



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-034
Appellants:	Aaron Loats and Abby Loats
Respondent (Assessment Manager):	Ian Simpson of My Cert Building Certification Qld
Co-respondent (Concurrence Agency):	Sunshine Coast Regional Council
Site Address:	Lot 131 RP194040/ 24 Summer Drive Maroochydore – 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 Building Works for additions to a dwelling house being an existing carport. The decision followed a concurrence agency response by the Sunshine Coast Regional Council, directing refusal of the application. Council stated in part, that the proposal did not meet Performance Outcomes PO2 (b) and (d) of the Dwelling House Code within the Sunshine Coast Planning Scheme 2014.

Date and time of hearing:	11.00am, 21 September 2021
Place of hearing:	The subject site
Tribunal:	Debbie Johnson - Chair Julie Brook - Member Suzanne Bosanquet - Member
Present:	Appellant - Aaron Loats Tegan Johnson - Assessment Manager representative Cameron Wilson-Yapp – Council representatives

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA), changes the decision of the assessment manager dated 4 June 2021 namely, to approve the siting of an *open carport* on the subject land situated as indicated on Archilads Drawing titled Preliminary RS dated 28 June 2017, Sheet 1 of 1 subject to the following conditions:

1. The street boundary setback is 1.1m as measured to the outermost projection of the carport;
2. At least two sides of the structure (including the front side) or more are open, noting a side is also considered open where the roof covering adjacent to that side is not less than 500mm from another building or a side or rear allotment boundary; and
3. Such further conditions as the assessment manager sees fit to impose to ensure compliance with the building assessment provisions under the *Building Act 1975*.

Background

1. The subject site is a rectangular residential property having a frontage of 20m and an area of 650sq/m. It is situated within an area locally known as Maroochy Waters. This estate was developed over a 30 year period commencing in the late 1970's.
2. The original home was built around 1985 and was typical of that period. The dwelling was a single storey building constructed on a concrete slab, with brick veneer external walls and a Dutch gable tiled roof. The home comprised three bedrooms, one bathroom and a single enclosed garage. The structure was rectangular in shape with the length of the building being parallel to the street frontage. This left minimal (1.5m) setbacks to each of the side boundaries restricting access to the rear yard. There was not sufficient width to get a vehicle or a trailer along the side of the dwelling.
3. The property has had many owners since it was established and it is evident that some minor aesthetic and structural changes have been made over the years. For example, along the rear of the home a low pitched skillion metal sheet roof was attached to provide a covered patio area. In the front yard, a small single carport structure (4.0m x 3.3m) was built over the driveway and attached to the fascia. This structure presumably enabled residents to park a small second car under cover.
4. The current owners purchased this property in May 2015. At that time, the single lock up garage was still fit for purpose and both the rear patio and the front carport were also evident.
5. The appellants purchased the home with the intention of increasing the living space and generally renovating to suit their growing family's needs. There has been significant interest in residential properties like this. Although the original homes are modest by current standards, the land is in a key location. This is particularly evident where the allotments are considered generous in size by comparison with land in new and emerging residential areas. To that end, many of the properties in this location have been extended and renovated or demolished and a larger home built in its place.
6. Throughout 2017, the appellants demolished the small single carport and replaced it with a double width gable roofed carport having an area of 5.4m x 5.4m. At that time no building permit was sought to construct the new carport. The appellants, believing that they were constructing a 'like for like' structure (albeit larger) assumed that approvals weren't necessary. Seemingly, no licenced contractors were involved in the erection of the new carport as they would have or should have known that permits were required.
7. It seems the appellants had spoken with Council at that time and understood the requirement to obtain a building permit was triggered by the cost of works. As they had had the opportunity to use second hand building materials, there was minimal costs (\$2500.00 as stated on the Form 2) involved.
8. At the hearing, which was held onsite, it was evident that the appellants have undertaken other building works inside their home without seeking a building permit. These works included the removal of an internal wall between the original living room and the single garage. Then by removing the garage door and making good that wall, they absorbed this area and increased their living space.
9. By removing that garage, they no longer had anywhere to park a car on site, outside of the 6.0m road setback area in the front of the home. Hence their need for the existing carport which is the subject of this appeal.
10. The appellant advised the tribunal that they had subsequently received a notice from the Council advising them that they had no record of any approvals relating to siting and construction of the existing carport that had been constructed within the street setback area.

11. The appellants discussed the matter further with Council and subsequently lodged a development application for building works with the assessment manager.
12. On 25 March 2021, the assessment manager referred the application to Council for consideration and advice in respect to the siting of the carport given it was built within the 6m road setback area.
13. On 20 April 2021, Council responded to the assessment manager directing him to refuse the development application.
14. On 4 June 2021, the assessment manager issued a Decision Notice of Refusal to the appellants stating that the application was refused due to the direction from the concurrence agency.
15. On 2 July 2021, the appellants stated their grounds for appeal, and completed and submitted the Form 10 – Notice of Appeal to the Registrar.

Jurisdiction

16. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
17. Section 1(2) of schedule 1 of the PA states Table 1 applies 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”.
18. 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 *Building Act 1975* which is assessed against the Queensland Development Code (QDC) side boundary setback provisions for structures. Similarly, under the *Building Act 1975*, section 33, the local planning scheme may impose alternative siting provisions as is the case in this instance. The Local Government is a concurrence agency as per Schedule 9, Table 3 of the Planning Regulation 2017.
19. 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 of all or part of the development application.
20. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

21. 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.

22. 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 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.

Material Considered

The material considered in arriving at this decision comprises:

1. Archilads Site Plan Drawing titled Preliminary RS dated 28 June 2017, Sheet 1 of 1.
2. Referral Agency Response dated 20 April 2021.
3. MyCert Decision Notice refusing the application 2021-0167 - dated 4 June 2021.
4. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 2 July 2021.
5. Sunshine Coast Regional Council ‘development.i’ for 24 Summer Rd Maroochydore.
6. Google maps and street view images.
7. Nearthmaps satellite images from 2010 to current date.
- 8.
9. CoreLogic Property Data pertaining to 24 Summer Drive Maroochydore.
10. The Planning Act 2016 (PA).
11. The Planning Regulation 2017 (PR).
12. The Development Application Rules.
13. The Building Act 1975 (BA).
14. The Building Regulation 2006 (BR).
15. The Queensland Development Code (QDC) Part MP 1.2.

16. The Sunshine Coast Planning Scheme 2014.
17. The National Construction Code 2019 (NCC).
18. The verbal submissions made by the parties at the hearing and during the site inspection.
19. The written submissions by ten neighbouring property owners providing support for the development which is the subject of this appeal.
20. The written submission (which included numerous photographs of homes nearby) by the appellant as provided to the Registrar upon lodging the appeal.
21. Email correspondence between Council and the assessment manager between 5 and 19 May 2021 that considered historical information in respect to the carport which was demolished in 2017.

Findings of Fact

23. The hearing for the appeal was held at the appellants' home and therefore at the subject site, on 21 September 2021. The Tribunal had the opportunity to view the existing carport structure, which is the subject of this appeal, from both the subject property and neighbouring properties.
24. The property is very tidy and the house that is predominately grey and white in colour, presents well when viewed from the street. The double carport is situated on the far right hand side or eastern portion of the front yard.
25. The gable end wall of the carport features a horizontal white coloured weatherboard infill that faces the street. Supporting the solid gable end of the roof there is a grey wall façade punctuated with a white garage door, fitted to provide security to the car parking area onsite. When viewed from the street this structure appears to be garage rather than a carport.
26. There is an open slat paling fence that is also coloured white and built 1.8m high along the frontage. The fence steps in 1.0m to allow a swinging entry gate at the centre and there is a further return of 1.0m at the eastern end to meet the corner of the carport. The base of the fencing is clearly defined by a continuous strip of landscaping right across the frontage either side of the entry gate. Inside the fence the front yard predominately features an open lawn area however there is a row of dense shrubs along eastern portion of the lawn aligning with the western side of the carport.
27. The precise side and front boundary setbacks of the existing carport are unknown as a surveyor hasn't been involved however the plans prepared by Archilads show a 1.1m setback to the frontage and a zero boundary setback to the eastern side boundary. The rear of the carport is defined by the front wall of the dwelling with the exception of the 1.5m length between the dwelling and the side boundary.
28. The front line of the existing carport structure is enclosed by a wall containing the garage door. The eastern side boundary is considered enclosed by virtue of the zero boundary setback and the rear wall is predominately enclosed (for a length of 4.0m) as it is bounded by the front wall of the house.
29. At the hearing several aspects of concern were discussed with the appellant. These included the fact that while the structure presented well it hadn't been lawfully constructed therefore the structural adequacy was in doubt. Discussion also took place in respect to fire safety and lack of compliance with respect to the National Construction Code provisions as the carport (class 10a structure) is attached to the dwelling (class 1 structure) and has been built to the side boundary without the protection of a fire rated wall (FRL 60/60/60) on that side boundary. Furthermore, there

is no evidence that there is a fire rated wall at the rear of the carport structure to protect the residence.

30. The *Building Regulation 2021* Schedule 7, nominates the Queensland Development Code, as setting out the standard siting requirements for buildings and structures. Similarly, Part 3 Section 6 Clause 2 (c) states: A local government planning scheme may provide for the following matters— a qualitative statement for a matter provided for under the performance criteria mentioned in paragraph (a) *or some of performance criteria 4, 5, 7, 8 or 9 under QDC part 1.1 and the acceptable solutions for the performance criteria apply for the building work;* or (b) *all or some of performance criteria 4, 5, 7 or 8 under QDC part 1.2 and the acceptable solutions for the performance criteria apply for the building work;* for the building work, if the scheme also provides for quantifiable standards for the statements.
31. Relevant to the subject building development application, the council's jurisdiction is limited to its Referral Agency functions under section 33 of the *Building Act 1975* in relation to assessing whether the proposed building or structure complies with the quantifiable standards under the planning scheme in respect of boundary clearances.

Sunshine Coast Planning Scheme 2014

32. A dwelling house is a defined use in Schedule 1 of the Sunshine Coast Planning Scheme 2014 which states: A residential use of premises for one household that contains a single dwelling. The use includes out-buildings and works normally associated with a dwelling house and may include a secondary dwelling. Therefore by definition, any building application for a carport is interpreted as a building application pertaining to a dwelling house.
33. The land is zoned low density residential. Under Part 5, Material Change of Use tables of assessment, Table 5.5.1 states: within the Low Density Residential zone, a dwelling house is accepted development provided it meets the acceptable outcomes of the Dwelling house code. Where proposed development does not meet the acceptable outcomes for the use code, the development triggers a development application for building works which is code assessable.
34. Under Part 5 Building Works Tables of assessment, Table 5.7.1 states: building works (for all zones) is accepted development if the applicable use code (Dwelling House code in this instance) and the Transport and Parking code identifies acceptable outcomes applicable to accepted development.
35. Section 5.3.3 (2) of the Scheme, states: Accepted development that does not comply with one or more of the relevant acceptable outcomes in the relevant parts of the applicable code(s) becomes assessable development requiring code assessment unless otherwise specified. In this matter, development for a Dwelling House becomes code assessable. The building works are subject to the provisions of the Dwelling house code, the Maroochydhore/ Kuluin local plan code and the Transport and parking code.
36. The local plan states: Kuluin and Maroochy Waters are established, predominantly low density residential neighbourhoods that offer a quiet, relaxed lifestyle in locations close to the beach and the services offered by the Maroochydhore Principal Regional Activity Centre.
37. Section 9.3.6.2 Purpose and overall outcomes of the Dwelling House Code states in part: The purpose of the Dwelling house code is to ensure dwelling houses achieve a high level of comfort and amenity for occupants, maintain the amenity and privacy of neighbouring residential premises and are compatible with the character and streetscape of the local area.
38. Part 9.3.6.1 of the Dwelling House Code sets out the application of the Dwelling house Code provisions stating as follows: This code applies to accepted development and assessable development identified as requiring assessment against the Dwelling house code by the tables of assessment in Part 5. The acceptable outcomes in Table 9.3.6.3.1 are requirements for

applicable accepted development. Where accepted development does not meet the prescribed acceptable outcomes, the development becomes assessable development and can be assessed against the corresponding performance outcomes. Council becomes the referral agency in this situation.

39. Table 9.3.6.3.1 of the Dwelling House Code sets out Performance outcomes and acceptable outcomes for the Dwelling House Code, the relevant assessment benchmarks are listed below: Acceptable outcome AO2.1 states in part:

Where located on a lot in a residential zone, a garage, carport or shed:-

- is setback at least 6m from any road frontage; and
- does not exceed a height of 3.6m;

Note AO2.1 (a) is an alternative provision to the Queensland Development Code (QDC)

The corresponding performance outcome PO2 states:

Garages, carports and sheds:-

- (a) preserve the amenity of adjacent land and dwelling houses;
- (b) do not dominate the streetscape;
- (c) maintain an adequate area suitable for landscapes adjacent to the road frontage; and
- (d) maintain the visual continuity and pattern of buildings and landscape elements within the street.

40. In this matter assessment must be considered against the performance outcomes set out in PO2 as the acceptable outcome provisions in AO2.1 are not being met. In addition, as is noted, AO2.1 (a) is an alternative provision to the Queensland Development Code, therefore no consideration is to be given to setback provisions contained in the QDC.

41. In relation to the carport setbacks, the planning scheme provisions listed at AO2 and PO2 are largely enforced to ensure there is opportunity for landscape thereby preserving and enhancing the streetscape and the amenity for residents.

42. By providing written endorsement the immediate neighbours and others nearby have clearly demonstrated support for the approval of the existing carport which has been there for more than 4 years.

43. Part 9 Developments: 9.1 Preliminary (2) of the Scheme states: Use Codes and other Development codes are specific to each planning scheme area. Thus, the Maroochydhore / Kuluin local plan performance outcomes and acceptable outcomes are given precedence to the provisions of the Dwelling house code and the Transport and parking code in this matter. However, there is only one specific reference to development in the low density zone development and it does not contradict and therefore does not override the outcomes sought in the Dwelling House Code or The Transport and Parking code pertaining to this matter. This is found under 7.2.19.4 at Table 7.2.19.4.1 PO2.

44. Table 7.2.19.4.1 PO2 states: Development provides for buildings, structures and landscaping that are consistent with, and reflect the coastal urban character of, the Maroochydhore / Kuluin local plan area. This outcome is not overly evident in that part of Summer Drive, which is the focus of our consideration. However, an understanding of what traditional beachside residential character might be is subjective.

45. AO8 within the Dwelling House Code states: onsite car parking is to be provided for two cars (for lots greater in area than 300sq/m) with at least one of them capable of being covered. Also within the Dwelling House Code AO2.1 (a) states: Where located on a lot in a residential zone, a garage, carport or shed is setback at least 6 metres from any road frontage.

46. The earlier development that facilitated the increase in the living area by absorbing and removing the original garage area was potentially unlawful in that it removed the compliant

covered car parking space. However, it can be argued that at that time there was also a small existing carport structure (thought to have been approved historically) that provided the required covered car parking space.

47. The minimal side setbacks leave the property with no vehicular access to the rear yard. Therefore any covered car parking to be provided on site must be within the 6m street setback.

The Queensland Development Code (QDC)

48. The Dwelling House Code 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 Dwelling House Code AO2.1 (a) provides some alternative siting provisions to the QDC A1 (a), therefore the 6m benchmark (for a garage or a carport) of the Dwelling House Code apply to the proposed development. Where alternative outcomes benchmarks cannot be met (in this instance the 6m frontage setback) the performance outcomes of the code apply.
49. In the Referral Agency Response Council stated that the 1.1m setback to the outermost projection of the existing carport structure did not meet the performance outcomes PO2 (b) and (d) of the Dwelling House Code.
PO2 (b) states Garages, carports and sheds-
(b) do not dominate the streetscape; and
(d) maintain the visual continuity and pattern of buildings and landscape elements within the street
50. In the context of the subject site there are at least six examples of shade structures providing cover to cars within the 6m street setback area. These structures may or may not have been erected lawfully but do not detract from the general streetscape. Given the residential development is long established both the building and landscape elements are varied with the benefit of time. Also noteworthy are the two mature street trees either side of the subject site.
51. The tribunal found that the dominance factor was not evidenced given the large number of existing substantial fences, shade sails and garage doors and the efforts made to soften this dominance by the appellant in matching and permeable fencing and frontage landscaping. It was not evident that the dominant form of construction was “open landscaped fronts” or a “consistent 6m setback” had been applied.
52. The tribunal found that when considering the visual continuity of the street that there were no ,consistent setbacks, fencing, street tree arrangement or build form on Summer Drive. The street contained a mix of architecture including some very modern structures and high-mass fencing to boundary and smaller structures on frontages such as pool pump houses. A defined ‘continuity and pattern’ of streetscape is not apparent
53. Within the Summer Drive streetscape, there are two different carport views that affect the street character:
View 1 - Carport door closed
The existing panel lift garage door is a solid white coloured door approximately 2.1m high. When closed, the carport door appearance creates a solid rectilinear shape on the boundary. Although the site plan shows a 1.1m setback, the visual appearance is that the building is located on the actual boundary with no setback.
View 2 - Carport door open
When the door is open, the carport creates a shaded recess under the roof and the line of shrubs along the western line of the carport is readily appreciated. The visual relief provided by the recess and shrub line greatly reduces the scale and impact of the carport when viewed from the street.

Reasons for the Decision

54. Given the carport was constructed and has been part of the streetscape for more than 4 years and there is no other alternative to provide compliant on-site covered car parking, the current location uses the vehicle crossover provided for the original garage.
55. Every immediate neighbour, ten in total, has been willing to provide written endorsements to support the approval of the existing carport. As the neighbours were evidently made aware of this appeal they could have used the opportunity to object to its form within their street. However, they have chosen to support the approval of this carport. Building line setbacks are largely imposed to provide opportunity for landscape and to preserve and enhance the streetscape for communities. The neighbouring residents, being the most affected in this instance, are also best positioned to judge the impact and in this case the outcome, as the carport has stood for 4 years.
56. Given the carport is to be retrospectively approved, conditions are imposed to reinforce the existing patterns of building and landscape and enhance the visual appearance of the structure. These conditions are aimed at reducing the bulk of the carport at pedestrian scale on the street.

Debbie Johnson

Development Tribunal Chair
Date: 17 December 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