



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-002
Appellants:	Ron George and Danika Royle
Respondent (Assessment Manager):	Rob Wibrow of Building Approvals United QLD
Co-respondent (Concurrence Agency):	Noosa Shire Council
Site Address:	3 Stardust Court Sunrise Beach and described as Lot 1007 on CP887113 Plan – the subject site

Appeal

Appeal under section 229 and item 1(a) of table 1 of section 1 of schedule 1 of the *Planning Act 2016* (PA) against the decision to refuse a development permit for construction of a class 10a carport within the road boundary setback and a cabana within the side boundary setback.

Date and time of hearing:	23 April 2021 at 2.00pm
Place of hearing:	The subject site.
Tribunal:	John O'Dwyer– Chair Debbie Johnson - Member
Present:	Ron George and Danika Royle – Appellants Jason Devine, Matt Adamson – Noosa Shire Council (Council) representatives Rob Wibrow – Building Approvals United QLD Paul Hinds – Soulspace Building Design

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA), **replaces** the original Refusal with an Approval subject to the following conditions:

- A. The development application is approved subject to the development being generally in accordance with the plans submitted with the application provided the cabana deck maintains a minimum setback of 1500mm from the side and rear boundaries to provide adequate acoustic amenity for neighbouring properties.
- B. The development is subject to any additional conditions attached to the building approval by the building certifier to address the requirements of the *Building Act 1975*.

Background

1. The subject site is a trapezoidal parcel of land located on the southern side of Stardust Court with a frontage of 20 metres and a depth of 33 metres. The site contains a dwelling, a single car carport in the north-east corner of the land and a swimming pool at the rear surrounded by paving. There is significant native vegetation plantings in the frontage of the property and on the verge outside the property in Stardust Court. The appellants advised their intent to remove the high fence at the front of the property and replace it with a more transparent fence and to add to native vegetation plantings in their front yard.
2. There is an easement across the rear of the land and no development is proposed in this easement. There is a sewer line across the rear of the lot outside this easement and no development is proposed over this sewer.
3. The Appellants applied on 20 August 2020 to the Assessment Manager for a development approval to construct alterations and additions to an existing building (Class 1 and 10A). The additions included a double carport in the north-east corner of the site and a cabana in the south-west part of the rear of the site. The proposed double carport will start at the north-east corner of the site with the front edge at right angles to the eastern side boundary. The additions also include a cabana (open structure) in the south-west corner of the site with its eaves 900mm from the western boundary and its deck 1500mm from the western side boundary.
4. Subsequently, the Assessment Manager referred the application to Sunshine Coast Regional Council (Council) as a concurrence agency for building work for design and siting under the *Planning Regulation 2017*, schedule 9, part 3, division 2, table 3.
5. On 26 November 2020, Council issued its referral agency response directing the Assessment Manager to refuse that part of the application relating to carport within front boundary setback and cabana within side boundary setbacks as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:

Noosa Plan 2020 (NP2020) – Low Density Residential Zone Code (LDRZ Code):

PO9 (a) *provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight;*

It has been considered that a reduced side boundary setback for the proposed cabana is not required to provide a high level of amenity to users of the site and the prescribed side boundary setbacks are able to be complied with. Furthermore there will be adverse effects on the acoustic privacy of the adjoining land users due to the entertainment use of the structure.

PO9 (c) *provide adequate distance from adjoining land uses;*

It has been considered that the reduction to the prescribed side boundary setbacks for the proposed pool cabana is not an adequate distance from the adjoining land owners.

PO9 (f) *be consistent with the predominant character of the streetscape;*

It has been considered that the design of the Carport provides for a location and building form that is not consistent with the predominant character of the street.

6. On 8 December 2020, the Assessment Manager issued a decision notice refusing the application as directed by Council.
7. On 4 January 2021, the Appellants lodged this appeal with the Development Tribunal Registry against the decision to refuse the application.

Jurisdiction

8. This Tribunal has jurisdiction to hear this 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 on the direction of the Referral Agency.
9. The appeal was made in time, thus enlivening the Tribunal's jurisdiction.

Background

10. The owners proposed a new double carport to replace the existing single carport and the existing garage at the north-eastern corner of the house and to create a cabana on a new deck in the area around the existing swimming pool in the south-west part of the site.
11. The existing carport is largely within the 6m setback as will be the proposed double carport. At the hearing Council advised the existing carport is an illegal structure and so does not give rights to a carport. The Tribunal accepts this. The existing garage is a typical single garage found across the Sunshine Coast with a narrow doorway with limitations for opening doors on medium and large sized cars and utilities. The building alteration proposed to enclose the garage and convert it to form part of the residential premises.
12. The Noosa Planning Scheme 2020 (NP2020) transport and parking code requires two covered spaces per dwelling. In enclosing the garage, the applicants would have to provide two covered spaces on site. A carport requires a clear opening of 3 metres for a single car port or 5.4 metres for a double carport. There is no available area on site between the existing dwelling and side boundaries where 3 metres can be achieved, after allowing for structural supports and setbacks from boundaries for gutters.
13. The previous Noosa Planning Scheme 2006 (NP2006) allowed 1500mm setbacks from side boundaries to be calculated from the walls of structures with an allowance for a 600mm eave within the 1500mm side setback. NP2020 requires setbacks to be achieved from the eaves not the walls. The works were designed before NP2020 came into effect based on the NP2006 requirements and the cabana would have been accepted development at that time. The relevant provisions of NP2020 as originally placed on public notice were the same as the provisions that came into effect on 31 July 2020. The application was not lodged until after NP2020 came into effect on 31 July 2020.
14. Normally, this application should have had to comply with the new setbacks, however, Noosa Shire Council Plumbing and Building Services issued an email to building certifiers acknowledging that there would be dwellings designed prior to the coming into effect of the New Noosa Plan that were now non-compliant and so a siting variation application needed to be lodged. The email also advised there would be a reduction in the siting application fee for a period of three months from the commencement date for siting applications where the dwelling was fully compliant with the Noosa Plan 2006.

Decision Framework

15. This is an appeal against a refusal of a development application, the onus rests on the Appellant to establish that the appeal should be upheld.
16. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Assessment Manager and Concurrence Agency who made the decision appealed against (PA section 253(4)) and for an appeal about a development application, this may mean addressing matters which an assessment manager or concurrence agency did not expressly rely on in refusing or directing refusal of the application respectively and matters raised at the hearing by any party.
17. Under the PA section 254, 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.
18. In this appeal, the Tribunal considers the appellant has satisfied the onus to demonstrate the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision of the Assessment Manager as set out above for the reasons set out below.

Material Considered

19. 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 Tribunals Registrar on 16 December 2019 including:

Development Application lodged with the Assessment Manager on 20 August 2020

Referral Agency Response dated 26 November 2020

Decision Notice – Refusal dated 8 December 2020

Form 10 - Notice of Appeal dated 4 January 2021 and Grounds for Appeal at Appendix 1

Copy of email from the Assessment Manager dated 4 January 2021 including the email from Council Building & plumbing Services dated 7 September 2020 regarding the reduced application fee for siting variation applications received within 3 months of commencement of Noosa Plan 2020.

B Email dated 7 May 2021 from Paul Hinder of Soulspace, the building designer showing the existing site layout does not enable the provision of a carport with the minimum width required by AS2890.1 anywhere on site behind the building setback line. The plan shows an extension of the existing garage to demonstrate a double garage could not fit within the space available on the eastern side of the existing dwelling and that a carport could not be fitted within the space available between the dwelling and the western site boundary.

C Email dated 12 May 2021 from Matt Adamson of Council noting that

- the proposed double garage is contradictory to the original proposal for a double carport
- the car parking spaces being referenced within this additional information only relates to the acceptable outcome listed in the Low Density Residential Zone Code, so there is an opportunity to submit an additional application to vary the prescribed outcomes
- the purpose of the assessment undertaken by Council was only in relation to siting of the proposed carport against the Performance Outcomes (PO9) as listed in the Low Density Residential Zone Code and notes the Australian Standard referenced by the designer is not a referenced standard in this circumstance
- The access door to the existing garage provides for a width considerably less than that specified by the designer.

D Noosa Plan 2020 Part 2 State Planning Provisions and Section 6.3.1 Low Density Residential Zone Code and Section 9.4.1 Driveways and Parking Code which calls up Australian Standards and Table 9.4.1.4 – Minimum parking requirements requiring two covered spaces for a dwelling.

Reasons for the Decision

20. It is appropriate to consider the relevance of Noosa Plan 2020 in a circumstance where Council has provided a grace period for building applications where the design was prepared prior to commencement of the new planning scheme and the weight to be given to that grace period vs the weight to be given to the new planning scheme; and the potential conflict between the car parking requirements and setback requirements, while giving primary consideration to the Low Density Residential Zone Code.

Cabana

21. The Tribunal has considered the nature of the transition from Noosa Plan 2006 to Noosa Plan 2020. Normally a dwelling would need to be fully compliant with the new planning scheme. However, the email to the building certifiers seem to provide an opportunity for dwellings non-compliant with Noosa 2020 to be approved provided a siting application was made within three months of commencement and the works were compliant with the Noosa Plan 2006.
22. On this basis, the cabana can be seen as a building element that would be compliant under Noosa Plan 2006 and prima facie would expect to receive approval of a siting application.
23. However, Council considers the cabana would impact on the acoustic privacy of adjoining properties and the cabana could be set back to be compliant with the new requirements and a reduced site setback is not required to provide a high level of amenity to the occupants of the subject site.
24. At the hearing, the Assessment Manager advised that the information request made by Council only mentioned the carport and not the cabana. Given that Council subsequently raised the issue of the cabana setback in the referral agency response, the Tribunal considers that Council had lost an opportunity to seek to have the Appellants agree to a compliant setback, and so the Tribunal is considering the application as submitted to the Assessment Manager.
25. At the hearing Council representatives conceded that the applicants could have made a superseded planning scheme application for the cabana but there was no guarantee that the application for the cabana would be approved.
26. Council's reasons for referral agency refusal do not reflect that the cabana floor is compliant with the setback requirements and therefore the acoustic amenity of neighbours will not change whether or not the eaves are compliant with the 1500mm.
27. The Tribunal considers that the Council's reason for refusal of the reduced cabana setback due to the loss of access to sunlight for adjoining properties is not supported given that the eaves are set back 900mm from the side boundary and further from the rear boundary. and it would only be in winter in the morning that there would be any potential for partial overshadowing of neighbouring properties.
28. The Tribunal considers that the Council's reasons for refusal of the reduced cabana setback due to the potential impacts of the cabana on the acoustic amenity of neighbours or the enjoyment of the subject site by the occupants do not carry significant weight. The Tribunal considers that in this instance the spirit of the email from Building Services should be applied to accept a reduced side boundary setback for the cabana roof given the building was designed prior to the commencement of Noosa Plan 2020 and the cabana floor achieves the required setback.

Carport

29. The new Noosa Plan 2020 requires the provision of two covered spaces for a dwelling and the Appellants wanted two covered spaces to protect their cars. The Appellants argued

that the existing garage has a narrow door which is sub-standard for modern medium to large cars and that when inside there is limited space to open car doors. The Appellants noted there was not sufficient space on either side of the dwelling for a carport to provide a second car space. This was supported in a submission from the building designer on 7 May 2021, where he demonstrated that it was not possible to meet the provision of two car spaces on site behind the building line to Australian Standards without significant demolition of the existing dwelling.

30. The Appellants also propose to replace the high fence on the site with a more transparent fence to be consistent with AO17.1 of the Low Density Residential Zone Code and to add additional native vegetation to the landscaping in the frontage of the site
31. There are two substantive issues that the Tribunal has considered in relation to the proposed carport:
 - a. The issues raised by Council about the lack of compliance with the Low Density Residential Zone Code to have the carparking behind the building line and the failure to be consistent with the predominant character of the street.
 - b. The existing garage is sub-standard in providing a car space on site, and the Appellants want two covered car spaces to meet their parking needs and to protect their vehicles.
32. The Tribunal inspected Stardust Court and considers there is no predominant character of the street. There are three different character aspects in the street. The first is created by the on-street vegetation and the native vegetation in the Noosa National Park and in some of the properties in the eastern end of the Court. The second is the mix of open front yards at the western end of the court. The third is the mix of front yards behind low and high fences from the middle of the court towards the eastern end largely within the heavily vegetated area.
33. The existing carport on the subject site has limited visibility from the street because of the on-street vegetation. The proposed carport will similarly have limited visibility from Stardust Court.
34. The Tribunal is of the opinion that the proposed carport is not inconsistent with the predominant character of the street, given there is no one predominant character of the street and the on-street vegetation and the landscaping on the subject site will provide significant screening of the proposed carport.
35. The issue then arises should the applicant be given approval to have a double carport at the front of the site? Noosa Plan 2020 requires two covered spaces per dwelling. There is no doubt that a greenfield site can be designed to meet that requirement with the car spaces behind the building setback line. However this Appeal is about a brownfield site. The dwelling has one substandard garage. Council advise the existing carport is an illegal structure. The Tribunal gives no weight to that existing carport as generating any use rights on site. Effectively the Appellants have no legal usable covered car space on site.
36. Can two covered car spaces be provided behind the building setback line? Only with demolition of the existing garage and other parts of the existing dwelling could two covered car spaces be provided either as a double garage or a double carport. It is not reasonable to require such demolition. An uncovered tandem car space could possibly be fitted on the western side of the building, but that would require the relocation of the driveway and removal of significant mature vegetation on the site and in the road verge which would have a deleterious impact on the character of the eastern end of the street. There is not sufficient space on the eastern side of the dwelling to fit a car space.
37. The Appellants have argued that the only place on site available for any covered car spaces is in the north-eastern part of the site where the existing carport is located.

38. The Tribunal considers that the Appellants have satisfactorily demonstrated that car parking should be located in the north-eastern part of the site as there is no other place on the site available that will not result in significant impact on the character of the street.
39. Council's email of 12 May 2021 in response to the Appellant's designer demonstrating the difficulty in locating covered car spaces on site behind the building setback line, argued the plan submitted by the designer was contradictory to the application as it considered a double garage not a double carport, and that the Applicant has the opportunity to submit an additional application to vary the prescribed outcomes; that the Council assessment was against the Low Density Residential Zone Code and the reference to Australian Standards for car parking is not referenced in this Code and lastly that the access door to the existing garage provides for a width considerably less than that currently specified by the designer.
40. The consideration of a double carport or the double garage would have required significant demolition of the existing dwelling which the Tribunal considered would be unreasonable.
41. The Appellant should not have to submit an additional application for a variation, particularly when the opinions expressed by Council on this appeal would likely be applied to that application resulting a further appeal. This appeal is the place where this matter should be resolved.
42. The Tribunal acknowledges that Council's assessment was against the Low Density Residential Zone Code and so consideration of the design of a car space was not part of Council's assessment. However, when seeking to locate car spaces on site to meet Council's requirement , it was appropriate for the designer to consider the design of the car space and the relevant Australian Standard, as Council had suggested car spaces could be located on site behind the building setback line.
43. Council noted the existing garage door is considerably less than the width the designer proposed for an alternate garage. That is the reason why the Appellants sought to replace that space as it was unusable.
44. The Appellants want two car spaces on site and want a double carport to protect their cars. The Tribunal considers that as the Noosa Plan 2020 calls for two covered car spaces per dwelling, the car parking should be covered. There is no legal usable car space on site. There is insufficient space for a tandem set up in the existing driveway and the only practical space on site for two car parking spaces is in the north-eastern part of the site. Accordingly, the Appellants have demonstrated that the double car port as proposed should be approved.

John O'Dwyer
Development Tribunal Chair
Date: 14 June 2021

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