



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	22-056
Appellant:	Trevor O'Flynn
Respondent: (Assessment manager)	Veen Lyall-Wilson
Co-respondent: (Concurrence agency)	Sunshine Coast Regional Council
Site address:	38 Barooka Street, Wurtulla, Queensland 4575 and described as Lot 230 on W93230 – the subject site

Appeal

This is an appeal under section 229(1)(a)(i) and schedule 1, section 1(1), table 1, item 1 and schedule 1, section 1(2)(g) of the Planning Act 2016 (**PA**) against a decision by the assessment manager (Respondent), at the direction of the referral agency (Co-respondent), to impose a condition regarding a garage door on the part-approval of the development application with respect to a carport on the southern side of the existing dwelling, and to part-refuse the application with respect to a patio at the northern side.

Date and time of hearing:	Wednesday 8 February 2023 at 10.00 am
Place of hearing:	On site, 38 Barooka Street, Wurtulla
Present:	Henk Mulder - Tribunal Chair Kate Isles - Tribunal Member Trevor O'Flynn - Appellant Brenda O'Flynn - For the Appellant Cameron Wilson-Yapp - Sunshine Coast Council Tegan Johnson - Sunshine Coast Council

Decision:

The Development Tribunal, in accordance with section 254(2)(b) of the Planning Act 2016, changes:

- (a) that part of the decision, which is a part-approval with respect to the carport at the southern side of the existing dwelling, by removing condition number 3

- (b) that part of the decision, which is a part-refusal for the patio at the northern side of the existing dwelling, by replacing the part-refusal with an approval for the patio roof as it has been constructed in situ with the following condition and such other conditions as the assessment manager reasonably requires to ensure compliance with the building assessment provisions:

- (1) A set of legible plans documenting the as-constructed northern patio roof is to be provided to the assessment manager.

Background

1. The allotment contains a single storey residence with a front entry and off-street parking in a double-bay carport available from the secondary Whyalla Street. The residence is located highly proximate to the northern and western boundaries, maximising the setback to both street boundaries at the east and west. For the purpose of assessment the site is defined as a corner block.
2. On 25 May 2022 a Show Cause Notice was issued to the Appellant by the Co-Respondent regarding alleged unapproved assessable building extensions. These included a patio roof made of three separate structures located at the rear and north of the dwelling, a single patio roof located at the front and south of the dwelling, and a carport built within the road boundary setback, also at the southern side, and connected to the southern patio roof.
3. All structures the subject of the Show Cause Notice were constructed more than 20 years ago. This has been confirmed via historic aerial imagery for the property.
4. In response to the Show Cause Notice, a development application was submitted by the Appellant with the Respondent and conveyed to the Co-respondent as a referral agency.
5. The development application included a carport within the road boundary setback, and two patio structures as covered shade areas to the north and south lengths of the residence.
6. The description of the existing carport in the development application did not indicate the existing garage door.
7. The patio roof to the north, described as Patio 'A' in the drawings accompanying the application, proposed a different configuration from that which currently exists.
8. The current 'patio A' structure to the north of the residence is 12.0m long, nominally 100mm away from the existing fence and currently constructed in three sections with the central section the highest. There is a short metal louvre screen affixed under the fascia, for the length of the existing roof panels.
9. The application proposed revising this patio A roof with a new single roof of similar length and an increased setback from the side boundary of 450mm to the outer most projection (OMP). A 900mm setback was proposed for the structural posts.
10. On 9 September 2022 the Co-respondent issued a request for additional information (RFI), seeking an increased setback to the northern boundary, or alternatively obtaining support from the adjoining neighbour to the north for the patio structure proposed in the application.
11. The email response from the Respondent to the RFI dated 19 October 2022 established the Applicant wished to proceed with a decision for a part-approval and a part-refusal, reserving rights to appeal.

12. On 26 October 2022, the Co-respondent issued the Referral Agency Response which directed a 'part refusal (patio)' for the northern roof described as Patio "A". In addition a condition (number 3) was imposed, requiring the Carport as approved not to have a garage door. The second Patio roof at the southern side was not referred to in the response as the Co-respondent did not consider it assessable development.
13. On 6 December 2022, the Respondent issued a decision notice which contained the following:
 - (a) Approval for patio roof on southern side of existing dwelling;
 - (b) Approval with conditions for carport on southern side of existing dwelling;
 - (c) Refusal for patio roof on northern side of existing dwelling.
14. At issue is the refusal for the Patio A structure proposed to the north of the residence, and the Carport condition 3 which seeks to ensure no garage door is fixed to the Carport.
15. In circumstances where the decision notice was dated 6 December 2022 and received on 7 December 2022, this appeal was to be filed on or before 21 December 2022. The appellant lodged the notice of appeal with the Registrar on 13 December 2022.

Jurisdiction

16. Section 229(1) of the Act identifies that schedule 1 states the matters that may be appealed to the Tribunal.
17. Table 1 of schedule 1 of the Act states the matters that may be appealed to the Planning and Environment Court or the Tribunal subject to (in the case of the Tribunal) the preconditions stated in section 1(2) of schedule 1.
18. The Tribunal has jurisdiction to determine this appeal under section 229(1)(a)(i), schedule 1, section 1, table 1, items 1(a) and 1(c), and schedule 1, section 1(2)(g) of the Act.

Decision framework

21. The Appellant as the recipient of the decision notice must establish that the appeal should be upheld (under section 253(2) of the PA).
22. 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 the subject of this appeal (under section 253(4) of the PA).
23. Section 249 of 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 person.
24. The Tribunal is required to decide the appeal in one of the following relevant 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*

Material considered

25. 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 13 December 2022.
 - (b) Planning Act 2016 (PA).
 - (c) Planning Regulation 2017 (PR).
 - (d) Building Act 1975 (BA).
 - (e) Building Code of Australia (BCA).
 - (f) Sunshine Coast Planning Scheme 2014 (SCPS)
 - (g) Queensland Development Code Part MP1.2 (QDC).
 - (h) Aerial imagery from QImagery and Near Map.
 - (i) Show Cause Notice dated 25 May 2022 (SCN)
 - (j) Council request for additional information dated 9 September 2022 (RFI)
 - (k) Email response to the RFI from applicant as conveyed by the Respondent, dated 19 October 2022 (ER)
 - (l) The verbal submissions made by the parties at the hearing and during the site inspection 8 February 2023 as referred to in the body of the decision.

Findings of fact

26. The Tribunal makes the following findings of fact:
- (a) An application for two Patio Roofs and a Carport was made by the Appellant with Veen Lyall-Wilson as the Assessment Manager.
 - (b) The Assessment Manager/Respondent referred the proposed development to the Co-respondent as a referral agency under the *Planning Regulation 2017* for the building setbacks, which Council confirms is stipulated in the SCPS and the QDC.
 - (c) On 26 October 2022, the referral agency, the Co-respondent, directed as follows:
 - (i) approval of the part of the development application with respect to the Carport located 1.4 metres (OMP) to the front property boundary, imposing various conditions with respect to the Carport including the following:
 - 3. *The carport must not have a roller door (or similar door) constructed on the entry to the carport.*
 - (ii) refusal of part of the development application with respect to Patio located 450mm (OMP) to the northern side boundary. Details of Council's reasons for refusal were:
 - *450mm setback from the outermost projection of the patio to the northern side boundary, in lieu of 1.5 metres.*
 - 1. *The proposal does not meet the Performance Criteria P2 (b) & (c) of the Queensland Development Code:*

P2 (b) – Buildings and structures allow for adequate light and ventilation to habitable rooms of buildings on adjoining lots.

- *The proposed patio would be located within very close proximity to the northern side boundary (450mm) and would be immediately adjacent to windows and habitable rooms on the northern neighbour's dwelling. As such, it is likely that the proposed patio would impede the neighbouring dwelling's access to light, and would not comply with P2 (b).*

P2 (c) – Buildings and structures do not adversely impact on the amenity and privacy of residents on adjoining lots.

- *The close proximity of the patio (450mm) to the northern side boundary and adjoining neighbour's dwelling would likely impact the neighbour's amenity, particularly if the patio were to be used for entertainment purposes. As such, the proposed patio would not meet compliance with P2 (c).*

The hearing

27. A hearing occurred on-site on 8 February 2023 with representatives from the Tribunal, the Appellant and the Co-Respondent in attendance.
28. The hearing confirmed the work as indicated in the development application had been constructed decades earlier.
29. In regard to the Carport, the Co-respondent was amenable to the removal of the condition number 3 against installing a roller door. Taking into account the corner lot, a variety of fencing and setback detail, and the existing streetscape with similar structures inside the road boundary setback, the condition was not considered necessary. The Co-respondent noted the application did not set out a roller door as an existing circumstance, and that the particular condition may have been an unintentional generic or pro-forma inclusion.
30. The existing patio roof at the north, described in the drawings as Patio A, was proposed to be redesigned to increase the setback from the boundary and also maintain a consistent height across the full length.
31. The Appellant had sought to compromise the QDC setback requirement of 1500mm for the awning at Patio A, with a 450mm setback to the boundary at the widest end. This was an increase to the existing and established setback of around 100mm.
32. The Appellant held the view that the application of an increase to a 900mm setback to the roof OMP as opposed to the 1500mm required setback for the roof would make the current use of the space as an outdoor sitting area unviable for the elements, being sun and rain.
33. The part-refusal of Patio A, the northern patio roof, in terms of the citation, revolved around the amenity, as it presently exists, and as may be required. The Co-respondent has sought for there to be less likelihood of an entertainment area at this location, with the patio roof made acceptable under the QDC criteria. The establishment of the existing patio roof to this part of the side boundary has in fact established an entertainment area at this location, in contrast with the part-refusal decision described for P2(c).
34. A discussion about how the application evolved clarified that the information was collated to satisfy issues raised with Council for the existing conditions of the roof, by an unnamed and concerned neighbour.
35. In regard to meeting QDC Performance Criteria P2(b), above, further inspection at the hearing demonstrated that ventilation and light are evenly distributed between the

neighbouring allotments at present. The neighbour to the north has a short setback to screened bedroom spaces.

36. The hearing also identified the existence of structures on the adjacent allotment and also built to the boundary and potentially encroaching. The lawfulness of these structures is unknown.
37. Issues for the actual location of a surveyable northern boundary were raised.
38. In regard to meeting QDC Performance Criteria P2(c), above, the extent of habitable area at the adjoining northern allotment is noticeable and noise may be the most noticeable impact. The existence of the Patio Roof A at this northern corner of the allotment as a part of the application invites noise at this location by the common boundary.

Reasons for the decision

39. The Tribunal is satisfied that the roller door as existing is consistent with the established streetscape, appropriate for the location on a corner lot, and having regard to its age in situ.
40. The circumstances for the patio roof at the northern boundary confirm a combined and integrated nature for privacy and amenity between allotments.
41. As to the criteria referred to in the assessment manager's decision and based on MP1.2 P2(b) for light and ventilation to be available to both allotments, the Tribunal determined this to be unaffected by the setback and height as existing. Light and ventilation with the existing patio roof is readily available and unimpeded to habitable rooms to both of the adjoining allotments.
42. In regard to P2(c), the increase of a setback to the patio roof does not cure the proximity between neighbours. The circumstances for noise, particularly, are not diminished with an MP1.2 acceptable outcome for the roofed area.
43. The circumstances are such between the allotments that with the proximity of multiple structures amidst habitable rooms and entertainment areas near both sides of the fence, the scope for privacy and noise separation is evinced and restricted in equal measure between the adjacent allotments.
44. Considering the circumstances between the adjacent allotments, the long period of life for the patio use, and the detail for the roof near the northern boundary, an increase of any setback to the boundary or change in roofline would be unwarranted and would not materially improve the assessment against MP1.2 P2.
45. The Tribunal is satisfied that the criteria as sought from MP 1.2 P2 can be met with the existing patio roof structure.

Henk Mulder

Development Tribunal Chair
Date: 16 March 2023

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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