



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	22-066
Appellant:	Designer Decks and Patios Pty Ltd ACN 115 429 199
Respondent (Assessment manager):	Grant Forde
Co-respondent (Concurrence agency):	Toowoomba Regional Council
Site address:	Unit 1/7 Shelby Street, Glenvale described as Lot 1 on SP 306080 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the Planning Act 2016 against the decision of the Assessment Manager, as directed by the Concurrence Agency, to refuse a Development Permit for Building Works for a Storeroom, being a conversion of a patio in a duplex on a residential site. The Council directed refusal on the grounds that the proposed storeroom was deemed to be inconsistent with Performance Criterion P9 of the *Queensland Development Code MP 1.3 – Design and Siting Standard for Duplex Housing*.

Date and time of hearing:	1.30pm 16 February 2023
Place of hearing:	The subject site
Tribunal:	Anthony Roberts – Chair Kym Barry - Member
Present:	Heath White (Designer Decks and Patios) – Appellant Grant Forde (Integrated Building Certification) – Assessment Manager Kevin Jefferies and Brenda Harth – Toowoomba Regional Council Kimberley Reinhart - Owner

Decision

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the Planning Act 2016 (PA), confirms the decision of the Assessment Manager, as directed by the Concurrence Agency, to refuse the application.

Background

1. The subject site is a unit (Unit 1) in a single-storey brick duplex located on a flat 508m² allotment (with dual frontages to Shelby Street and Glenvale Road) and zoned Low Density Residential. Unit 1 has a floor area of approximately 126m², incorporates a patio

with an area of 9.6m² open on two sides and has access to a private open space in the form of a backyard.

2. The proposed storeroom comprises the enclosure of the existing patio with windowed walls and a glazed sliding door.
3. The previous history of the subject site includes a Tribunal Decision Notice (59-2017, March 2018) which set aside the decision of the then Assessment Manager refusing the development application for a duplex at the direction of the Concurrence Agency, Toowoomba Regional Council.
4. The earlier appeal related to the satisfaction of the setback requirements under MP 1.3 P1 of the Queensland Development Code – the Acceptable Solution for which is a 6m street setback. Council’s rationale for refusal was that the proposed 4m setback from Shelby Street did not meet the Performance Criterion as it would ‘provide unjustifiable bulk to the street and neighbouring buildings or structures and be incompatible with the road boundary setbacks of neighbouring buildings and structures’. Council had previously accepted a lesser setback of 4m from Glenvale Road under its Planning Scheme provisions.
5. Pertinent to this current appeal, the Tribunal’s Decision Notice in 59-2017 included a Finding of Fact that in relation to QDC MP 1.3 P9 private open space, the 26.5m² per unit of private open space provided exceeds the 16m² requirement in A9 of QDC MP 1.3. Further, the Tribunal’s Reasons for the Decision contained the statement that ‘...the Tribunal ...has also considered the effect of the exceedance of the A9 Outdoor Living Space and A2 Side Boundary setback minimum requirements as mitigating effects that assist in compliance with the overall purpose of QDC MP 1.3’.
6. The plans lodged with the development application at that time clearly depict the patio areas in each duplex as an ‘outdoor room’.
7. In respect of the current appeal, as the proposed conversion of the patio to a storeroom did not comply with all Acceptable Solutions under QDC MP 1.3, the Assessment Manager lodged a request for a Referral Agency Response for the building work with the Council on 8 November 2022. Council subsequently issued an Information Request on 14 November 2022 requiring a statement of reasons justifying how the proposal met Performance Criterion 9 of QDC MP 1.3.
8. As the response to the Information Request provided on 5 December 2022 did not include the requested justification against Performance Criterion 9 of QDC MP 1.3, Council issued a Concurrence Agency Response on 15 December 2022 directing that the application be refused.
9. The reasons for refusal set out in the Concurrence Agency Response stated, in part, as follows:

*The reason for Council’s refusal is that the proposal is deemed to be **inconsistent with Performance Criteria P9** of the Queensland Development Code MP 1.3 Design and Siting Standard for Duplex Housing which provides:*
(...)

The plans and justifications provided to Council on the 5th November 2022 identify the proposed building work is to convert the pre-existing Outdoor Room to an Enclosed Storeroom, with walls and doors of glass and flyscreen.

*The proposal to enclose this area to a class 10a Storeroom does not provide access to the Outdoor Living Space from a living area which:
(...)*

Despite being provided the opportunity, the applicant failed to provide advice demonstrating how the proposal satisfies the requirements of P9 in its entirety. Access from a living area to Outdoor Living Space has not been provided.

10. Accordingly, the Assessment Manager issued a Decision Notice on 16 December 2022 refusing the proposed development based exclusively on the Concurrence Agency Response from Council.
11. The Appellant subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 20 December 2022.
12. The hearing for the appeal was held at the subject site on 16 February 2023 at 1.30pm. The Tribunal had the opportunity to view the proposed development from the subject site, neighbouring properties, and the streetscape more generally.
13. At the request of the Tribunal following the hearing, Council provided further particulars demonstrating the decision-making process relied on in arriving at the refusal decision in Council's submission dated 13 March 2023.

Material considered

14. The Tribunal considered the following material:
 - a. Form 10 – Appeal Notice, grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar 20 December 2022
 - b. The Planning Act 2016 (PA)
 - c. The Planning Regulation 2017 (PR)
 - d. The Building Act 1975 (BA)
 - e. The Building Regulation 2006 (BR)
 - f. The Queensland Development Code (QDC) Part MP 1.3
 - g. The Queensland Development Code (QDC) Part MP 1.4
 - h. The Toowoomba Regional Planning Scheme 2012
 - i. The verbal submissions made by the parties at the hearing
 - j. Additional post-hearing submission made by Council dated 13 March 2023
 - k. Development Tribunal - Decision Notice 59-2017.

Jurisdiction

15. The Tribunal has jurisdiction to hear the appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(1)(b), 1(2)(g) and Table 1, item 1(a), being an appeal by the Appellant against the refusal of the development application by the Assessment Manager at the direction of the Concurrence Agency.

Decision framework

16. Section 253 of the PA sets out matters relevant to the conduct of this appeal. Subsections (2), (4) and (5) of that section are as follows:

(2) *Generally, the appellant must establish the appeal should be upheld.*

- (4) *The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.*
- (5) *However, the tribunal may, but need not, consider— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.*

17. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and is not relevant here) are as follows:

- (1) *This section applies to an appeal to a tribunal against a decision.*
- (2) *The tribunal must decide the appeal by-*
 - (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) *[not relevant].*
- (3) *However, the tribunal must not make a change, other than a minor change, to a development application.*

18. The Planning Regulation 2017, Schedule 9, Part 3 Referral Agency's Assessment, sets the bounds for Council's jurisdiction as Referral Agency for the proposal. Table 3 to this section states that where the 'Queensland Development Code, part 1.1, 1.2 or 1.3 applies to the building work and, under the part, the proposed building or structure does not include an acceptable solution for a relevant performance criteria under the part' the matters that the referral agency's assessment must be against are '...whether the proposed building or structure complies with the performance criteria stated in the paragraph'.

19. For the purposes of this appeal, the specific Performance Criterion in question is P9 which provides:

- In a duplex, each dwelling has its own individual outdoor living space available which -*
- (a) *has suitable size and slope is to allow residents to extend their living activities outdoors; and*
 - (b) *is available for the sole use of the residents of individual dwellings; and*
 - (c) *is adequately separated.*

Findings of fact

20. The Tribunal makes the following findings of fact:

Compliance with QDC MP 1.3

- a. In relation to the grounds for refusal identified by Council, the Appellant provided the following grounds for appeal:

Access from the internal living room to the Outdoor Living Space is achieved via the sliding door of the storeroom;

It is our opinion compliance with P9 of the Performance Criteria is achieved as the existing outdoor living space remains unaffected;

The building application for the construction of the duplex was previously appealed to the development tribunal which identified the private open space for each unit achieved 26.5m² which exceeded the minimum requirement. ...

- b. Council contends that the proposal fails to satisfy Performance Criterion P9 as:

*Plans provided to Council confirm the dwelling currently provides direct access to what Council considers to be the **outdoor living space**, inclusive of the covered patio area, open on two sides and open green space, via the living/dining area.*

*Council's assessment of the submitted application determined the use of the existing patio area forming part of; or providing direct access to the outdoor living space would be substantially altered to form a new Class 10a use as an enclosed storeroom and no longer a **living area**.*

The application submitted to Council proposing the conversion of an existing Covered Patio area to an enclosed storeroom did not achieve compliance with the identified Acceptable Solutions of the QDC and did not demonstrate any proposed Alternative Solution to the required Performance Criteria.

Council's reason for refusal lies in the failure of the applicant to adequately demonstrate the ability of the design proposal to either continue to meet the requirements of the Acceptable Solutions or to provide an Alternative Solution to satisfy the requirements of the Performance Criteria of the Mandatory Part, specifically:

*Acceptable Solution **A9 (c)** has access from a **living area**; and Performance Criteria **P9 (a)** has suitable size and slope is to allow residents to **extend their living activities outdoors**;*

(...)

*The National Construction Code Building Classifications demonstrate that a Class 10a enclosed storeroom can no longer be 'inhabited', 'dwelled' or 'lived' in and therefore no longer allows the residents to **extend their living activities outdoors, from a living area** per the intention of the Performance Criteria. The use proposed is for storage, similar to that of a shed or garage and does not form a satisfactory Alternative Solution for the Performance Criteria with regard to access of the **outdoor living space**.*

(...)

21. The Tribunal finds that the proposed conversion of an existing patio to an enclosed storeroom would not satisfy the requirements MP 1.3, and in particular, P9. In arriving at its decision, the Tribunal relied on the following understanding:
- a. As identified in paragraph 19 above, the Performance Criteria set out in MP 1.3 form the material considerations in this appeal.
 - b. Performance Criterion P9 does not include a requirement that the outdoor living space be directly accessed from a living area, which is the case for Acceptable Solution A9. Therefore, Council's seeming reliance on this requirement as a component of its refusal appears incorrect.

- c. The stated Purpose of QDC MP1.3 includes reference to promoting ‘an acceptable amenity to residents’ relating to the design and siting of duplex housing.
- d. The original approval for the duplex clearly specified the patio areas as ‘outdoor rooms’.
- e. Council’s submission states that it considers the existing covered patio area together with the green space to constitute the ‘outdoor living space’ (required against A9) for the approved duplex.
- f. The ‘mitigating effects’ of the provision of 26.5m² private open space per unit exceeding the 16m² requirement in A9 of QDC MP 1.3 relied on by the previous Tribunal in support of its decision to replace the Council’s refusal of the duplex (and referenced by the Applicant as a ground of appeal), would be substantially eroded by the reduction of the outdoor living space with the conversion of the 9.5m² patio - resulting in a net outdoor living space area of 17m².
- g. The intention behind Performance Criteria P9(a) to provide outdoor living space to ‘allow residents to extend their living activities outdoors’, on practical interpretation, would suggest that for flow and connectivity purposes the outdoor living space would be located adjacent to the living areas of the dwelling providing high living amenity and convenience to residents.
- h. In this case, the Tribunal concurs with Council’s assessment that the proposed conversion of the patio as a ‘habitable room’ to a non-habitable storeroom would likely, in practical terms, not enable the intent of Performance Criterion P9(a) to be satisfied – consistent with the amenity intentions referenced in the Purpose of QDC MP1.3.

Reasons for the decision

- 22. In this appeal, the Tribunal considers the Appellant has not satisfied the onus of demonstrating the appeal should be upheld. Therefore, the Tribunal has determined to confirm the decision of the Assessment Manager, as directed by the Concurrence Agency, to refuse the application for the reasons identified below.
- 23. Whilst the Tribunal does not accept that Council’s refusal should have, at least in part, relied on invoking Acceptable Solution A9(c) requiring that outdoor living space for the duplex must have access from the living area, it considers that (in this particular case) the intent of Performance Criteria P9(a) could not otherwise be practically achieved.
- 24. The Tribunal considers approval of the proposal would be inconsistent with the original design of the duplex, as approved, resulting in reduced amenity for residents and further that it would substantially erode one of the ‘mitigating effects’ cited in Tribunal Decision Notice (59-2017, March 2018) approving the original duplex application.
- 25. The Tribunal holds a further concern that the approval of this proposal would potentially set an undesirable precedent for conversion of open patio areas in existing duplexes.

Anthony Roberts
Development Tribunal Chair

Date: 28 April 2023

Appeal rights

Schedule 1, Table 2, item 1 of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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