



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	24-017
Appellant:	Clayton and Hayley Ross
Assessment manager:	Ken Clarke, KC and ET Consultants
Co-respondent (Concurrence agency):	Brisbane City Council (“Council”)
Site address:	24 Deloraine Street, Wavell Heights Qld 4012, formally described as Lot 45 on RP45085 (“the subject site”)

Appeal

Appeal under section 229(2) and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1(a), of the *Planning Act 2016* (“the PA”) against the assessment manager’s decision to refuse the appellant’s application for a building works development permit for alterations to an existing Class 10a building, including a change in the building classification of a part of the building to a Class 1a dwelling (“the application”)

Date and time of hearing:	Wednesday, 17 July 2024 at 10:00am
Place of hearing:	The subject site
Tribunal:	Neil de Bruyn – Chairperson Amy Adamson – Member Elizabeth Anderson – Member
Present	Clayton Ross – appellant Hayley Ross - appellant Ken Clarke – assessment manager Ann-Marie Kyranis – Council representative Roger Greenway – Council representative

Decision

1. The Development Tribunal (“the tribunal”), in accordance with section 254(2)(d) of the PA, **sets aside** the decision of the assessment manager to refuse the application, and orders the assessment manager to:
 - a) remake the decision within 25 business days of the date of receiving this decision notice, as if the concurrence agency had no requirements; and
 - b) in the event that the assessment manager then decides to approve the application, to include the following condition in the resultant building works development permit:

“The approved development is to be in accordance with the UPD8 Design plans dated 13 February 2024 (Dwg Nos CP02 to CP10, Issue CP3).”

Background

2. The subject site is a rectangular residential site, formally described as Lot 45 on RP45085, with an area of 607m² and a street frontage of 15.075m. The subject site is located at 24 Deloraine Street in Wavell Heights, within the Brisbane City Council local government area. Deloraine Street is an access street predominantly containing low-rise, low-density residential land uses in the vicinity of the subject site.
3. The subject site is included within the Character Residential Zone under the Brisbane City Plan 2014 (version 29.00/2023), being the current and applicable planning scheme for the subject site (“the planning scheme”). The subject site is also within the Character Zone Precinct under the planning scheme and is subject to planning scheme overlays relating to airport environs, critical infrastructure and movement networks, dwelling house character, road and streetscape hierarchies and traditional building character.
4. The subject site contains a substantial, pre-1947 dwelling house addressing Deloraine Street. Within the rear yard is a two-storey building for which a building approval was given in 2001. This building, which is the subject of this appeal (“subject building”), was, according to plans included in the material before the tribunal, approved as a garage and store.
5. The appellant proposes to undertake alterations to the subject building, including the conversion of the upper storey to a Class 1a dwelling house, as a secondary dwelling for “ageing relatives.” The lower storey is, according to the submitted plans, to be retained as a garage/shed, albeit that vehicular access is not available to the subject building due to the siting of the existing dwelling house. The proposed development also includes the removal of two sections of decking to the upper storey, that were previously added without approval (ostensibly by previous owners). Based on the material before the tribunal, the application was made to the assessment manager on or before 9 April 2024.
6. The siting of the subject building is such that the minimum side and rear setbacks do not (and will not) achieve Acceptable Solution A2(a)(ii) of the applicable part MP1.2 of the Queensland Development Code (“QDC”), which provides that the minimum side and rear boundary clearances (setbacks) for a part of a building having a height of between 4.5m and 7.5m are to be 2m. Based on the submitted plans, the subject building is sited 430mm from the rear site boundary.
7. It is not clear, from either the current plans or the approved 2001 plans, what the minimum side setback dimension actually is. The 2001 plans suggest that this dimension was originally proposed to be 200mm but amended on the approved plans to 400mm. A report by KC and ET Consultancy that was included with the referral material appears to suggest that this setback is 450mm. In any event, it is clear from the tribunal’s observations that neither of these setbacks comply with the 2m acceptable solution.
8. For section 54 of the PA, schedule 9, part 3, division 2, table 3 of the Planning Regulation 2017 (“the PR”) specifies that a development application for building work that is subject to part MP1.2 of the QDC, that does not comply with an acceptable solution for a performance criterion under that part, requires referral to the applicable

local government as a concurrence agency. Accordingly, on 28 February 2024, a referral was made to Council pursuant to section 57 of the PA for a design and siting assessment and referral agency response.

9. Council issued a referral agency response dated 9 April 2024, directing refusal of the application. The grounds for this decision were stated as follows:
 - a) *The proposal does not achieve the purpose of the Queensland Development Code ('QDC') in that it does not achieve a good residential design that achieves an acceptable amenity to residents;*
 - b) *The proposal seeks to convert a class 10a shed to a class 1a secondary dwelling, involving alterations that increase the height of the building from the original approval given in 2001. Specifically, the original approval for a non-habitable wall facing the northern boundary with a maximum height of approx. 3.4m above natural ground level (NGL) is greatly exceeded in the proposed plans, resulting in a visually dominant and overbearing structure that will cause an adverse impact on the amenity of the adjoining neighbours;*
 - c) *Furthermore, there is discrepancy between the NGL shown on the proposed plans compared to the 2002 Contours plotted on City Plan 2014 mapping. As a result, the overall height of the proposal is greater than shown on the proposed elevations, resulting in an increased adverse impact on the adjoining neighbours.*
 - d) *In addition to the above, it is noted that the existing and intended use of the structure for habitable purposes does not comply with the originally approved non-habitable use. The impact on amenity to the adjoining neighbours is therefore greater than what was originally approved for the structure, and such a high-use activity within a structure of the proposed siting and design does not achieve an acceptable amenity for residents.*
10. On 9 April 2024, the assessment manager duly issued a decision notice refusing the application. The decision notice states that this decision was made because of Council's referral agency direction, but also states that "the refusal is supported by the assessment manager."
11. The appellant duly lodged this appeal with the tribunal registrar on 23 April 2024.
12. A site inspection and hearing were held on the subject site on Wednesday 17 July 2024 at 10:00am.
13. Following the site inspection and hearing, the tribunal issued the following directions to the parties, by email on 22 July 2024:

Following the hearing and site inspection held on the subject site on 17 July 2024, the Tribunal requests the appellant to provide the following material by email to the Registrar, with copies to the council, by no later than 4pm on Friday 2 August 2024:

 - *Copies of all final certificates for the "garage/store" as approved in 2001;*
 - *a copy of the recent site survey plan referred to by the appellants and their representative at the hearing; and*

- *copies of all correspondence received from neighbours in relation to the proposed development.*

14. The appellants provided their response to the tribunal's directions by email on 23 July 2024, including all of the requested material.

Jurisdiction

15. Section 229(1) of the PA provides that Schedule 1 ("the schedule") of the PA states the matters that may be appealed to a tribunal.
16. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule ("Table 1") are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of the matters set out in section 1(2).
17. Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the BA, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
18. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision framework

19. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
20. The tribunal is required to hear and decide an appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal, or any information provided under section 246 of PA.
21. The tribunal is required to decide an appeal in one of the ways mentioned in section 254(2) of the PA, and the tribunal's decision takes the place of the decision appealed against (section 254(4)).
22. The tribunal must not make a change, other than a minor change, to a development application (section 254(3)).

Material considered

23. The following material has been considered by the tribunal in this appeal:
- a) Form 10 – Notice of Appeal lodged with the tribunal's registrar on 23 April 2024;
 - b) The assessment manager's decision notice dated 9 April 2024;
 - c) Brisbane City Council's referral agency response dated 9 April 2024;
 - d) KC and ET Consultancy "Report to Regulatory Services" dated 26 February 2024, submitted in support of the referral to Council;

- e) Various documents and plans relating to the 2001 building approval for the subject building and the subsequent approved deck extension;
- f) UPD8 Design plans of the proposed development the subject of the application ("Construction Plans CP3/2038/Ross, all dated 13 February 2024;
- g) DA Form 2 (partly completed but presumably accepted by the assessment manager pursuant to section 51(4)(c) of the PA);
- h) Assessment manager's confirmation notice dated 9 April 2024;
- i) Material submitted by the appellant in response to the tribunal's directions dated 22 July 2024;
- j) The *Planning Act 2016* and the *Planning Regulation 2017*;
- k) Mandatory part 1.2 of the QDC;
- l) Brisbane City Plan 2014 (version 29.00/2023).

Findings of fact

- 24. The side and rear setbacks of the subject building do not comply with the relevant acceptable solution specified under Part MP1.2 of the QDC (A2(a)(ii)), in that these dimensions are demonstrably less than 2m.
- 25. The Council's grounds for directing refusal of the application were solely that the proposed development does not achieve the above-mentioned acceptable solution, nor the associated performance outcome (P2), for the reasons stated in paragraph 9 above.
- 26. The assessment manager duly refused the application. At the hearing, the assessment manager clarified that this refusal was solely as a consequence of the referral agency's direction and that this direction of refusal was not supported (contrary to what was stated in the decision notice).
- 27. The subject building is, for the most part, an existing building, approved in 2001, albeit with some unapproved sections of decking (that are to be removed as part of the proposed development). The proposed development essentially comprises of the aforementioned removal of unapproved sections of deck and the conversion of the upper story of the subject building into a 63.32m² secondary dwelling including the incorporation of a 19.12m² area of the remaining deck into the secondary dwelling.
- 28. The part of the deck to be incorporated into the secondary dwelling does not encroach into the 2m side or rear setbacks required under A2(a)(ii). Otherwise, the proposed development will not alter the existing setbacks of the subject building.
- 29. At the hearing, the assessment manager reiterated the statements made in the referral material to the effect that the approved height of the subject building will not be altered or increased as part of the proposed development.
- 30. At the hearing, the Council representative stated that, having inspected the subject site and the subject building (ostensibly for the first time), there were no longer any objections to the proposed development proceeding, provided all works were to be strictly in accordance with the submitted plans and that there was to be no increase in either building height or as-built setback encroachments.

31. In relation to the Council's stated grounds of directing refusal of the application, the tribunal finds that neither the siting of the proposed development, nor the change in building classification, will result in any adverse impacts upon the amenity of either the future occupants of the secondary dwelling or that of any neighbouring premises. That is, there will be no loss of daylight or ventilation to any habitable rooms on any affected premises, nor any other amenity or privacy impacts. As such, the tribunal finds that the proposed development will comply with performance outcome P2 of Part MP 1.2 of the QDC.
32. For the above reasons, the tribunal finds that the appellant has established that this appeal should be upheld, as required under section 253(2) of the PA.

Reasons for the decision

33. The tribunal, in accordance with section 254(2)(d) of the PA, has decided this appeal as set out in paragraph 1 above.
34. The tribunal's reasons for this decision are that the design and siting of the proposed development, as shown on the plans listed under paragraph 1, will comply with P2 of the relevant part of the QDC, for the reasons stated in paragraphs 28 to 31, inclusive.

Neil de Bruyn
Development Tribunal Chair

Date: 7 August 2024

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:

The Registrar of Development Tribunals
Department of Housing, Local Government, Planning and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au