



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-018
Appellant:	Daniel Eichhorn of Project BA
Respondent (Assessment Manager):	Brisbane City Council
Site Address:	19 Erathema Place, Coopers Plains QLD 4108 and described as Lot 18 on SP 268899 – the subject site

Appeal

Appeal under section 229 and Schedule 1, section 1, Table 1, Item 1 of the *Planning Act 2016* against the decision of the Assessment Manager to refuse an application for a two storey extension and patio to the rear of the existing house.

Date and time of hearing:	10:30am on Thursday 8 October 2020
Place of hearing:	The subject site – 19 Erathema Place, Coopers Plains QLD 4108, described as Lot 18 on SP 268899
Tribunal:	Henk Mulder– Chair Christopher Robertson – Member
Present:	Terry Verner– Owner and Appellant Daniel Eichhorn – Project BA – for the Appellant Lance Brown – Developer, Builder – for the Appellant Beverley Kelly – Neighbour – for the Appellant Hubert Toś – Brisbane City Council (Council)

Decision:

The Development Tribunal (Tribunal) in accordance with section 254(2)(c) of the *Planning Act 2016* (PA2016) **replaces** the decision of the assessment manager with another decision, namely, that the development application be approved subject to the conditions contained in the draft Approval package - Version 2 and the accompanying stamped drawings, dated 20 October 2020, as contained in the email from Council to the Registrar also dated 20 October 2020.

Background:

1. Approval is sought for a two storey extension and patio to the rear of the existing house. The extension has already been constructed.
2. The site is 413m² and is currently improved by a two storey dwelling house. The site is located in the low density residential zone. Land use in the locality predominately consists of Dwelling houses. The site shares a rear boundary to bush/parkland, identified as Beryl Roberts Park.
3. The building setback is 2.75m from the rear property boundary. The application was supported by an assessment report; a bushfire report; plans; an information request response, and letters of consent from adjoining properties.
4. The development history for the site is as follows:

Council application A004241438 – Reconfiguration of a lot (1 into 31 lot + road) Refused by Council on 28/7/16. Approved in the Planning and Environment Court on 21/6/17 (3143/2016).

Council application A005324717 – Plan sealing - Request for endorsement of Survey Plan. Endorsed 17/1/20.

Council application A005418932 – MCU – Dwelling house – Approved 2/4/20.

- Building height – 2 storeys and less than 9.5m above ground level
 - Front setback – 3.74m and 5m to garage
 - Side setbacks – 1.8m-2.64m & 0.5m for garage
 - Rear setback – 6.41m
 - Site cover – 48.3%
5. The dwelling house was not constructed in accordance with the last development approval A005418932, above.
 6. The extent of work not constructed in accordance is currently a balcony to the first floor above ground level with a roof. A pergola over a part of the external ground floor, and a wall extending along the side of the residence parallel to the side boundary is also sought in the application, the subject of the appeal.
 7. Council refused the application on the basis of a non-compliance with the overall outcomes of the *Brisbane City Plan 2014*, “Low Density Residential Zone Code”, and the “Dwelling House (Small Lot) Code.” Council set out the Key issues for refusal as follows:

1. Low density suburban identity and traditional backyards

- a. The proposal fails to provide for a traditional detached backyard to be accommodated on site which is essential to the low density detached housing suburban identity of the Low density residential zone. The balance area outside of the footprint does not provide adequate space for outdoor recreation.
- b. The unacceptable impacts on the low density residential zone referred to in paragraph (a) are reinforced and evidenced by the departure of the following provisions in the City Plan 2014
 - i. Low density residential zone code – Overall outcome 5(b), 5(c)(iii) and 5(e)(iii); and

- ii. Dwelling house (small lot) code – Overall outcome 2(c) and Performance outcomes PO2, PO7 and PO8.

2. Privacy and amenity

- a) The proposal fails to provide adequate privacy and amenity to adjoining dwelling houses and their private open space as the proposals position closer to the rear property boundary will be overbearing and will directly overlook the two adjacent dwelling houses under construction. The setback to the two storey extension will reduce outlooks from the backyards of the adjoining dwelling houses and will reduce breezes.
- b) The unacceptable impacts on the adjoining dwelling houses referred to in paragraph a are reinforced and evidenced by the departure of the following provisions of City Plan 2014:
 - i. Low density residential zone code – Overall outcome 5(d) and 5(e)(iii); and
 - ii. Dwelling house (small lot) code – Overall outcome 2(d) and 2(g) and Performance outcome PO2 and PO7.

3. Community benefit

- a) To the extent that the proposed development would provide a community benefit (which is not admitted), any of such community benefit would not outweigh the unacceptable outcomes or impacts resulted from the proposed development.

4. Imposition of conditions

- a) The unacceptable outcomes or impacts resulted from the proposed development cannot be overcome by an approval of the development application.

8. The Appellant sets out a response to the issues in the Grounds for Appeal as follows:

Private open space is unaffected by the proposal from the original approved dwelling, as the covered balcony and pergola add no constraint to the open space in the back yard.

The proposal complies with side boundary setbacks, and, with no current or likely future neighbour at the rear boundary which is open bushland and serves as a mapped drain and overland flow path, there is no local impact for privacy, overlooking or amenity.

The proposed work at the rear of the site does not create a dominant or overbearing character for the adjacent lots.

The proposal is compliant with the Australian standards as set out in the accompanying bushfire assessment report.

- 9. The site inspection established that the site is built on fill, and falls away significantly to the rear boundary fence beyond a retaining wall, such that the top of this fence is below floor level. The retaining wall is set in 1.0 metre from the rear boundary and the ground rises up until it meets tiled floor of the patio, approximately 3.0 metres from the rear wall line of the residence. Side boundary fences are nominally 1.8 metres high. The timber pergola and side wall as shown in the Drawings are not built, though the roofed balcony has been completed.
- 10. Attendance at the site hearing was undertaken by all parties where, after formalities were established, Council sought to make presentation of new information.

11. Council informed the hearing of their willingness to approve the extensions as proposed, subject to the Appellant agreeing with privacy screening, and no additional building work, for the matter to be resolved. Council agreed to supply a written copy of the revised requirement conditions to the Registry to be distributed to the Appellant.
12. The Appellant was in agreement with Council's proposal and accepting of the conditions.

Jurisdiction:

13. The Appellant lodged the Appeal with the Tribunal under section 229 of the *Planning Act 2016* (PA).
14. The Tribunal is of the opinion that a refusal of the development application in this instance is:
 - (a) a matter under the PA that relates to the *Building Act 1975* (BA), and
 - (b) cannot be decided by the QBCC pursuant to the BA.
15. 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.
16. 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.

Material Considered:

The material considered in arriving at this decision comprises:

17. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 12 August 2020 (receipt of fee by Registrar).
18. DA Form 2 version 1.2, 7 February 2020
19. Development Application letter from Project BA dated 23 July 2019
20. Bushfire Risk Assessment and Bushfire Risk Management Plan dated April 2019 (**Bushfire Plan**)
21. Tony James Building Design Drawings WD.01 'A' - WD.10 'A' inclusive, dated 6 September 2019 (**Drawings**)
22. Council Information Request dated 22 May 2020 (**Information Request**)
23. Neighbours statements in support of the application dated 16 June 2020
24. Information Request Response from Project BA dated 25 June 2020 (**Information Response**)
25. Council Refusal Letter dated 23 July 2020 (**Refusal Letter**)
26. Council Notice about Decision Assessment Report

27. The Grounds for Appeal (**Grounds**)
28. Site Inspection and hearing.
29. Submissions made at the hearing.
30. Council response email (**Response email**) dated 20th October 2020.
31. Appellant agreement of conditions provided by Council (**Agreement email**) dated 21st October 2020.
32. *Brisbane City Plan 2014*, including but not limited to the “Low Density Residential Zone Code”, the “Dwelling House (Small Lot) Code.”

Findings of Fact:

33. The site is a part of a new small lot subdivision of 29 lots completed in 2020 which, at the time of the Hearing, had a majority of new two storey residences either complete or nearing completion.
34. The site is 413m² and is currently improved by a two storey dwelling house which has a current Development approval no A005418932 for a new residence with a 6.41 metre setback to the rear boundary.
35. The subdivision is surrounded by an open bush/parkland to three sides, and an existing access road to the remaining side. The subject site faces the bush/parkland at the rear boundary.
36. The viability generally of the outdoor area to the rear of the site is limited to the benefit of the patio areas as the distinct and narrow band of falling ground to the retaining wall with its subsequent drop-off generally constrains a wide array of outdoor activities.
37. The builder advised at the hearing that the work was completed from an early set of drawings that did not reflect the Development Approval no A005418932, which led to the unapproved work being constructed.
38. Support for the retention of the patio was provided by neighbours in their Statements and in attendance at the Hearing.
39. Council, in their submission at the Hearing, through their representative, Mr Hubert Toś, verbally presented revised Acceptable Outcomes for the applicable codes in the matter, in particular in relation to Brisbane City Plan 2014, Low Density Residential Zone Code and Dwelling House (Small Lot) Code.
40. The revised Acceptable Outcomes are based upon the extent of the work undertaken, the contextual nature of the property and the surrounding environs. The Acceptable Outcomes primarily include:
 - i. suitable screening to the balcony from the nearest side boundary, and
 - ii. maintenance of fence heights at the side boundaries.
41. Council subsequently provided their revised Acceptable Outcomes including Conditions, in writing (Response email).

42. The Appellant agreed to the revised Acceptable Outcomes and Conditions (Agreement email).

Reasons for the Decision:

43. The Tribunal is satisfied that the proposal as set out in the draft Approval package - Version 2 and the accompanying stamped drawings, dated 20 October 2020, as contained in the email from Council to the Registrar also dated 20 October 2020 is acceptable in the terms cited for the original grounds for refusal, namely low density suburban identity, privacy, and amenity.

44. The Tribunal is satisfied that the proposed extension is in a zone *Low density residential* where there are existing residences nearby with a similar scale and bulk. With the written policy criteria from Council, the Appellant's agreement to fulfil the revised acceptable outcomes and conditions, the support of the neighbours, the circumstances of the adjacent dwellings and in consideration of the adjacent environs - including the bush/parkland to the rear boundary of the Subject Site - the dwelling with the proposed extension will fit into the existing streetscape and will not dominate.

Henk Mulder

Development Tribunal Chair
Date: 23 November 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
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833

Email: registrar@hpw.qld.gov.au