<b>Appeal number:</b>	23-064
<b>Appellant:</b>	Keenhaig Pty Ltd, trading as ShedBoss Cairns
<b>Assessment manager/Respondent:</b>	Rapid Building Approvals
<b>Co-respondent/Concurrence agency:</b>	Cairns Regional Council
<b>Site address:</b>	55 Kewarra Street, Kewarra Beach Qld 4879 and described as Lot 28 on RP 728024 – the subject site

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### **Appeal**

Appeal under section 229(1)(a)(i) and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the assessment manager's decision to refuse the appellant's development application, as directed by the concurrence agency, for the construction of a Class 10a shed.

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<b>Date and time of hearing:</b>	1.00pm Friday 12 April 2024
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Russell Schuler —Chair John Bright —Member Heath Bussell —Member
<b>Present:</b>	Les Sheahan —Appellant Mark Renfree —Property Owner Scott Wheeler —Respondent Hannah Dayes—Council representative Justin Phipps—Council representative
<b>Apologies:</b>	Dylan Thomas—Council representative (apology given at Hearing, unable to attend)

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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 by the assessment manager, as directed by the concurrence agency the Cairns Regional Council, to refuse the development application for building work with respect to the construction of a Class 10a shed on the subject site.

## Background

1. The subject site is a relatively level rectangular allotment of land of 1709m<sup>2</sup> in area, with a frontage to Kewarra Street of approximately 30 metres, and a depth of approximately 57 metres. Facing the subject site from Kewarra Street, it shares a left side boundary with an allotment of similar dimensions (53 Kewarra Street), and on the right side shares with the rear boundaries of two smaller lots which front onto Albatross Street. To the rear of the subject site is a drainage reserve which runs behind a number of allotments in Kewarra Street and is part of a larger waterway system. Kewarra Street is a constructed urban street with bitumen surface and kerb and channel on both sides.
2. The subject site is included in the Low Density Residential Zone in the current planning scheme for Cairns Regional Council (Council), CairnsPlan 2016 Version 3.1 (CairnsPlan). The subject site is currently improved by a Class 1a single detached dwelling house, as are the adjoining allotments.
3. The property owner has sought approval to construct a new Class 10a shed – building work under the *Building Act 1975* – on the subject site. Part 1.6 of the CairnsPlan outlines the provisions regarding “building work” regulated under that planning scheme. Part 1.6 of the CairnsPlan does not alter the standard provisions of the relevant part of the Queensland Development Code for siting and boundary clearance matters for either Class 1 or Class 10 structures in relation to the subject site, as it is zoned Low Density Residential. Therefore, the applicable code for consideration of the proposal is the Queensland Development Code Part MP1.2 (QDC MP1.2).
4. The new Class 10a structure proposed on the subject site, as depicted in the development application material, consisted of a building of overall dimensions of 12m in length and 10m in width. However, one section of the proposed building was shown as being a smaller component of some 6m in length and 3m in width, which reduces the overall size of the structure (i.e. 12m x 7m + 6m x 3m). The development application referenced a building floor area of 84m<sup>2</sup> however the enclosed building area is 102m<sup>2</sup> rather than as stated in the application. The proposed Class 10a is shown on the application plans as having a boundary setback of 0.75m from both side (shared with 53 Kewarra Street) and rear (shared with the drainage reserve) boundaries of the subject site. The building length adjacent to the adjoining property is 12m in length, and along the rear it is 10m in length. The wall height along the side boundary is 4m above floor slab with a maximum building height at the roof ridge of 4.94m above floor slab. The roof ridgeline is 4.25m inside the side boundary. The shed is to be clad in Colorbond metal sheeting and fully enclosed with one (1) double roller door servicing the “main” part of the structure and a single roller door giving external access to the smaller section of the shed.
5. The application was subject to a concurrence agency referral by the Assessment Manager to the Council due to the following non-compliances with the QDC MP1.2:
  - (a) Acceptable Solution A2(a)(i) – The minimum side and rear boundary clearances are to be 1.5m (proposal is 0.75m both side and rear);
  - (b) Acceptable Solution A2(d)(i) – The mean height of the part of the building within the boundary clearance is not more than 3.5m (proposal is 4.0m mean height on the side boundary and 4.29m mean height on the rear boundary); and
  - (c) Acceptable Solution A2(d)(ii) – The total length of the part of the building within the boundary clearance is not more than 9m along any one boundary (proposal is 12m along the side boundary and 10m along the rear boundary).

6. On 7 November 2023, Council, as concurrence agency, having assessed the proposal, issued a “Referral Agency Response” directing the Assessment Manager to refuse the development application.
7. The development application was subsequently refused by the Assessment Manager on 27 November 2023 and the appeal lodged with the Tribunal on 30 November 2023.

### **Jurisdiction**

8. Section 229(1) of the PA identifies that schedule 1 of the PA states the matters that may be appealed to the Tribunal.
9. The Tribunal has jurisdiction to determine this appeal under section 229(1)(a)(i) of the PA, and schedule 1, section 1(1), table 1, item 1(a), and schedule 1, section 1(2)(g) of the PA, it being an appeal by the appellant against the refusal of the development application by the Assessment Manager.

### **Decision framework**

10. The onus rests on the appellant to establish that the appeal should be upheld (section 253(2) of the PA).
11. The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of the PA).
12. The tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings),
13. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA, and the Tribunal decision takes the place of the decision appealed against (section 254(4) of the PA).

### **Material considered**

14. The material considered in arriving at this decision was:
  - (a) Form 10 Notice of appeal, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals registrar on 30 November 2013.
  - (b) ‘Building Application letter of refusal’ issued by the Assessment Manager to the Applicant dated 27 November 2023.
  - (c) Cairns Regional Council ‘Referral Agency Response’ – Application refusal in relation to the siting provisions of the QDC MP1.2 dated 7 November 2023.
  - (d) ‘Building Certifiers Request for Referral Agency Response (Building Work)’ Form dated 11 September 2023, including accompanying ‘DA Form 2 – Building works details’ and ‘Assessment Responses for Referral Agency Assessment (Building Work)’ Form information package addressing a siting dispensation request for non-compliance with the siting provisions of the QDC MP1.2 (in relation to the proposed new construction of the Class 10a shed at the subject site).
  - (e) Proposed Shed plans showing Front Elevation, Rear Elevation, Front View, Rear View and Plan prepared by ShedBoss Cairns, notated Order No 384197 and dated 29 August 2023, plus an undated Site Plan (no reference number).
  - (f) Site inspection and verbal representations at the Tribunal hearing on 12 April 2024.

- (g) Direction Notice issued by the Tribunal Registrar (Registrar) to all parties dated 12 April 2024 allowing the appellant and property owner to submit additional information, and then allowing all parties to provide any response to that additional information.
- (h) Property owners' emails dated 17 April 2024 to the Registrar providing additional information.
- (i) Appellants email dated 22 April 2024 to the Registrar providing additional information.
- (j) Concurrence agency (Council) email dated 8 May 2024 to the Registrar providing a response to the additional information from the property owner and the appellant.
- (k) The *Planning Act 2016*.
- (l) The *Cairns Plan 2016 Version 3.1*.
- (m) The *Queensland Development Code MP1.2 – Design and Siting Standard for Single Detached Housing – On Lots 450m<sup>2</sup> and Over*.

### Findings of fact

15. The tribunal makes the following findings of fact:

- (a) The proposed development was assessed by Council as concurrence agency against the relevant sections of the QDC MP1.2, the purpose of MP1.2 being: *“To provide good residential design that promotes the efficient use of a lot, an acceptable amenity to residents, and to facilitate off street parking.”*
- (b) Council's decision was that the application for a referral agency response be refused, as Council considered the proposed shed would compromise the achievement of the applicable Performance Criteria of the QDC MP1.2, with specific reference to P2(c), that being:

*(P2) Buildings and structures –*

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

The referral agency response did not include reference to P2(a), or P2(b), or any other component of the QDC in the section outlining the reasons for decision, and the Tribunal is satisfied also that with respect to compliance (or otherwise) with the siting requirements of the QDC MP1.2 the relevant parts of the QDC for this appeal are Performance Criteria P2, specifically P2(c), and the relevant Acceptable Solutions as contained in A2.

- (c) Council's specific reasons for deciding to refuse the application as stated in the referral agency response are summarised as follows:

*As the maximum height of the structure would be 4.94m, the prescribed side boundary clearance would be greater than 2m to the outermost projection, in accordance with A2(a)(ii).*

*Further, the proposed Shed does not comply with A2(d)(ii) for maximum length, being 12m within the side boundary clearance. The proposed Shed would be setback 0.75m from the side boundary at a length of 12m, representing a departure of 3m in length from the Acceptable Solution A2(d)(ii) of the Queensland Development Code MP1.2. The proposed Shed would present as a 12-metre-long wall with no articulation of the built form facing the neighbouring premises. The proposed Shed would occupy the majority of the length of the neighbours rear*

*recreational space, moreover, in the direct vicinity of areas of enjoyment for the subject neighbour. Officers consider that the current degree of residential amenity enjoyed by the neighbour would be significantly diminished.*

*Further, the proximity of the building to the side boundary limits opportunities for landscaping with screening qualities to act as visual buffer and soften the appearance of the built form.*

During the hearing, discussion between the parties on Council's reasons for decision resulted in the Tribunal deciding that the Council had erroneously used the maximum height of the proposed shed to nominate that to comply with the Acceptable Solutions of the QDC MP1.2 the required boundary clearance would be greater than 2m, when the correct interpretation of the Standard is that as the height of that part of the proposed shed at the side boundary is less than 4.5m the required setback is 1.5m to the outermost projection, in accordance with A2(a)(i).

The Council's reasons for decision also stated that the proposed shed, at 12m in length within the boundary clearance, would be 3m too long to allow consideration of the proposal to be approved under the relevant Acceptable Solution, being A(2)(d)(ii). Acceptable Solution A(2)(d) states that in certain circumstances Class10a buildings, or parts of buildings, may be within the boundary clearances nominated in, in this case, Acceptable Solution A(2)(a), but with provisos regarding height and length. The Tribunal noted that not only is the proposed shed greater in length than 9m, the total length stated as meeting the requirements of A(2)(d), but it also fails to meet the limit of the mean height (not more than 3.5m) as required by A(2)(d) as well. There was some discussion at the hearing as to potential alterations to the plans of the proposed shed to possibly overcome some of the siting concerns however no particular suggestions met with any specific agreement.

The Tribunal hearing discussed the relevance of any 'landscaping' requirements in undertaking an assessment of a proposal being considered under P2 of the QDC MP1.2. The Tribunal noted that there is no specific reference to landscaping or to screening or to providing a visual buffer in this section of the QDC.

Following the discussions at the hearing the Tribunal considered that the most significant departures from MP1.2 concerning the proposed development are –

- Possible adverse impact on the amenity of adjoining residents (P2(c)) due to reduced side boundary clearance;
  - Mean height of building (4m) within reduced setback, being more than 3.5m along side boundary (A2(d)(i)); and
  - Total length of building (12m) within reduced setback, being more than 9m along side boundary.
- (d) Besides the discussions relative to the referral agency response as outlined in 15(c) above, both the appellant and the property owner sought to table further documentation for the Tribunal's consideration at the hearing. The Tribunal required any such information to be forwarded to the Registrar, with the intention that it would be contained in a Direction Notice which would be provided to all parties for review and response. The hearing was advised that the Tribunal would take the submissions and any responses into account when making the final decision.
- (e) The site inspection undertaken at the Tribunal hearing on 12 April 2023 showed that the concrete floor slab for the proposed shed was already constructed, at 0.75m

(approximately) setbacks to both the side and rear boundaries. Representations made by the appellant at the hearing were that this situation was due to misunderstandings/miscommunications between the registered builder and building certifier and property owner as to giving/receiving approval to the plans for the proposed shed. The site inspection did not identify any practical impediment to achieving the required 1.5m setbacks to meet the requirements of the QDC.

- (f) The site inspection also showed that a relatively new Colorbond fence nominally 1.8m high had recently been erected along the side boundary shared with the neighbouring property, with the above-mentioned concrete slab being sited some 0.75m in from this fence.
- (g) At the site inspection the property owner also provided a visual representation within his property of the 'view' from a specific location on the neighbouring property (swimming pool) towards the proposed shed, and the perceived change in visible wall/roof height at a boundary setback of 0.75m and 1.5m above the current fence. The property owner expressed his opinion that the visual impact at 0.75m would only be marginally worse than if the shed was constructed at 1.5m setback.

#### Submissions to the Tribunal

16. A submission was received by the Registrar from the property owner (2 x emails). The submission initially went through the calculations regarding the siting of the proposed shed at either 0.75m or 1.5m setbacks from the side boundary. Comments were included on the possibility of being able to increase the height of the proposed shed should it be setback 1.5m, and the resultant visual impact if this happened. Several photographs and Google views were also supplied showing various Class 10 structures in the general neighbourhood which appear to be close to property boundaries.

A submission was received by the Registrar from the appellant. The submission consisted of notes prepared by another party as a commentary on the Council's referral agency response, with prominence being given to whether the application should have been assessed by Council against Acceptable Solution A2(a) and not Acceptable Solution A2(d). It was stated that A2(d) was not relevant as the proposed structure has a mean height greater than 3.5m and does not comply with A2(c). Additional comments regarding interpretation of amenity and privacy, setback based on height and landscaping were also included in the submission.

A response to both submissions was received by the Registrar from the Council. The response addressed matters raised in both submissions, as follows:

- In relation to the submission from the property owner Council stated that their position is that visual amenity impacts of the neighbouring site as a whole have to be considered and not just from a specific location on that site. The Council also restated the view that to permit a Class 10a structure within the reduced boundary setback allowed by A2(d), the dimensions of the structure should not exceed 3.5m in height and 9m in length, otherwise the structure would not be consistent with the amenity of a residential zone. In relation to the property owner's list of similar developments, the Council gave the opinion that as these structures were assessed for front boundary setbacks, a different Performance Criteria had applied to their assessment as compared to the matter under appeal.
- The submission from the appellant was also addressed by the Council, who stated that as Acceptable Solution A2(d) provides for further dispensation for Class 10 structures as compared to Acceptable Solution A2(a), it is considered to be the

appropriate assessment benchmark for the proposal. The applicant's referral agency application did not request assessment against either benchmark, and as such Council believes that the correct assessment was made. Responses were also provided on the comments regarding interpretation of amenity and privacy, setback based on height, and landscaping.

17. Following a review of the key points raised in the submissions and responses, the Tribunal has made the following findings:

- The assessment of visual amenity impacts on or from a neighbouring property should be more extensive than from one specific location. The relevant Performance Criteria in the QDC (P2(c)) specifies assessing whether there is an adverse impact on the amenity and privacy of residents on adjoining lots, rather than a particular location on a lot. Effectively, anywhere within a property could be considered to be a viewing position.
- It is not properly comparable to equate open carports close to front boundaries to enclosed sheds close to side and rear boundaries. Class 10 structures proposed to be sited within the front boundary setback are assessed through a different QDC Performance Criteria than side/rear boundary setback cases. An assessment against P1 (front boundary setback) and P2 (side / rear boundary setback) are markedly different. QDC P1 focuses on acceptable streetscapes – bulk, similarity to neighbouring setbacks, outlook/views of neighbouring residents and nuisance and safety to the public; whereas P2 focuses on acceptable living conditions for occupants (at the site and neighbours) – light and ventilation, amenity and privacy. However, in the examples provided by the landowner it is unclear whether side boundary setback issues may have also needed to be addressed at least in some instances. There was no information as to this in either the submissions or the response, and whilst it may be that there are specific circumstances where the structures would have required approval via a Performance Criteria pathway the Tribunal does not consider this issue as relevant in this instance.
- QDC MP1.2 Acceptable Solution A2(d) provides specific dispensation for Class 10 structures for assessing authorities to take into account in circumstances where an applicant is seeking to construct a structure within the boundary clearances nominated in Acceptable Solution A2(a). It is considered the appropriate assessment benchmark in this case.

### **Reasons for the decision**

18. The proposed structure exceeds the quantitative requirements of the relevant Acceptable Solution A2(d) of the QDC MP1.2 for the siting of Class 10a buildings or parts of buildings within the boundary clearances nominated in A2(a), in having a mean height and a total length along a boundary greater than the stated criteria. It is considered the proposed structure would have an adverse visual impact on the amenity of the residents of the adjoining property and the use of the property's private open space.
19. The proposal as presented did not offer alternative options that would comply or more closely comply with the relevant Acceptable Solution for consideration by the Tribunal. Nor were alternatives to the proposal which were discussed at the hearing acceptable to the appellant. As such, the Tribunal had no alternative proposal to consider which may have contributed to the mitigation of the impacts of the proposal on the adjoining property.
20. In its assessment the Tribunal was not satisfied that the appellant had established that the appeal should be upheld. The appellant's grounds were directed towards the proposition

that QDC compliance was mostly immaterial in this case and that the proposed structure would be acceptable as presented.

21. The existence of the concrete floor slab, whilst unfortunate, could not be relevant to the Tribunal's deliberations.
22. The Tribunal wishes to note that as the subject site shares a rear boundary with a drainage reserve, the proposed rear boundary setback of 0.75m is considered not to have an adverse impact on amenity.

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**Russell Schuler**  
**Development Tribunal Chair**

**Date: 23 May 2024**



## **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)