



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	24-011
Appellant:	Paul Murdoch
Assessment manager:	Neil Oliveri
Co-respondent (concurrence agency):	Brisbane City Council
Site address:	41 Walmsley Street, Kangaroo Point Qld 4169 and described as Lot 6 on RP 11151 – the subject site

Appeal

Appeal under section 229 of the *Planning Act* (PA) and schedule 1, table 1, item 1(a) of the *Planning Act* 2016, against the refusal by the assessment manager, at the direction of the referral agency, of a development application for a development permit for building work to increase the height of boundary walls to 3 metres.

Date and time of hearing:	N/A
Place of hearing:	The appeal was decided on submissions
Tribunal:	John Panaretos—Chair Suzanne Bosanquet —Member

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(d) of the *Planning Act* 2016 (PA), sets aside the decision of the assessment manager to refuse the application and orders the assessment manager to:

- a) remake the decision within 25 business days of the date of receiving this decision notice, as if the concurrence agency had no requirements; and
- b) should the application be approved, the approval will be subject to the amended plans submitted to the tribunal registrar on 27 September 2024.

Background

1. The proposal was to increase the height of existing side and rear walls bordering the rear yard of the existing dwelling house to a maximum height of 3 metres, thus exceeding the maximum height of 2 metres prescribed by Acceptable Solution A2(c)(iii) of the Queensland Development Code (QDC MP1.1).

2. The application was referred to Council as referral agency, to be assessed against Performance Criteria P2, which requires the provision of adequate daylight and ventilation to habitable rooms, the provision of light and ventilation to habitable rooms of buildings on adjoining lots, and that amenity and privacy of adjoining lots is not adversely impacted.
3. The submission dated 14 December 2023, accompanying the application, stated that two of the adjoining neighbours (on the western and northern boundaries) of the site had indicated their assent to the proposal.
4. Council refused the application on 15 May 2023, reasoning that:
 - a) *'...The proposed increased fence height is within 1.5m of the adjoining dwelling houses to the east and west and will be adjacent to habitable areas of these dwellings. The height of the fence with masonry material will impact the ventilation from the habitable areas;'*
 - b) *'...The additional wall fence height will restrict natural light and breeze and adversely impact on the amenity of residents on these dwellings.'*
 - c) *'...The proposed fence heights will result in an overbearing bulk and scale to the adjoining properties, impacting on the adjoining residents amenity and use of habitable and recreational areas.'*
5. The appeal was lodged with the Registrar on 19 March 2024, a tribunal convened and a hearing date set. However, prior to the hearing date, the Registrar was notified by verbal and written communication that the parties to the appeal had agreed on an amended plan and that no hearing was now necessary.
6. On 8 October, the tribunal requested confirmation from Council of its support for the amended proposal and copies of letters from two neighbours in support of the initial proposal, as cited by the appellant.
7. On 9 October, Council confirmed its agreement to the amended plans.
8. The tribunal subsequently issued an order requiring Council's submissions *'addressing how the change...addressed the issues raised in Council's reasons for directing refusal in its Referral Agency Response of 19 January 2024'*, to which Council responded on 21 October.
9. Council's response addressed the reduced impact of the amended wall design on light and ventilation to the neighbouring house to the east. However, it did not address the unchanged impact on ventilation of the house to the west, which was a concern in its Referral Agency Response, nor did it address how the amended proposal overcame the *"...overbearing bulk and scale to the adjoining properties, impacting on the adjoining residents amenity and use of habitable and recreational areas"* cited in clause (c) of its Referral Agency Response.
10. Despite these omissions, Council stated it *"...is satisfied that the amended fence design achieves compliance with the Purpose and P2 of MP1.1 of the Queensland Development Code."*
11. On 31 October, due to the incomplete nature of Council's assessment, the tribunal issued directions for Council to address the issues raised in paragraph 9 above.
12. On 8 November, Council submitted its assessment of the outstanding matters raised in paragraph 9.
13. Subsequently, on 14 November, the appellant lodged further comments on Council's assessment.

Amended plan

14. The amended plan agreed to by both parties shows two changes:

- (a) The height extension from approximately 2 metres to maximum 3 metres is to be Hebel block construction; except
- (b) The height extension of the 5 metre long front-most portion of the eastern wall, overlapping the neighbouring house, is to be an angled slat screen with a minimum 25% openings.

Jurisdiction

- 15. Section 229(1) and schedule 1 clause 1(2)(g) of the PA jointly establish that the subject appeal is within the scope of the tribunal's jurisdiction subject to the qualifications stated in section 1(2) of Schedule 1.
- 16. With respect to the qualifications mentioned above, since the appeal is in relation to an application under the Building Act and one that is not subject to impact assessment nor in relation to which a properly made submission was made, it is within the scope of the tribunal's jurisdiction.

Decision framework

- 17. In this case, in accordance with section 249(1) and (2) the tribunal has decided the appeal on the parties' written submissions, including the email advice and amended plans received by the Registrar, with the concurrence of Council, on 27 September 2024.
- 18. Regardless of the parties' agreement on the amended plans:
 - (a) pursuant to section 253(2) of the PA, the onus rests on the appellant to establish that the appeal should be upheld.
 - (b) additionally, subject to 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 person who made the decision appealed against.
- 19. The tribunal notes that in relation to the matters within Council's referral agency jurisdiction, the appellant has provided further material that was not before Council at the time Council gave its referral agency advice. Similarly, the further material provided was not before the assessment manager when the building development application was decided.
- 20. Pursuant to section 253(5)(a) of the PA, the tribunal grants leave and accepts the further material including the amended plan provided to the tribunal by the appellant and information provided in response to the tribunal's directions and orders.
- 21. Further, the tribunal has considered the amended plans and decided to impose a condition requiring the development to proceed in accordance with amended plans rather than those that were the subject of the Council's decision. In so doing, the tribunal must consider the limitation placed on it under section 254(3) of the PA, namely that it must not make a change, other than a minor change, to a development application.
- 22. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Material considered

- 23. 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 26 March 2024, including:
 - (b) initial plans lodged with the application and referred to Council by the assessment manager.
 - (c) submissions made to Council by Murray Bell Planning Co on behalf of the appellant dated 28 July 2023 and 14 December 2023.

- (d) the referral agency response issued by the referral agency on 19 January 2024
- (e) the decision notice issued by the assessment manager on 18 March 2024
- (f) the appellant's email to the registrar on 27 September 2024, copying in various Council officers, stating that the parties had reached agreement on the amended plans.
- (g) letters endorsing the increased wall height from neighbouring owners at 41 Walmsley St and 50 Llewellyn St Kangaroo Point dated 11 October 2023 and 10 November 2023 respectively.
- (h) email from Council to the registrar dated 9 October confirming its endorsement of the amended plans.
- (i) the amended plans submitted to the registrar on 27 September 2024.
- (j) Council's response, dated 21 October, to the tribunal's direction requiring clarification of how the proposed plan changes addressed Council's reasons for refusal.
- (k) Council's assessment of outstanding assessment issues dated 31 October.
- (l) the appellant's submission on 14 November, commenting on Council's further submission.
- (m) *Planning Act 2016*.
- (n) *Planning Regulation 2017*.
- (o) QDC MP1.1.
- (p) Brisbane City Plan 2014
- (q) Google maps.

Findings of fact

24. The tribunal makes the following findings of fact:

- (a) The amended plans submitted by the appellant are a 'minor change' to the original proposal plans submitted to Council for referral agency response.
- (b) The subject site and surrounds are zoned CR2 Character Residential (Infill) under Brisbane City Plan 2014.
- (c) The subject site and adjoining allotments are less than 450 m² in area.
- (d) The eastern boundary of the subject lot is currently screened by dense vegetation to a height greater than the proposed wall.
- (e) The northern (rear) wall faces an existing rear garage wall which ranges between 2.7 metres and 3.5 metres high on the adjoining rear lot, with a short portion of boundary to the neighbouring lot at the rear.
- (f) In this case, the proposal is assessed against QDC MP1.1, specifically the provisions of Performance Criteria P2 as it fails to satisfy the setback and height limits prescribed by Acceptable Solution A2(a) and (c)(iii).
- (g) Performance Criteria P2 lists three criteria (a), (b) and (c). A reading of these criteria indicates that (a) applies to the amenity of the dwelling on the subject site, while (b) and (c) are aimed at protecting the amenity of adjoining lots.
- (h) Letters from neighbours supporting the original proposal were not afforded significant weight by the tribunal as that support may be motivated by reasons unrelated to the amenity of their allotments. Also, development approval persists while neighbours may be transitory.

- (i) The slope of the land grades upwards to the back yard of the allotment to the west, rendering the wall at a lower relative height.

Dwelling house (small lot) code

- (j) The appellant has cited as a reason for the increased wall height the encroachment on back yard swimming pool privacy resulting from development of surrounding dwellings in conformity with the Brisbane City Plan's Dwelling house (small lot) code.
- (k) Such reasoning calls into question the adequacy of the Dwelling house (small lot) code provisions in protecting privacy and amenity of neighbouring dwellings.
- (l) Consequently, the approval of the subject application may be a relevant consideration in any review of the adequacy of the provisions of the Dwelling house (small lot) code.

Reasons for the decision

- 25. With respect to criterion (a), the proposed eastern and western walls overlap a small portion of the rear of the subject dwelling, thus having negligible impact on the amenity of its habitable rooms.
- 26. With respect to criteria (b) and (c):
 - (a) The northern (rear) wall faces firstly, an existing garage wall on the adjoining lot and a very short portion of wall on the neighbouring lot to the rear. Hence, it has negligible impact on adjoining amenity.
 - (b) The impact of the height extension on the eastern wall is mitigated by the existing dense vegetation.
 - (c) The portion of the height extension on the eastern wall which overlaps the adjoining house will be characterised by 25% openings in the screen, allowing for ventilation and light to adjoining habitable room windows.
 - (d) The higher surface level of the rear yard of the lot to the west reduces the perceived height of the proposed western wall extension.
 - (e) Council, as concurrence agency, has reassessed the proposal based on the plan amendments listed above and agreed to its approval.

John Panaretos
Development Tribunal Chair
Date: 22 November 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 and Public Works
GPO Box 2457
Brisbane Qld 4001

Telephone 1800 804 833

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