



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 19-048

Appellant: Caloundra Building Approvals Pty Ltd

**Respondent:
(Assessment Manager)** Sunshine Coast Regional Council

Site Address: 17 Oleander Avenue Shelley Beach, Qld 4551, and described as Lot 1 on RP 87594 – the subject site

Appeal

Appeal under section 229, Schedule 1, section 1, table 1, item 1 of the *Planning Act 2016* against the refusal of a development application for a Carport.

Sunshine Coast Regional Council (**Council**) as the Assessment Manager advised the Appellant of the refusal of the application on the basis that the development proposed did not comply with the performance for outcomes PO2(a), (b), (d), PO15(a) and (c) from Table 9.3.6.3.1 in Section 9.3.6 Dwelling House Code (**DHC**) and also not comply with the purpose and overall outcomes of the *dwelling house code* from the Sunshine Coast Planning Scheme 2014 (**SCPS**).

Date and time of hearing: Thursday 22 November 2019 from 11:30am.

Place of hearing: The subject site (17 Oleander Avenue, Shelly Beach QLD 4551)

Tribunal: Henk Mulder– Chair
Jane Grimmond - Member

Present: Terry Frey – Planner, for the Appellant
Sean Pike – Owner and applicant
Peter Chamberlain – Council representative
Tracey Douglas– Council representative

Decision:

For the reasons set out below, the Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the Planning Act 2016 (PA2016) **confirms** the decision of the Council to refuse the development application for works associated with a Dwelling House - Carport.

Background:

1. The property owner has sought to undertake building alterations and additions to the residence at the Site, including a new Carport located in front of the dwelling and in the front boundary setback facing Oleander Avenue. Caloundra Building Approvals made application to Council on the owner's behalf as Assessment Manager for Building Works Assessable against the Planning Scheme (works associated with a Dwelling House - carport), which was received by Council on 26 June 2019.
2. Council responded with a request for information dated 5 July 2019. This was based on the proposed structure being located forward of the existing dwelling and dwellings on nearby properties and likely to have a dominant appearance within the street. Council did not consider the street as characterised by carports within the front setback, nor any major setback relaxations to the front boundary. Council describe the proposal as a garage and indicated it is not likely to be supported. Council also noted that the proposed height was greater than sought in the DHC.
3. The response to the information request as provided by the owner identified the adjacent neighbour's existing setback for a carport, along with three other carports or structures within the street which were constructed forward of the dwelling.
4. Council in its decision notice dated 26 September 2019 refused the application (Refusal Letter), citing the following reasons for the refusal:
 - A. The proposed carport does not comply with Performance Outcomes PO2 (a), (b) and (d) of the Dwelling house code as the proposed carport would:
 1. Not preserve the amenity of adjacent land and dwelling houses;
 2. Not protect the amenity of neighbouring residential premises;
 3. Dominate the streetscape with built form that is currently characterised by established vegetation and open landscapes; and
 4. Not maintain the visual continuity and pattern of buildings and landscape elements in the street due to the reduced setback within Oleander Avenue that has dwellings consistently setback (on average) a minimum of 6 metres.
 - B. The proposed carport does not comply with Performance Outcomes PO15(a) and (c) of the Dwelling house code as the proposed carport would:
 1. Dominate the streetscape and;
 2. Would not preserve the amenity of adjacent land and dwelling houses.
 - C. The proposed carport does not comply with the Purpose and Overall Outcomes of the Dwelling house code as the proposed carport would:
 1. Not be compatible with the character and streetscape of the local area that is currently characterised by established vegetation, open landscapes and dwellings consistently setback a minimum of 6 metres;
 2. Not make a positive contribution to the streetscape character of Oleander Avenue as it would dominate the streetscape with overdeveloped built form.
 - D. The proposal cannot be conditioned to comply.
5. The Appellants lodged an appeal with the Tribunal, received on 18 October 2019.

Jurisdiction and Decision Framework:

6. The onus rests on the Appellants to establish that the appeal should be upheld (see section 253(2) of the PA2016. 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 and was appealed against (see section 253(4) of the PA).
7. The Appellant lodged the Appeal with the Tribunal under section 229 of the PA2016, against the Decision Notice of the Assessment Manager for refusal of the application.
8. The Tribunal is of the opinion that a refusal of the development application in this instance is:
 - (a) a matter under the PA2016 that relates to the Building Act, and
 - (b) cannot be decided by the QBCC pursuant to the Building Act.
9. As such the Tribunal has jurisdiction to hear this appeal under the PA2016 schedule 1, section 1 table 1 item 1. The precondition for the application of table 1, in section 1(2)(g) of Schedule 1 is satisfied in this instance.
10. The development application was accepted as properly made by Council, with its response on 5 July 2019. At that time, the PA2016 and the SCPS 2014 was in force.

Material Considered:

11. The material considered in arriving at this decision comprises verbal submissions at the hearing from the attendant parties to the appeal, observations from Site Inspection, as mentioned in this decision, and the following written documents:
 - a) IDAS Form 2 - Building work requiring assessment against the Building Act 1975;
 - b) Eight drawings of plans and elevations for the proposed Carport as a part of a more complete scope of building works from Linea Design and Drafting, job no 2017297, numbered 1-8, dated November 2018.
 - c) Information Request from Council, dated 5 July 2019. (**Request**)
 - d) Response to the Information Request by Emerge Planning and Development, (**Response**) dated 11 October 2019 (discussed at the hearing as an incorrect date).
 - e) Response from Council dated 26 September 2019 advising refusal of the Development Application for Building Work (**Refusal Letter**).
 - f) Information from Council being a 'Notice about Decision – Statement of Reasons'
 - g) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal received by the Tribunals Registrar on 18 October 2019.
 - h) Emerge Planning and Development letter regarding grounds for the Appeal (**Grounds**) dated 17 October
 - i) Request for additional information sought by the Tribunal from the Appellant in an email dated 29 November 2019.
 - j) Appellant information response to the Tribunal with two marked photographs, unnumbered and undated, referred to as 'Carport Reprofile', sent in email dated 12 December 2019. (**Reprofile**)

- k) The Planning Act 2016 (**PA2016**).
- l) The Planning Regulation 2017 (**PR2017**)
- m) Sunshine Coast Planning Scheme 2014(**SCPS**).
- n) The Dwelling House Code (**DHC**).
- o) Queensland Development Code MP1.2 (**QDC MP1.2**).
- p) Sunshine Coast Planning Scheme User Guide (**SCPS User Guide**)

Findings of Fact:

12. The Committee makes the following findings of fact:

The Subject Site and Proposal

- 13. The Subject Site is a rectangular allotment of 818m² with a street frontage of 16.4 metres to Oleander Avenue. The site falls downhill from the street at a rate of 1.0 metre every 12.0 metres, approximately, in the area of the proposed Carport, based on the drawings.
- 14. The existing residence is a single storey brick and tile residence as viewed from the street, with the existing tile roof visible in the streetscape. The residence has different levels at the rear.
- 15. The site is located at or near the highest point in the street, with vehicles rising up to Oleander Avenue from both directions. The site is located such that there exists a significant sightline down Simpson Street, which has a perpendicular junction with Oleander Avenue, facing the front of the site.
- 16. Currently the site affords a rendered masonry fence generally to a nominal height of 1.8m with a sliding entry gate for vehicle access. The fence and proposed Carport location readily forms an end vista to the junction with Simpson Street. The neighbour at 19 Oleander Avenue with the subject site appear as the only properties in the street with solid high wall fences at the street boundary.
- 17. Landscaping throughout the streetscape is readily apparent, including to the neighbour at 19 Oleander Avenue.
- 18. Existing structures forward of the building line and within the front boundary setback exist in the street. These include the neighbour's carport at 19 Oleander Avenue; the construction of the residence with garage under to the neighbour at 15 Oleander Avenue within the 6.0m setback by approximately 2.0 metres; a covered entry structure at 9 Oleander Avenue, and carport structures at no's 6 and 8 Oleander Avenue. Similar circumstances exist sporadically in the surrounding area.

The Application Process

- 19. The Assessment Manager lodged an application to Council for a new Carport, received by Council on 26 June 2019, based on PR2017 Schedule 9 Part 3 division 2 Table 3 - Building work for Design and Siting. The proposal was for the Carport to be set out forward of the building line and within the front boundary setback of 6.0 metres.
- 20. Council processed the application as Development Permit for Building Works Assessable against the Planning Scheme (works associated with a Dwelling House - carport).

21. SCPS Section 1.6 'Building work regulated under the planning scheme' Table 1.6.1 establishes the DHC to be an alternative assessment provision to QDC MP1.2 for boundary clearance (setback) for the proposed Class 10 building.
22. From the SCSP User Guide, section 6.2 Assessable Development Requiring Code Assessment sets out that:
- ... a proposal which complies with the acceptable outcomes of the applicable code is automatically taken to comply with the corresponding performance outcomes and all higher order outcomes of the code (overall outcomes and purpose of the code). Similarly, a proposal which complies with the performance outcomes of the applicable code is automatically taken to comply with the higher order outcomes of the code.
- Where a proposal does not comply with the acceptable outcomes or performance outcomes of an applicable code, development complies with the code where it complies with the purpose and overall outcomes of the code.
23. Council set out the Assessment Type as a Code Assessment, based on the application not satisfying the Acceptable Outcomes sought for a Carport in the DHC, and proceeded to make an assessment against the Performance Outcomes and the Purpose and Overall Outcomes of the *Dwelling house code*.
24. Council sought further information regarding height and front setback in their letter of 5 July 2019. Specifically, Council sought the following in relation to height with regard to the siting and effect on the street:
- Provide an alternative proposal to include a redesign of the location for the garage that will achieve compliance with Performance Outcome PO2 of the Dwelling house code. It is recommended that the garage be sited further back from the front boundary to significantly reduce the appearance of bulk. Council would be open to accepting the height of the garage if the garage is at a more acceptable setback from the street.
25. In relation to the issue for setback, Council sought the following:
- Provide an alternative proposal which includes an increased front setback and/or design which achieves compliance with Performance Outcome PO2 of the Dwelling house code.
26. The response to the Information request from Council was provided on behalf of the applicant by Emerge Planning and Development in a document, incorrectly dated 11 October 2019.
27. The response to the information request identified a consistency with the neighbour at 19 Oleander Avenue's setback; the prevalence of existing structure's setbacks within the street establishing a desired continuity, and the scope for landscaping remaining at the streetfront boundary being ample, without loss of amenity to the neighbours.
28. Council issued the Refusal letter on 25 January 2019. Council set out its refusal on two Performance Outcomes from the DHC Table 9.3.6.3.1: Performance Outcome PO2(a), (b), and (d), and Performance Outcome PO15(a) and (c), and the Purpose and overall outcomes of the DHC.
29. Performance Outcome PO2(a), (b), and (d) is set out as follows:
- PO2 Garages, carports and sheds:-
- (a) preserve the amenity of adjacent land and dwelling houses;
 - (b) do not dominate the *streetscape*;
 - (d) maintain the visual continuity and pattern of buildings and landscape elements within the street.

30. Council then re-stated these outcomes in a slightly different way, with slightly different reasons:

...the proposed carport would:

- a) Not preserve the amenity of adjacent land and dwelling houses;
- b) Not protect the amenity of neighbouring residential premises;
- c) Dominate the streetscape with built form that is currently characterised by established vegetation and open landscapes; and
- d) Not maintain the visual continuity and pattern of buildings and landscape elements in the street due to the reduced setback within Oleander Avenue that has dwellings consistently setback (on average) a minimum of 6 metres.

31. The second point for protecting the amenity is more closely related to the higher order of purpose and overall outcomes of the code, described below.

32. The second Performance Outcome that Council cited in the Refusal letter from the DHC Table 9.3.6.3.1 was: Performance Outcome PO15(a) and (c):

PO15 The *dwelling house* preserves the amenity of adjacent land and *dwelling houses* and does not dominate the *streetscape* having regard to:-

- (a) building character and appearance;
- (c) building mass and scale as seen from neighbouring premises.

33. Again, Council re-stated these performance outcomes in a slightly different way, with slightly different reasons:

...the proposed carport would:

- Dominate the streetscape and;
- Would not preserve the amenity of adjacent land and dwelling houses.

34. Council considers then that the proposal is too dominant in the streetscape because of its appearance, building character, and the mass and scale of the proposal from nearby premises.

35. As again set out in the SCSP User Guide, section 6.2 Assessable Development Requiring Code Assessment, where the Performance Outcomes are not met, assessment against the higher order or Purpose and Overall outcomes of the code are considered against the proposal.

Where a proposal does not comply with the acceptable outcomes or performance outcomes of an applicable code, development complies with the code where it complies with the purpose and overall outcomes of the code.

36. The DHC section 9.3.6.2 sets out these higher order outcomes sought from the proposal:

9.3.6.2 Purpose and overall outcomes

- (1) 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.
- (2) The purpose of the Dwelling house code will be achieved through the following overall outcomes:-
 - (a) a *dwelling house* incorporates a high standard of design and makes a positive contribution to the *streetscape* character of the area in which it is located;
 - (b) a *dwelling house* is sited and designed to protect the amenity and privacy of neighbouring residential premises;

- (c) (c) a *dwelling house* provides a high level of amenity to the residents of the *dwelling house*; and
- (d) (d) a *dwelling house* is provided with an acceptable level of *infrastructure* and services.

37. Council also set out in the Refusal letter two paragraphs as to how the proposal does not meet the above criteria expressed in the higher order of outcomes of DHC section 9.3.6.2 Purpose and overall outcomes.

The proposed carport does not comply with the Purpose and Overall Outcomes of the *Dwelling house code* as the proposed carport would:

1. Not be compatible with the character and streetscape of the local area that is currently characterised by established vegetation, open landscapes and dwellings consistently setback a minimum of 6 metres;
2. Not make a positive contribution to the streetscape character of Oleander Avenue as it would dominate the streetscape with overdeveloped built form.

38. The Appellant established a response to the reasons for the Refusal, as summarised in the grounds:

The follow summarises the ground for the Appeal:

- The proposed carport will not impact on the amenity of adjoining properties. It does not adjoin any habitable rooms, block views or vistas, result in overlooking or impact solar or wind access given the open nature of the structure.
- The proposed carport is compatible with the streetscape given there are five structures in the immediate vicinity (between William and Alfred Streets), including both immediately adjoining sites with setbacks within the prescribed 6.0m.
- The development is neither dominant nor 'overdevelopment'. The carport does not require a dispensation for height and overall site cover remains well below 50%.

The Hearing

39. The Appellant and their representative clarified the current existence of structures within the 6.0 metre front boundary setback in the street and Council's could not reasonably exclude similar structures as a consequence.
40. The Appellant considered that a pattern of continuity for structures including carports was established within the 6.0 metre front boundary setback in the street.
41. The Appellant described the issues raised by Council in the Refusal for the loss of amenity to adjacent properties and a creation of an undesirably dominant streetscape as suitably and successfully moderated by the type, scale and location of the neighbour adjacent at no 19. This was in tandem with a topography that suited the proposal in that the land fell away from the street, further enabling the structure as proposed to fit in well with the streetscape.
42. The Appellant reiterated the views set out in the Grounds, mainly that the proposed carport does not impact on the amenity of adjoining properties with no sightline or climatic issues for example; the proposed carport would be one of six structures in the street built inside the 6.0m street setback, including both immediately adjoining sites, and the proposal is not a dominant or overdeveloped element in the street with only the apex above the maximum allowable height of 3.6 metres.
43. Council's representatives at the hearing emphasised the high value placed on the setback criteria to the area and the street. Council stated the local Councillor strongly supported the 6.0 metre setback based on strong community sentiment, although no information, documentation or clarification was provided for this view.

44. Council representatives confirmed that the pattern of the street was distinct and not in keeping with the proposal, being open, set back, and distinctly landscaped.
45. In regard to the existing structures within the front boundary setback in the street, Council clarified these were from different planning schemes and should not be viewed as complicit in relation to the criteria sought under the current planning criteria.
46. Council emphasised that the issue for carports within the front boundary setback were of great concern to the local community, that there was not a clear pattern in the street to facilitate the proposal, and that the surrounding area was not relevant to the discussion, as only this street's circumstance had bearing.
47. The issue of Council criteria for a height limit was clarified as 3.6 metres above natural ground, in contrast with the 3.7 metres set out in the Request.
48. The Appellant clarified the DHC sets out criteria for Acceptable Outcomes which have the flexible facility of being assessed against the less prescriptive Performance Outcomes in the DHC.
49. With the prompting of the Tribunal, the issue for the current visibility of a Carport proposal and any perceived effect of a structure built at or near the street boundary was discussed as being mitigated by a skillion roof that could fall down to the house with a fascia line at the street boundary. This could be considered as an alternative option in a submission after the Hearing, with feedback from Council.
50. Council suggested these could be 'stick' drawings, which was understood to be without great effort. The Tribunal however clarified that these should be a properly considered resolution, with correct information.
51. In viewing the circumstance in the street, a number of integral differences were noted by the parties between the proposal and the neighbouring structure at the street boundary of 19 Oleander Avenue:
 - i. the nominal but relevant setback of the main structural elements of the roofed structure,
 - ii. the use of landscaping at the street boundary as a part of the walling and
 - iii. the setback to neighbours at the side boundary.
52. These elements were considered to be beneficial in any option submitted after the Hearing.
53. Council also considered letters of support from neighbours would also be of assistance, and that these could be obtained by the appellant.

Submissions after the Hearing

54. A request for additional information based on discussions at the Hearing using a skillion roof that fell away from the street was sought by the Tribunal from the Appellant in an email forwarded by the Registrar on 29 November 2019:

Further to the site inspection and on-site hearing of Friday 22 November 2019, the Tribunal seeks additional information from the appellant to be forwarded to the Registrar.

This should be in the form of drawings that provide a response to the issue of minimising the visibility of the proposed carport from the street. This was discussed as a skillion roof falling back down to the residence, well set back to suit, from the street. Changes to the existing street conditions such as to the front fence should be noted.

The drawings should include an accurate site measure that sets out the furthest reasonable distance of the proposed carport from the front fence, and then also from the residence. A survey is likely to be sought in any approval.

As also discussed, it is intended for this information to be forwarded by the Registrar to Council for review and comment, prior to the Tribunal completing any decision.

This information should be received by the Registrar on or before 2pm on the Friday 6 December 2019.

55. A response to the information request was supplied to the Registrar with two marked photographs, described as a 'Carport Reprofile', in an email received by the Tribunal on 12 December 2019, a date that had been rearranged with the agreement of the tribunal.
56. The Carport Reprofile as supplied lacked relevant information regarding datum, fall, materials or scale, and indicated a roof in conflict with the issues discussed for direction of pitch and reducing visibility within the streetscape for a proposed carport.
57. No additional information regarding neighbours' support was provided.

Reasons for the Decision:

58. As an application for Building Works Assessable against the Planning Scheme (works associated with a Dwelling House - carport) the proposal fails to satisfy the criteria expressed in PO2(b) and PO15(a) and (c) and in the Purpose and overall outcomes 9.3.6.2(2)(a) of the Dwelling House Code
59. These criteria seek to establish a positive contribution at the streetscape, left unresolved in a large, high and relatively solid structure proposed for both the street boundary and at the side boundary in the residential zone. The proposal affects and alters the existing streetscape without contributing to the particular character of the streetscape in this street.
60. The Tribunal considers that the streetscape is generally well vegetated and predominantly open, as described by Council. The opportunity to develop an improved scheme was described in Council's initial information request, and submissions were sought after the hearing by the Tribunal to consider an improved design oriented scheme that might mitigate Council's stated concern for the effect to the streetscape.
61. Height as described in the SCSP is used in regard to the natural ground level, and when the proposal is considered against this criteria, the lack of a developed consideration for the compliance of the proposal is reinforced.
62. In considering the Reprofile as supplied, the Tribunal took the view that the information was not adequate and would not likely be improved upon with any subsequent submission request, and that there was no option other than to consider the Carport as originally proposed.
63. The effect of the proposal being minimised by virtue of rising up to the site from either downhill sides of the street was considered by the Tribunal, along with the aspect looking downhill from Simpson Street to the site.
64. The circumstance of existing Carports or similar 'entry' type structures in the street do establish the basis of a precedent for structures within the 6.0 metre front boundary setback, and a consequent slight pattern for continuity of such structures is not excluded. This is more relevant with the proposal between two sites that have structures within the 6.0 metre front boundary setback. The significant pattern that exists in the street is plainly that of landscaping and openness.
65. The neighbour at 19 Oleander Avenue uses a carport structure within the front boundary setback and is consistently regarded as the basis for the proposed Carport to warrant relaxation of DHC criteria. However this neighbouring carport establishes some variety of

built elements and landscaping which provide variety and afford a level of contribution to the character of the surrounding streetscape that is not utilised or developed in the proposal.

66. The DHC sets out the current and relevant criteria which require a developed and considered response toward an amended streetscape which is not evident in the proposal, or in the Reprofile submission. The Carport does not incorporate the high standard of design that is sought for such a change to the street setback of a new structure.

Henk Mulder

Development Tribunal Chair

Date: 17 February 2020

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
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Brisbane QLD 4001

Telephone (07) 1800 804 833

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