



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	22-015
Appellant:	Annabel Somerville and Christopher Symons
Respondent: (Assessment manager)	Michael Kunze
Co-respondent (Concurrence agency):	Cairns Regional Council (Council)
Site address:	123 Hillview Crescent, Whitfield and described as lots 75 and 76 on RP 714280 – the subject site

Appeal

Appeal under section 229(1)(a)(i) and schedule 1, section 1, table 1, item 1 of the Planning Act 2016 (PA), against the refusal of a development application for construction of a proposed Garage, Workshop and lean to/Storage room on residential premises.

Date and time of hearing:	Tuesday 4 October 2022 at 11.00am
Place of hearing:	123 Hillview Crescent, Whitfield (the subject site)
Tribunal:	Kim Calio – Chair Lindy Osborne Burton – Member
Present:	Annabel Somerville – Landowner and Appellant Dylan Thomas – Planning Officer – Council representative Laura Wilkie – Planning Officer – Council representative Michael Kunze – The Building Approval Company (TBAC) – Certifier and Respondent

Decision

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) replaces the assessment manager's decision with the following decision:

- (1) The proposed Garage is approved in the form and location indicated on Plan Option 2 dated 14 October 2022 (*Material Item 31(r)(iii) refers*), subject to the below requirements and such other reasonable and relevant condition or conditions as the assessment

manager sees fit to impose provided that such condition is (or such conditions are) not inconsistent with the below requirements:

- a. Fast growing, low maintenance screening vegetation should be established within the subject property generally between the southern boundary of the subject site and southern side of the proposed Garage, and a minimum distance of 2m from the Hillview Crescent road frontage; and
 - b. A hedge with a low wall to match the existing planting and wall, is to be provided to extend to and align with the northern wall of the proposed Garage.
- (2) The assessment manager is to notify the parties of such other reasonable and relevant condition or conditions as the assessment manager sees fit that is (or are) not inconsistent with the described modifications.

Background

1. The Appellants' consultants (Koru Building Contractors c/o The Building Approval Company) submitted an application for a Referral Agency Response for an enclosed Garage located at 123 Hillview Crescent, Whitfield (75 & 76 RP714280) to Cairns Regional Council on 8 December 2021 (*Material Item 31(a) refers*).
2. The proposed Garage encroached into the 6m front boundary setback stipulated by the Queensland Development Code MP 1.2 – Design and Siting Standard for Single Detached Housing on Lots 450m² and Over – A1(a). A minimum setback of 60mm (south western corner) and a maximum setback of 1.8m (north western corner) from the outer most projection of the proposed Garage were proposed.
3. Letters dated February 2020 and addressed to Cairns Regional Council from the owners of 124 and 126 Hillview Crescent (opposite the subject site) confirming no objection to the proposal as submitted to Council on 8 December 2021 were obtained. (*Material Items 31(b) and 31(c) refer*).
4. Council issued a confirmation notice and request for further information on 16 December 2021. (*Material Item 31(d) refers*).
5. In the request for further information issued by Council it was identified that the height of the proposed Garage, at 5.15m, exceeded the maximum height of 4.5m identified in the CairnsPlan 2016 V3.0 Item 9 of Section 1.6. Council also identified that the proposal should be amended to an open Carport with a minimum setback of 1 metre from the front boundary along Hillview Crescent or:
 - a. confirm the total length of the building within the side boundary setback and provide amended plans demonstrating the proposed setback distance of the south eastern corner of the proposed Garage; and
 - b. provide amended elevation plans with an assessment against and consideration to Item 9 of Section 1.6 of the CairnsPlan 2016 v3.0, being:
 - a. Buildings are not more than 4.5 metres in height where located within the nominated setback to a road frontage.
6. Council emailed TBAC on 14 January 2022 referring to the discussion on 15 January 2021 advising that if the plans for a Garage (i.e. enclosed structure) are not amended to meet the negotiated minimum front boundary setback of 2m to Hillview Crescent, or current

plans are not amended to be an open Carport as per the definition under the Queensland Development Code MP1.2, a Notice of Intent to Refuse will be issued. In addition, a reminder about the reduction in total height to meet the maximum height requirement of 4.5m in A2 of the Queensland Development Code MP1.2, given the proposed setback to the side boundary, was provided. (*Material Item 31(e) refers*).

7. TBAC emailed Council 7 February 2022 confirming that the maximum height of the proposed Garage can be reduced to 4.5m and raising the structures at 117 and 132 Hillview Crescent, which are located at the front road boundary and have a similar bulk and scale. (*Material Item 31(f) refers*).
8. Council emailed TBAC 22 February 2022 noting no applications or approvals in their systems for an enclosed structure within the front boundary setback for either property. Further Council advised the vehicle accommodation on 117 Hillview Crescent was considered by Council to be an open structure with a roller door. With regards to 132 Hillview Crescent, Council noted that the enclosed structure is not an enclosed Garage within the front boundary; rather it is a Shed that has significant landscaping along the front boundary which is considered to conceal the bulk of the structure from the street frontage. Council also noted that one or two properties do not make or determine a streetscape and that it was observed by Officers that most Garages and/or Carports are either set back at distances much further than the 0.60m proposed or contained under the roof of the Dwelling House or are an Open Structure if constructed within the front boundary setback. (*Material Item 31(g) refers*).
9. TBAC emailed Council on 24 February 2022 requesting confirmation as to when the information response is due. (*Material Item 31(h) refers*).
10. Council emailed TBAC on 24 February 2022 confirming the information response period ends 4 May 2022. (*Material Item 31(i) refers*).
11. TBAC emailed Council on 8 March 2022 requesting a pause to this request for information period and advising of the intention of providing further information in due course. (*Material Item 31(j) refers*).
12. Council emailed TBAC on 9 March 2022 agreeing to stop the clock for 130 Business Days as per Part 7, Section 32 of the Development Assessment Rules. The end date for the Stop was to be 26 August 2022. (*Material Item 31(k) refers*).
13. TBAC emailed Council 29 March 2022 attaching a response to Council's information request prepared by KR Development and Property Services dated 29 March 2022. The response advised that the applicant had elected to proceed with the application for the proposed Garage and provided a response to items 2 and 3 of the Council's request for information comprising amended plans (the amended plans were dated December 2021, the same date as the plans originally submitted with the application):
 - a. that show the length of the building within the side boundary setback;
 - b. demonstrate the proposed setback distance of the south-eastern corner of the proposed Garage; and
 - c. demonstrate that the proposed Garage is now not more than 4.5 metres in height, where located within the nominated setback to a road frontage.
14. The response also included further details and information which was summarised as follows:

- *The proposal complies with the Quantifiable Standards of CairnsPlan 2016.*
- *The proposal complies with the relevant Performance Criteria of MP1.2.*
- *The building facilitates an acceptable streetscape in that-*
 - *The bulk of the building is softened by landscaping, responsive design, and angle to the street frontage.*
 - *The boundary setback is consistent with other comparable development within the neighbourhood area.*
 - *The views and outlook of the neighbouring property is improved by the proposed setback as opposed to the 2m setback requested by Council.*
 - *There is no nuisance caused by the development and it does not impact on public safety.*
- *The proposal has the consent of all adjoining landowners.*
- *The proposal cannot be sited in the alternate location proposed by Council due to the land profile and impact on the neighbouring property.*
- *There is little practical difference in terms of appearance between an open carport and a garage. Council has indicated support for an open carport in this location.*
- *The proposal presents an improved outcome in terms of personal safety and is consistent with current QPS advice. (Material Item 31(l) refers).*

15. The response to Council's information request prepared by KR Development and Property Services dated 29 March 2022 included a copy of three letters of support from surrounding neighbours. Two of the letters were dated February 2020 (as referenced in point 3 above and listed as material items 31(b) and 31(c)). The third letter was dated March 2022 and was from the owners of 127 Hillview Crescent Whitfield (adjoining the southern boundary of the subject site). The owners of 127 Hillview Crescent Whitfield confirmed their support for the Garage as proposed and noted that their strong preference was that the proposed Garage was not moved 2m back from the road frontage as requested by Council. This would result in the proposed Garage being closer to their living area and it would be an obvious feature visible through their windows. *(Material Item 31(m) refers).*
16. On 13 April 2022 Council issued a Referral Agency Response directing refusal of the application on the basis of non-compliance with Performance Criteria P1 (a) and (b) of MP1.2 of the Queensland Development Code *(Material Item 31(o) refers).*
17. The assessment manager issued a Decision Notice refusing the building application for an enclosed Garage class 10a building due to the bulk of the structure as per the Referral Agency Response from Council. *(Material Item 31(p) refers).*
18. The Landowners, Annabel Somerville and Christopher Symons, lodged a Notice of Appeal with the Development Tribunal on 28 April 2022. *(Material Item 31(q) refers).*
19. The Hearing was held on 4 October 2022 where the Appellant illustrated her concerns and context for the Garage as proposed. The Appellant also presented a 7 page document including 19 photographs. The intent of this document was to demonstrate other properties in the surrounding local streets which have had stand areas or structures including Carports close to the street frontage. The document also included Revised Plans dated July 2022 Sheets 1-3, prepared by F. Burke and Titled: Option 1.
20. Additional Information received by the Registrar from the owner Annabel Somerville 14 November 2022 *(Material Items 31(r)(i)-(iii) refer):*
 - a. a 7 page document including 19 photographs purporting to demonstrate other properties in the surrounding local streets which have had stand areas or structures including Carports close to the street frontage (this document was tabled at the Tribunal Hearing 4 October 2022);

- b. Revised Plans dated July 2022 Sheets 1 – 3 prepared by F. Burke and Titled: Option 1 (these plans were tabled at the Tribunal Hearing 4 October 2022); and
- c. Revised Plan dated 14 October 2022 Sheet 3 prepared by F. Burke and Titled: Option 2.

- 21. Additional Information received by the Registrar from the Cairns Regional Council in response to a direction issued by the Tribunal, included a contour plan. This contour plan illustrated the subject site at 123 and 125 Hillview Crescent Whitfield, and confirmed the slope of subject site. (*Material Item 31(s) refers.*)
- 22. The Tribunal noted that the subject site is contained within the low density residential zone of the CairnsPlan 2016.

Jurisdiction

- 23. Section 229(1) of the PA identifies that schedule 1 of the PA states the matters that may be appealed to the Tribunal.
- 24. Table 1 of schedule 1 states the matters that may be appealed to the Planning and Environment Court or the Tribunal (subject, in the case of the Tribunal, to the pre-conditions stated in section 1(2) of Schedule 1).
- 25. The Tribunal has jurisdiction under section 229 and schedule 1, section 1, table 1, item 1 of the PA.
- 26. The pre-condition in section 1 sub-section (2) of schedule 1 for the application of table 1 to the Tribunal is satisfied in this instance because of paragraph (g), in that the development application is a matter under the PA that relates to the Building Act 1975 (BA). The Appellants seek approval for certain building work that is assessable against the building assessment provisions in the BA.

Decision framework

- 27. The onus rests on the Appellants to establish that the Appeal should be upheld (section 253(2) of the PA).
- 28. 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).
- 29. 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.
- 30. The Tribunal is required to decide the Appeal in one of the ways mentioned in section 254(2) of the PA.

Material considered

- 31. The material (*Material Item*) considered in arriving at this decision comprises:
 - a. Application for a Request for Concurrence Agency Response (Building Work) submitted to Cairns Regional Council on 8 December 2021 with Koru Building

Contractors c/o The Building Approval Company as the applicant. The application was accompanied by plans Sheets 1 – 3 prepared by F. Burke dated December 2021.

- b. Letter dated February 2020 addressed to Cairns Regional Council from the owner of 124 Hillview Crescent (opposite the subject site) confirming no objection to the proposal as submitted to Council on 8 December 2021.
- c. Letter dated February 2020 addressed to Cairns Regional Council from the owner of 126 Hillview Crescent (opposite the subject site) confirming no objection to the proposal as submitted to Council on 8 December 2021.
- d. Council's Information Request Concurrence Agency dated 16 December 2021.
- e. Email from Council to TBAC dated 14 January 2022.
- f. Email from TBAC to Council dated 7 February 2022.
- g. Email from Council to TBAC dated 22 February 2022.
- h. Email from TBAC to Council dated 24 February 2022.
- i. Email from Council to TBAC dated 24 February 2022.
- j. Email from TBAC to Council dated 8 March 2022.
- k. Email from Council to TBAC dated 9 March 2022.
- l. Email from TBAC to Council dated 29 March 2022 including the response to Council's information request prepared by KR Development and Property Services dated 29 March 2022. Amended Plans Sheets 1-3 included remain dated December 2021.
- m. Letter dated March 2022 addressed to Cairns Regional Council from the owners of 127 Hillview Crescent Whitfield (adjoining the subject to the south) confirming no objection to the proposal as submitted to Council on 8 December 2021.
- n. Council's Referral Agency Checklist dated 12 April 2022 (internal document only).
- o. Council's Referral Agency Response dated 12 April 2022.
- p. Decision Notice Form 6 – Refusal of building application for an enclosed Garage class 10a building issued by TBAC 28 April 2022.
- q. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the Appeal lodged with the Tribunals Registrar on 28 April 2021.
- r. Additional Information received by the Registrar from the owner Annabel Somerville 14 November 2022:
 - (i) a 7 page document including 19 photographs purporting to demonstrate other properties in the surrounding local streets which have had stand areas or structures including Carports close to the street frontage (this document was tabled at the Tribunal Hearing 4 October 2022);
 - (ii) Revised Plans dated July 2022 Sheets 1 – 3 prepared by F. Burke and Titled: Option 1 (these plans were tabled at the Tribunal Hearing 4 October 2022);
and

- (iii) Revised Plan dated 14 October 2022 Sheet 3 prepared by F. Burke and Titled: Option 2.
- s. Contour plan illustrating the subject site at 123 and 125 Hillview Crescent Whitfield provided by Cairns Regional Council in response to a direction issued by the Tribunal.
- t. Planning Act 2016 (PA).
- u. Planning Regulation 2017.

Findings of fact

32. The Tribunal makes the following findings of fact:

Subject site and immediate streetscapes

- 33. The subject site is located at 123 Hillview Crescent, Whitfield, and is described as lots 75 and 76 on RP 714280. Lot 75 is 815m² and lot 76 is 809m² comprising a total subject site area of 1,624m². The subject site is a corner property that has a frontage of approximately 20.1m to Hillview Crescent, 36.2m to McHugh Crescent, with a truncation of approximately 5.7m. The subject site is generally rectangular in shape and slopes in an easterly direction from Hillview Crescent. Vehicle access to a double and single carport is obtained from McHugh Crescent.
- 34. The subject site contains a detached dwelling, two carports and an inground pool. The dwelling is single storey at the Hillview Crescent frontage from which the main pedestrian entrance is obtained. The majority of the dwelling is of timber construction with a metal roof. The dwelling is two storeys at the McHugh Crescent frontage with the ground level being of masonry construction.
- 35. Neither Hillview Crescent or McHugh Crescent are constructed with kerb and channel. The road reserve is approximately 20m wide and contains a bitumen seal of approximately 5m in width and grassed verges of approximately 6 to 7m in width. A spoon drain is evident in the grassed verge along the McHugh Crescent street frontage of the subject site.
- 36. The Hillview Crescent streetscape in the vicinity of the subject site contains significant landscaping both within the verge and private properties. Houses to the west of the subject site are two storeys in form and located on allotments that slope up significantly from Hillview Crescent. Houses on the eastern side of Hillview Crescent typically present a single storey height and form, due to the topography of allotments all sloping down from the road frontage.
- 37. The McHugh Crescent streetscape in the vicinity of the subject site similarly contains significant landscaping both within the verge and private properties. Houses to the north of the subject site are two storeys in form and located on allotments that slope down from McHugh Crescent. Houses on the southern side of McHugh Crescent typically present a single storey height and form. Further to the east a mix of single storey and two storey dwellings are present, due to the topography of allotments all sloping down from the road frontage.

Proposal

38. The proposal as submitted to Council on 8 December 2021 and as documented on Sheets 1 to 3 dated December 2021, drawn by F. Burke, comprised a double Garage (approximately 57.4m²) with a Workshop (approximately 10m²) adjoining the eastern side and a lean to/Storage room (approximately 3.75m²) adjoining the southern side of the Garage.
39. The minimum setback of the outmost projection of the structure to the Hillview Crescent property boundary noted on plans was 60mm while the maximum setback was 1.8m. The minimum setback of the outmost projection of the structure to the southern property boundary noted on plans was 976mm.
40. The maximum height of the proposed Garage at the central roof gable was noted as 5.1m.
41. The proposal submitted to Council on 8 December 2021 stated that the proposed Garage was 7m wide (roof width of 8.6m) with a 5.4m wide roller door. It was also noted in the application that the proposed Garage was to be set back approximately 7m from the edge of the bitumen in the Hillview Crescent road reserve, and was to be of masonry construction (application form).
42. The Appellant's response to Council's information request of 16 December 2021 submitted to Council on 29 March 2022 included amended plans which reduced the height of the proposed Garage at the central roof gable from 5.1m to 4.5m. This amendment resulted in the height of the proposed Garage meeting the requirements of the Cairns Regional Council Planning Scheme. It is noted that the date on the amended plans remained December 2021.

The hearing

The Appellant

43. The Appellant advised that the location of the proposed Garage responds to the shape and topography of the lot and considers the amenity of neighbours adjoining the southern boundary of the subject site.
44. The Appellant expressed her surprise and disappointment to discover that the opportunity to discuss the application with Council was not suggested by her consultants, in addition to the fact that the application referred to the proposed Garage as being of masonry construction, in error. In her view the proposal was always intended to reflect the same construction materials and colours as the existing dwelling.
45. The Appellant spoke to her Appeal documentation (*Material Item 31(q) refers*) during the hearing and illustrated the proposal with a three dimensional, physical model.
46. The Appellant provided a series of photographs of properties in the vicinity of the subject site, which provided examples of car accommodation constructed close to or at the road frontage (*Material Item 31(r)(i) refers*). The photographs were subsequently provided to the Registrar 4/11/2022.
47. The Appellant also provided amended plans dated July 2022 and titled Option 1. These plans had been amended to show an increase of the minimum setback of the outmost projection of the structure to the Hillview Crescent property boundary, from the original dimension of 60mm to 600mm. They also showed the length of the proposed Garage reduced from the original dimension of 8.2m to 7.6m. (*Material Item 31(r)(ii) refers*). The amended plans were subsequently provided to the Registrar 4/11/2022.

48. The Appellant advised that the Workshop was required for activities related to her hobby, and the Storage room was required to store gardening equipment including a ride-on mower.
49. The alternative of a Carport with a roller door and open sides was not considered satisfactory to the Appellant because of her security concerns. The Appellant provided policing statistics of recent offences recorded in the local area. In addition, the Appellant expressed the view that from a building bulk perspective, a carport with a roller door is not dissimilar to an enclosed Garage.
50. The Appellant noted her previous offer to replace the existing trees on the verge of Hillview Crescent, which had died some time ago and had not been replaced by Council. She suggested that replacing these could assist in reducing the bulk and softening the built form.
51. Alternatives to mitigate or relocate the existing structure were canvassed with the Appellant. This included the addition of new landscaping on the property where the proposed Garage is closest to the road frontage, to enhance the streetscape. However while the Appellant expressed willingness to provide landscaping at the south western frontage and extend the existing wall and hedge to align with the northern wall of the proposed Garage, the Appellant was unwilling to make changes to the position of the Garage.
52. The Appellant agreed to consider the matters discussed at the hearing, and to consider the provision of a revised plan which illustrates the proposed landscaping and any adjustments to the structure she was willing to make.

The Council

53. Council in its role of concurrency agency, directed refusal of the proposed Garage on 12 April 2022 due to non-compliance with Performance Criteria P1 (a) and (b) of MP1.2 of the Queensland Development Code:

P1 The location of a building or structure facilitates an acceptable streetscape, appropriate for-

- (a) the bulk of the building or structure; and*
- (b) the road boundary setbacks of neighbouring buildings and structures.*

54. Council noted that setback dispensations are normally not less than 4.5m for enclosed structures.
55. The Council Representatives noted their concern about non-compliance with P1(a) and (b) of the MP1.2 of the Queensland Development Code and indicated that the proposal was inconsistent with other structures in the street and furthermore, that there appeared to be minimal opportunity for landscaping to mitigate the structure. Council wanted a larger setback to be proposed, and noted their assessment was based on the information provided and the streetscape at the front of the dwelling. Council did not have the benefit of assessing the revised plan Option 1 tabled at the Hearing by the Appellant.
56. Council noted that landscaping within the road reserve was not considered an appropriate justification to mitigate development impacts on private property.

Post Hearing

57. A revised plan dated 14/10/2022 titled Option 2 was provided by the Appellant, which in addition to the amendments set out on the Option 1 plan, removed the lean to/Storage room and fence/gate at the south western corner and replaced with deep plantings to minimise bulk. (*Material Item 31(r)(iii) refers*).
58. The Appellant also provided the document and plans tabled at the Hearing to the Registrar.
59. The Tribunal issued directions for further information from both Council and the Appellant.
60. The Appellant responded with the requested information received by the Registrar on 4 November 2022.
61. The Council responded with the requested information through a series of emails with the last information being received by the Registrar 9 December 2022.

Reasons for the decision

62. The Tribunal considers that the form and location of the proposed Garage illustrated on Option 2 plan dated 14/10/2022 with:
 - a. The outer most projection of the proposed Garage being no closer than 600mm to the Hillview Crescent frontage;
 - b. The proposed Garage length being reduced from 8.2m to 7.6m;
 - c. The removal of the lean to/Storage room and gate;
 - d. Deep landscaping being provided to the south western corner of the property;
 - e. The existing hedge and wall along the Hillview Crescent being extended in a southerly direction to align with the northern wall of the proposed Garage; and
 - f. Materials and colours selected to match the existing dwelling.

...would facilitate an acceptable solution, and not dominate the streetscape in terms of building bulk and setbacks.
63. The Tribunal also considers that the streetscape and mitigation of the proposed Garage building bulk in Hillview Crescent could be enhanced with an additional depth of landscaping within the site between the Garage and the southern boundary of the property.
64. Therefore the Tribunal has determined that:
 - a. The proposed Garage with adjoining Workshop should be approved in the form and location indicated on Plan Option 2 dated 14 October 2022;
 - b. Fast growing, low maintenance screening vegetation should be established within the subject property, generally between the southern boundary of the subject site and southern side of the proposed Garage, and a minimum distance of 2m from the Hillview Crescent road frontage; and

- c. A hedge with a low wall to match the existing planting and wall, is to be provided to extend to and align with the northern wall of the proposed Garage.

Kim Calio
Development Tribunal Chair
Date: 20 January 2023

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:

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