



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-012
Appellant:	Dominic Lord
Respondent (Assessment Manager):	Harald Weber of All Construction Approvals
Co-Respondent (Concurrence Agency):	Cairns Regional Council
Site Address:	230 Spence Street, Bungalow QLD, and described as Lot 8 RP709751 – the subject site

Appeal

Appeal under Section 229 and Item 1(a) of Table 1, section 1, Schedule 1 of the *Planning Act 2016* against the refusal, as directed by the concurrence agency, of a development application for building works being construction of a shade sail on residential premises involving a lesser side setback than that specified in MP1.2 of the Queensland Development Code.

Date and time of hearing:	Written Submissions
Place of hearing:	N/A (application decided on written submissions)
Tribunal:	Linda Tait– Chair Jane Grimmond - Referee
Present:	Dominic Lord – Appellant Kylie Nolan – Cairns Regional Council

Decision:

In accordance with the *Planning Act 2016* (PA) section 254(2)(d), the Development Tribunal **sets aside** the decision made by All Construction Approvals on 20 May 2020. The Development Tribunal orders that All Construction Approvals remake the decision by 18 December 2020, reflecting the Tribunal's finding that the proposed shade sail as designed complies with Queensland Development Code MP1.2 Performance Outcome P2.

Background:

- [1] On 19 May 2020, Council issued a Concurrence Agency Response notice directing the certifier, Harald Weber of All Construction Approvals, that the shade sail application be refused.
- [2] On 19 May 2020, All Construction Approvals issued a Decision Notice refusing the shade sail development application.
- [3] On 22 May 2020, a form 10 – Notice of Appeal and applicable fee was lodged seeking to appeal the refusal. On 26 May 2020, the assessment manager and the Council were notified of the appeal by the Registrar via email pursuant to section 230(3) of the PA.
- [4] On 7 August 2020, the registrar advised parties that pursuant to section 242 of the PA, a tribunal had been established.
- [5] Following the establishment of the Tribunal, the Chairperson of the Tribunal caused an email to be sent by the Tribunal's Acting Registrar to the parties to create a timetable for the provision of written submissions by the parties with respect to the issues in dispute.
- [6] On 12 August 2020, the registrar sought feedback from the appellant and respondent as to whether both parties agreed to this appeal being heard by submissions. Both parties agreed in writing. Each party provided written submissions in accordance with the timetable and copies of the submissions were provided to the tribunal, the appellant and respondent. The assessment manager elected, via an email dated 12 August 2020 to the Registrar, not to play any part in the appeal proceedings.
- [7] Council's submission states that a Siting application was lodged on 24 April 2020. The identified applicant was Pickers Vinyl and Canvas on behalf of the landowner, Dominic Lord.
- [8] Council's submission states that a "submission against the proposed works was submitted to Council by the neighbouring property, detailing how the proposed works will affect the amenity and light of her property".
- [9] Council's submission notes that the application addressed the performance criteria "however not sufficient justification was supplied".
- [10] The appellants submission states "The addition of the shade sail is for rain protection only and was always slated to be done to fill in the angled roof above the deck. The south easterly rain in the wet season is relentless and comes in sideways, pouring onto the deck and making the outdoor area uninhabitable during these months as well as damaging and weathering the amenities on the deck. The shade sail has been designed to be put up during these months and taken down during the dry season and in cyclones . previously we have used a tarp to stop the rain which flaps in the wind and does little to stop the rain. we have designed the shade sail to be inline with existing roof and at thus the only sunlight obstructed would be for minutes during the morning. there is no change to the Ventilation of the area as it is at roof height. We are happy to compromise and make the shade sail in clear plastic to let light through. (we chose a grey initially as it would be same colour as roof and would not show up any mould as the years went by) I am trying to protect my family and property with this shade sail and have endeavoured to design and erect it to maintain all parties interests and comply with all regulations.'
- [11] The tribunal sought clarification on the width of the property. The appellant provided a copy of the survey plan. The original survey plan identifies the width of the property is 66.66 links (13.41m).

[12] Council's submission stated that the site has an area of 491m².

Jurisdiction:

[13] The Development Tribunal has jurisdiction as this is an appeal under Section 229 and Item 1(a) of Table 1, section 1, Schedule 1 of the PA against the refusal of a development application for construction of a shade sail on residential premises. The precondition for the application of table 1, in section 1(2)(g) of Schedule 1 is satisfied in this instance.

[14] The application was not subject to Impact Assessment and did not involve a variation approval.

Decision Framework:

[15] With reference to 253(2), the Appellants lodged the Form 10 appeal request within the 20-business day appeal period.

[16] It is noted that:

- i. the onus rests on the Appellants to establish that the appeal should be upheld (s. 253(2) of the PA),
- ii. 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 (s. 253(4) of the PA),
- iii. the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under s.246 of the PA (pursuant to which the registrar may require information for tribunal proceedings),
- iv. the tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA, and
- v. the tribunal's decision takes the place of the decision appealed against (s.254(4) of the PA).

Material Considered:

[17] The material considered in arriving at this decision comprises:

- i. Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 22 May 2020. Those documents included:
 - Decision Notice
 - Concurrence Agency Response
 - Proposal Plans (site plan, aerial and elevations)
 - Site photo taken onsite from the backyard facing towards Spence Street, showing the house with first floor deck and poles (for the shade sail) in proximity to the boundary fence.
- ii. Written submissions of the Respondent received 28 September 2020.
- iii. Written submissions of the Appellant dated 16 October 2020.
- iv. Survey Plan received from the Appellant on 7 September 2020.
- v. The Planning Act 2016 (PA).

- vi. The Planning Regulation 2017 (PR).
- vii. CairnsPlan 2016 and associated mapping.
- viii. Queensland Development Code MP1.2
- ix. Macquarie Dictionary 2020

Findings of Fact:

[18] The Tribunal makes the following findings of fact:

- i. The subject lot is located within the Cairns local government area. The CairnsPlan 2016 is the categorising instrument for this area. The proposed shade sail constitutes Building Work and is not identified as assessable development pursuant to the CairnsPlan.
- ii. The shade sail is Building Work assessable in relation to the Queensland Development Code MP1.2 Design and Siting Standard for Single Detached Housing – on lots 450m² and over. The shade sail is proposed to be located on the southern side of the existing house, adjacent to the existing deck. The support poles (max. 4.4m above ground level) are adjacent to the southern western side boundary and the shade sail is proposed to be connected to the existing roofline, beyond the setback (5.1m above ground level).
- iii. The proposed shade sail slopes downwards from the existing house towards the neighbouring boundary to the south west.
- iv. The proposed shade sail setback is an alternative to QDC MP1.2 A2, particularly A2(d)(ii).
 - Notably, with reference to MP1.2 A2(c), the structure is not a deck, patio, pergola, verandah, gazebo, or the like.
 - The structure is not used for entertainment, recreation purposes or the like. (The appellant has advised that the purpose of the shade sail is to protect the deck from rain).
 - The structure is not a screen, fence or retaining wall.
 - The structure does not comply with MP1.2 A2(d)(i) in terms of mean height of not more than 3.5m.
 - The total length within the boundary clearance is less than 9m (identified in MP1.2 A2(d)(ii)).
 - The aerial of the site shows that the structure is adjacent to tall established palm trees in the neighbouring property, not within 1.5m of a window in a habitable room of an adjoining dwelling.
- v. Accordingly, pursuant to the PR Schedule 9, Division 2 – Local Government as Referral Agency, Table 3 – Design and Siting applies.
- vi. The application was referred to Cairns Regional Council as concurrence agency on 24 April 2020.
- vii. The Concurrence Agency Response dated 19 May 2020 directed refusal on the grounds of non-compliance with the performance criteria in QDC MP1.2.

viii. The Decision Notice issued by All Construction Approvals on 19 May 2020 refused the development in accordance with the Concurrence Agency Response and PA section 62.

ix. QDC MP1.2 is identified by Council as the assessment benchmark for the design and siting assessment. As identified above, the proposal is an alternative to MP1.2 A2(d)(ii). The related assessment benchmark is Performance Criteria P2 which states:

P2 Buildings and structures –

(a) provide adequate daylight and ventilation to habitable rooms; and

(b) allow adequate light and ventilation to habitable rooms of buildings on adjoining lots.

(c) do not adversely impact on the amenity and privacy of residents on adjoining lots.

x. The proposed shade sail is not in proximity to habitable rooms on the adjoining property. Therefore, the shade sail will comply with P2(a) and P2(b).

xi. The shade sail will improve the privacy of residents on adjoining lots insofar as the proposed sloping shade sail will partially obscure views between users of the deck at the subject site and users in the yard of the adjoining property.

xii. While impacts to amenity is referenced in P2(c), it is not a defined term, the Macquarie Dictionary defines amenity as “the quality of being pleasant or agreeable in situation, prospect, disposition, etc.; pleasantness: the amenity of the climate.”

xiii. With reference to P2(c) and the abovementioned definition, the rear yard of the neighbouring property features large established palm in proximity to the proposed shade sail location. At present, the neighbouring deck (on the subject site) is visible. The proposed shade sail will provide a separation between the two spaces, thereby improving the amenity of the neighbouring property. In this way, the proposed development complies with P2(c).

xiv. The proposed shade sail as lodged is intended to be Dust Grey, as opposed to a bright colour. This matches the existing house colour scheme and will not pose a detrimental impact on the adjoining lot.

Reasons for the Decision:

[19] The application and appeal have been undertaken in accordance with the relevant legislative timeframes.

i. The Tribunal has focused on the identified assessment benchmark relevant to side setbacks, Queensland Development Code MP1.2 Performance Criteria P2 which states:

P2 Buildings and structures –

(a) provide adequate daylight and ventilation to habitable rooms; and

(b) allow adequate light and ventilation to habitable rooms of buildings on adjoining lots.

(c) do not adversely impact on the amenity and privacy of residents on adjoining lots.

[20] As the shade sail is intended to be constructed of colours that match the existing dwelling in a context of established vegetation and away from habitable rooms, the proposed shade sail and associated supports comply with P2.

[21] In this context, the tribunal is satisfied that the proposed shade sail and supporting posts comply with the design and setback requirements of the Queensland Development Code MP1.2.

Linda Tait

Development Tribunal Chair
Date: 25 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:

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