



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	24-015
Appellant:	Glenn Davies and Hilary Jane
Respondent (Assessment manager):	Don Grehan
Co-respondent (Concurrence agency):	Noosa Shire Council ('Council')
Site Address:	152 Lenehans Lane, Doonan Qld 4562 and described as Lot 65 on RP856751 – the subject site

Appeal

This is an appeal under section 229, section 1 and Schedule 1, item 1 of Table 1 of the *Planning Act 2016 (PA)* against the refusal by the assessment manager, at the direction of the concurrence agency of a development application for building work (assessable against the Planning Scheme) for a class 10a detached shed associated with a dwelling house made by the Appellant (**development application**).

Date and time of hearing:	10am, 6 September 2024
Place of hearing:	The subject site
Tribunal:	Linda Tait—Chair Catherine Brouwer—Member
Present:	Appellant Glenn Davies—Appellant Hilary Jane—Appellant Kirsten Hawkins—Witness (adjacent neighbour from 146 Lenehans Lane) Co-respondent—Concurrence Agency, Noosa Shire Council Jarrad Postle—Building Technical Officer
Absent:	Respondent —Don Grehan, building certifier

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(d) of the PA, **sets aside** the decision of the Respondent to refuse the development 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) in the event the decision is to approve the development application, then including the following conditions:
 - A. The shed colour is to retain the dark grey colour on all external walls.
 - B. The shed is not to include any openings (windows, doors or vents) or lighting to the north, eastern and southern sides of the shed /building.
 - C. Landscape screening of the shed is to be planted and maintained along the sides and the rear of the shed. Planting density results in plants capable of growing to minimum 3 metres tall, planted at no less than 1 metre centres. Species are to avoid declared plants and environmental weeds.

Background

1. The subject site was included in the Rural residential zone of the Noosa Plan 2020 (**RR Zone**).
2. The subject site is located on the corner of Lenehans Lane (Council District Collector Road) and Hesper Drive (Local Road). The subject site has an area of 4,231.75m² and adjoins land to the north (14 Hesper Drive) and to the east (146 Lenehans Lane).
3. The subject site contains an existing dwelling house, garage, shed, and (the matter for this appeal) an unapproved shipping container shed.
4. Noosa Council Application Tracking online identifies that Concurrence Agency Referral RAB23/0101 for Shipping Container within side boundary setback was lodged on 8 August 2023 in response to an Enforcement Notice.
5. By letter dated 21 August 2023, Council issued an Information Request to the Appellant (**Information Request**). The information request raised an issue, 'that the proposed shed does not provide an adequate distance from the adjoining land uses and has the potential to impact the amenity of the users of the adjoining premises.'
6. The Information Request required further information be provided by the Appellant in respect of the following:
 - (a) 'Reconsider the location of the proposed shed and if a more compliant design can be achieved, submit revised plans for further consideration. It is suggested that Council may consider a 3.0 metre side boundary setback for the proposed shed.'
7. Council's Referral Agency Response dated 5 January 2024 directed refusal of RAB23/0101 for Shipping Container within side boundary setback. The reasons for the refusal were identified as being:

The application is refused as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:

Noosa Plan 2020 – Rural Residential Zone Code

PO6 Buildings and other structures are designed and sited to:-

- a) *provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy, access to breezes and protection from noise, odour or artificial lighting;*

It has been considered that the shipping container located within the side boundary setback has the potential to impact the amenity of the users of the adjoining premises.

Additionally, it is suggested that there are alternative design options available for which the shipping container may be located that provides for the same level of amenity to the users of the subject site, while also reducing the potential impact on the users of the adjoining premises.

- b) *provide adequate distance from adjoining land uses and avoid conflict with existing or future rural uses and activities on adjoining properties;*

It has been considered that the shipping container fails to provide an adequate distance from the adjoining land uses. Given the size of the rural residential property, it is suggested that a greater setback can be achieved to comply with the relevant performance outcomes.

8. The Respondent issued a Decision Notice reference 20230249 dated 5 April 2024 refusing the Shipping Container Storage Shed application stating 'The Assessment Manager was directed to refuse the application solely at the direction of the Referral Agency (Concurrence) listed in Schedule A', being Council.
9. The Site Plan attached to the Refusal, Pacific BCQ reference 2023 0249, and dated 5 January 2024, shows the shipping container shed under construction, bright blue in colour and located 10.5m from the Lenehans Lane boundary and 2.0-2.4m from the boundary with 146 Lenehans Lane.
10. Form 10 Notice of Appeal was dated 5 April 2024, describing the appeal 'Appeal enforcement notice under Planning Act 2016' and noting the grounds for appeal as 'We disagree with the 'grounds of refusal' decision because it has no impact on our neighbours and we have our neighbour's consent and support'.
11. The Form 10 references both the Enforcement Notice and the Decision, both of which relate to the shipping container storage shed.
12. By email, on 8 July 2024 from the Registrar, notice was given of the establishment of the Development Tribunal.
13. The hearing of the appeal was conducted at the subject site by the Tribunal on 6 September 2024.

Jurisdiction

14. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.¹
15. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).
16. Section 1(2)(g) of Schedule 1 of the PA, relevantly refers to a matter under the PA, to the extent the matter relates to the *Building Act 1975 (BA)*, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.

¹ Section 229(1)(a) of the PA.

17. In the form 10 under 'Description of appeal (for guidance on common appeal types see pages 3 and 4)', the appellants stated 'Appeal enforcement notice under Planning Act 2016' and stated '05/04/2024' under 'Date of the written notice of decision sought to be appealed'. The date 5 April 2024 is the date of the assessment manager's decision refusing the development application. Under 'Grounds for appeal/declaration' in the form 10, the appellants stated 'We disagree with the 'grounds of refusal' decision because it has no impact on our neighbours and we have our neighbours consent and support.' The appellants attached a copy of the assessment manager's decision to the form 10, and the tribunal has not been provided with a copy of an enforcement notice. The tribunal is satisfied that the decision under appeal is the respondent's decision dated 5 April 2024.
18. Table 1 of Schedule 1 of the PA applies to the Tribunal.
19. Under item 1 of table 1 of Schedule 1 of the PA, an appeal may be made against the refusal of a development application. The appeal is to be made by the applicant, who in this case was the Appellant and the respondent to the appeal is the assessment manager, who in this case is the Respondent.
20. In circumstances where the Decision Notice was dated 5 April 2024 and was received on 5 April 2024², this appeal was to be filed within 20 business days after the day the notice is given.³ This was satisfied.
21. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision framework

22. The Concurrency Agency Response was issued by Council on 5 January 2024.
23. The Decision Notice was issued by the respondent on or about 5 April 2024. At that time, the PA was in force.
24. The Appellant filed a Form 10 – Notice of Appeal / Application for Declaration on 18 April 2024.
25. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.
26. This is an appeal by the Appellant, the recipient of the Decision Notice and accordingly, the Appellant must establish that the appeal should be upheld.⁴
27. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Respondent who decided to give the Decision Notice the subject of this appeal.⁵
28. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal⁶.
29. At the hearing of this appeal, the Appellant sought leave from the Tribunal to present other evidence to the Tribunal comprising verbal evidence from the adjoining neighbour, Kirsten Hawkins. Council did not object to this evidence.

² Dates for both the Decision and Form 10 – Notice of Appeal / Application for Declaration of this appeal.

³ Section 229 of the PA.

⁴ Section 253(2) of the PA.

⁵ Section 253(4) of the PA.

⁶ Section 253(5)(a) of the PA.

30. Both the Appellant and Council made reference to Council's Information Request and the 3m side boundary setback referred to therein, as potentially acceptable. A copy of the Information Request was provided to the Tribunal on 11 September 2024.
31. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and the Tribunal may seek the views of any person⁷.
32. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.⁸
33. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
 - (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) *for a deemed refusal of an application:*
 - (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
 - (ii) *deciding the application.*

Material considered

34. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on or about 5 April 2024.
 - (b) An email dated 11 September 2024 from Jarrad Postle of Council to the Registrar, Development Tribunals with attached electronic copies of Council's Information Request.
 - (c) Noosa Planning Online – Application Search (for application lodgement date)
 - (d) *Noosa Plan 2020 (Noosa Scheme)*.
 - (e) *Planning Act 2016 (PA)*.
 - (f) *Development Assessment Rules (Version 1.3) 11 September 2020 (DAR)*, being the version in force at the time of the application.
 - (g) *Planning Regulation 2017 (PR)*.
 - (h) *Building Act 1975 (BA)*.
 - (i) *Building Regulation 2006 (BR)*.

⁷ Section 249 of the PA.

⁸ Section 253 and section 246 of the PA.

(j) *Queensland Development Code (QDC).*

Findings of fact

The Tribunal makes the following findings of fact:

Issues in dispute in appeal

35. The issues in dispute in the appeal centred on the issue of amenity and whether the proposed shed side boundary setback preserved the amenity of the adjacent land and dwelling house residents.
36. The Decision Notice identified the Noosa Scheme Rural Residential Zone Code as being relevant to the Respondent's consideration of the development application.
37. Noosa Scheme Part 1, Table 1.6.1 identifies that the Rural Residential Zone Code are QDC alternative provisions with regard to setback, site cover, and QDC performance criteria 4 and 8 for a dwelling house or class 10 building or structure located on the same lot as a dwelling house.
38. Noosa Scheme Part 5, Table 5.7.1 identifies that Carrying out building work not associated with a material change of use if involving a dwelling house or a class 10 structure is Accepted Development Subject to Requirements in relation to the Rural Residential Zone Code.
39. Noosa Scheme 5.3.3(4)(b) identifies that where development does not comply with and is not capable of complying with the assessment benchmarks for Accepted Development Subject to Requirements, assessment is limited to the subject matter of the required acceptable outcome.
40. This appeal relates to the non-compliance with Rural Residential Zone Code Acceptable Outcome AO6.4(d) – side boundary setbacks less than 6m, thereby requiring the limited assessment of the non-compliance with Rural Residential Zone Code Performance Outcome PO6.

Rural Residential Zone Code Performance Outcome

Boundary setback

PO6

Buildings and other structures are designed and sited to:-

- (a) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy, access to breezes and protection from noise, odour or artificial lighting;*
- (b) provide adequate distance from adjoining land uses and avoid conflict with existing or future rural uses and activities on adjoining properties;*
- (c) allow for space and landscaping to be provided between buildings;*
- (d) preserve existing vegetation that will help buffer development;*
- (e) protect the natural character and avoid adverse impacts on ecologically important areas such as national parks, waterways and wetlands.*

41. The Concurrence Response reasons for refusal (extracted below) made specific reference (only) to PO6(a) and (b). Therefore, these matters are the focus of the Tribunal with regard to the shed.

Impacts to Adjoining Property – Evidence Provided at the Hearing

42. Council made reference to the 3m setback distance identified in the Information Request, giving evidence that Council has accepted this outcome in previous cases. They also noted that this was the former setback required under the superseded planning scheme and was thus in evidence in established setbacks in the region.
43. Council stated that landscaping was not a preferred alternative to physical building setbacks due to the difficulties associated with ensuring long term compliance with landscaping conditions.
44. The Appellant acknowledged that they had constructed the shed without initially seeking Council approval. They lodged a development application in response to Council's Enforcement Notice. Since lodgement of the application, the Appellant has painted the building a dark grey, constructed a solid front fence and planted shrubs to provide some screening alongside the side boundary fence between the shed and the front boundary.
45. The Appellant presented the interior of the shed and the uses undertaken there, which comprised a workshop-like set up primarily for motorbike maintenance involving the use of machines and tools, some of which may generate noise. It is also included a small refreshment and rest area for the workshop.
46. The Appellant made representations at the hearing that moving the building approximately 1m to bring it to the 3m boundary setback would be of a high expense and would not make much physical difference to the visual impact of the building.
47. With reference to Planning Act s45(3), code assessment is an assessment only against the assessment benchmarks in a categorising instrument for the development. It cannot include consideration of a person's personal circumstances, financial or otherwise.
48. The Tribunal, the Appellant, and Council viewed the building in-situ, and noted: the location; the height; the finished appearance and colour of the building; and the side boundary wire fence; and the vegetation along that side boundary. The vegetation between the shed and the boundary comprises two established trees, and the new Murraya shrubs planted between the shed and the boundary along the remainder of the space there.
49. From the verge outside the subject site, there was limited visibility of the shed due to the solid front fence.
50. The witness (the neighbour) provided statements supportive of the current shed location, identifying that the building was barely visible due to established trees and other vegetation on 146 Lenehans Lane. All parties were invited onto the neighbouring land and were able to see the shed from that perspective.
51. The witness also advised that the land adjacent to the shed, on the 146 Lenehans Lane property, is the location of the septic dispersion area and aboveground electricity line, and that there are no plans for that area to be a frequently used outdoor living area, or to be built upon.

Reasons for the decision

Maintenance of amenity

What is amenity?

52. 'Amenity' is a concept that is long steeped in planning and planning law and has transcended a number of different planning regimes in Queensland.

53. There is no neat legal definition of amenity, despite there being a large body of case law that has considered the term.
54. The most succinct way the Tribunal can describe amenity is taken from the recent case of *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18 at paragraphs [141] – [142], where His Honour Judge Williamson QC DCJ relevantly provided the following:

‘... the concept of amenity is a broad one and not examined solely by reference to empirical standards. The assessment of impacts on amenity, as a consequence, involves an examination of intangible considerations (such as character and sense of place), where questions of degree, judgment and impression intrude.

Whilst the examination of the potential impacts of development on amenity involves matters of degree, impression and judgment, the exercise is not carried out by reference to some amorphous notion that takes its meaning from those who seek to maintain the status quo. Rather, such an assessment is informed by a range of considerations, including an objective reading of the adopted planning controls to ascertain what, if any, reasonable expectation there should be about the type and intensity of development intended for any given locality.’

55. So, to consider whether the proposed shed would preserve the amenity of adjacent land and dwelling houses, the Tribunal needs to consider not just tangible things like the scale, height and materials of the proposed garage and the views the neighbours would have of the structure but also the expectations the community might have about the type of development in the locality.
56. With respect to expectations, the Noosa Scheme sets the expectations for the community in respect of development that might or might not occur. Council also made reference to 3m setbacks constructed under the superseded planning scheme by way of community expectation.
57. The law however allows for an applicant to offer alternative outcomes where acceptable outcomes cannot be met. As long as these alternative outcomes, or performance outcomes, can be demonstrated to meet the applicable criteria, an applicant is also entitled to have an expectation that an application will be approved.

Assessment

58. The development application was triggered because the shed does not comply with the 6m side boundary setback prescribed in Rural Residential Zone Code Acceptable Outcome AO6.4(d).
59. The development application is Code Assessment, limited to assessment in relation to Rural Residential Zone Code Performance Outcome PO6 as it relates to the side setback non-compliance.
60. The Concurrence Response reasons for refusal (extracted below) made specific reference (only) to PO6(a) and (b):

Council (Co-respondent) Reasons for refusal – PO6(a) and (b)

PO6 (a) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy, access to breezes and protection from noise, odour or artificial lighting;

'It has been considered that the shipping container located within the side boundary setback has the potential to impact the amenity of the users of the adjoining premises.

Additionally, it is suggested that there are alternative design options available for which the shipping container may be located that provides for the same level of amenity to the users of the subject site, while also reducing the potential impact on the users of the adjoining premises. '

PO6 (b) provide adequate distance from adjoining land uses and avoid conflict with existing or future rural uses and activities on adjoining properties;

'It has been considered that the shipping container fails to provide an adequate distance from the adjoining land uses. Given the size of the rural residential property, it is suggested that a greater setback can be achieved to comply with the relevant performance outcomes.

61. PO6(a) has two focusses, the outcomes for the users on the subject site, and the outcomes for the users on the adjoining premises. Having the hearing onsite in relation to a constructed building, and hearing witness statements from the neighbour with a site visit to the neighbouring property afforded the Tribunal the opportunity to assess the shed from both the subject site user and neighbour perspectives.
62. The Tribunal found that the shed construction, colour, scale and orientation result in a building which is compatible with this particular subject location, having the adjacent property's unique characteristics of a septic dispersion land use adjacent the shed, of the relatively substantial distance of the shed from the residence, and of the density and mass of vegetation alongside the boundary adjacent and near the shed; and, only in the rural residential context.
63. The Tribunal found that the subject site users find the shed location suitable and amenable in relation to their house and garden and their use of the grounds.
64. The Tribunal also found that due to its dark colour, the mature vegetation close by which places it in shade much of the day, and absence of openings in the north and east sides, the building is not obtrusive as viewed from the neighbouring property, 146 Lenehans Lane.
65. The *Environmental Protection Act 1994* (EP Act) regulates residential, commercial and industrial noise nuisances, air pollution, light and water pollution. In this way, the tribunal considers that noise impacts are addressed by the EP Act and are therefore not further assessed by the tribunal.
66. PO6(b) specifically relates to separation distance. The location and nature of the shed do not impact on the privacy of the use of the adjoining land, nor does it introduce a habitable building that may be in conflict with existing or future rural uses or activities on the adjoining property.
67. While not included in Council's reasons for refusal, PO6(c) and (d) relate to allowing space for landscaping and preserving existing vegetation. The shed has been located to retain established vegetation, including a *Grevillea robusta* (silky oak) tree and a *Spathodea campanulata* (African tulip) tree alongside the east boundary, and garden plants elsewhere nearby.

Can the impacts of the proposed garage be conditioned?

68. The Decision Notice stated that *'The proposal cannot be conditioned to comply with the assessment benchmarks'*.

69. The Performance Outcome PO6 does not nominate a specific numerical separation distance. Through the imposition of a condition addressing colour and restricting openings to the east, the shed in its current location complies with PO6(a) and (b).

Conclusion

70. While the proposed shed does not comply with AO6.4(d) of the Noosa Scheme, the Tribunal finds that, subject to the imposition of relevant conditions, the proposed shed would comply with PO6.
71. The Tribunal therefore sets aside the decision of the Respondent to refuse the development 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) in the event the decision is to approve the development application, then including the following conditions:
 - A. The shed colour is to retain the dark grey colour on all external walls.
 - B. The shed is not to include any openings (windows, doors or vents) or lighting to the north, eastern and southern sides of the shed /building.
 - C. Landscape screening of the shed is to be planted and maintained along the sides and the rear of the shed. Planting density results in plants capable of growing to minimum 3 metres tall, planted at no less than 1 metre centres. Species are to avoid declared plants and environmental weeds.

Linda Tait
Development Tribunal Chair
Date: 22 October 2024

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, Local Government, Planning and Public Works
GPO Box 2457
Brisbane Qld 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au