



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-024
Appellant:	Jake and Shauna Kelly
Assessment Manager:	Trevor Gerhardt
Concurrence Agency: (if applicable)	Sunshine Coast Regional Council
Site Address:	12 Barwon Street, Currimundi and described as Lot 350 on Crown Plan C92825 – the subject site

Appeal

Appeal under section 229 and item 1 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 on the basis that the structure, did not comply with the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 and could not be conditioned to comply with the assessment benchmarks.

Date and time of hearing:	20 November 2020 at 2.30pm
Place of hearing:	The subject site.
Tribunal:	John O'Dwyer– Chair Lisa Lambie – Member
Present:	Jake and Shauna Kelly – Appellants Trevor Gerhardt, representative of the Assessment Manager - Sunshine Coast Building Approvals (SCBA) Leanne Simpson, Mitchell Swieso - Council representatives

Decision:

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

- A. The carport is to be set back 1.0 metres from the road frontage
- B. The carport is to be set back a minimum of 0.5 metres from the northern side boundary
- C. The carport is to have a skillion roof to reduce its visibility
- D. The Appellant is to plant and maintain a minimum of three native plants spaced along the frontage south of the carport. The native plants are to be species common to the area being bushy in nature and have a design height of at least 3.5 metres and diameter of at least 2.0 metres at full growth to provide visual screening of the carport from the south.

Such other conditions (consistent with the above) as may be imposed by the Assessment Manager to address the requirements of the *Building Act 1975* and the Building Regulation 2006.

Background:

1. The Appellants applied in July 2020 to the Assessment Manager for a preliminary approval to construct a double carport set back 0.8 metres from the road frontage and a patio set back 3.2 metres from the road frontage across the balance of the front of the dwelling existing on the site.
2. On 21 July 2020, the Assessment Manager referred the application to Sunshine Coast Regional Council (Council) as a concurrence agency for the application, in relation to the design and siting of the car port under the *Planning Regulation 2017*, schedule 9, part 3, division 2, table 3.
3. During the Concurrence Agency assessment period, negotiations were held between the Council, Assessment Manager and Appellants resulting in an agreement to set the patio back 4.5 metres from the road frontage, therefore making the patio accepted development. The agreement also resulted in the carport being set further back to 1.0 metres from the road frontage.
4. On 24 August 2020, Council issued its referral agency response directing the Assessment manager to refuse that part of the application:

“1000mm setback from outer most projection of the carport to the road/property boundary”

For the reason:

“The proposal does not meet the Sunshine Coast Planning Scheme 2014 Dwelling House Code (amended 11 November 2019), Performance Outcome PO2(d)”.

5. PO2(d) states:

“(d) – maintain the visual continuity and pattern of buildings and landscape elements within the street.”
6. The referral agency response made no mention of the agreement to the change to 4.5 metres in the setback for the patio, nor did it refer to the change in setback for the carport from 0.8 to 1.0m metres.
7. On 11 September 2020, the Assessment Manager issued a decision notice refusing the part of the application for the carport as directed by Council.
8. On 21 September 2020, the Appellants lodged this appeal with the Development Tribunal Registry against the decision to refuse the carport.

Jurisdiction:

9. 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 part of the development application by the Assessment Manager.
10. The appeal was made in time, thus enlivening the Tribunal’s jurisdiction.

Decision Framework:

11. This is an appeal against a decision in relation to a development application and so the onus rests on the appellant to establish that the appeal should be upheld (s. 253(2) of the PA).
12. 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. 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). The tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.
13. During the Appeal, the Tribunal noted that there was a discrepancy between the building application and the referral agency response and the decision notice, in that the original application and referral for a concurrence agency response referred to a carport with a setback of 0.8 metres from the road frontage and a patio with a setback of 3.2 metres from the road frontage, whereas the referral agency response and the decision notice referred to a carport with a setback of 1.0 metres from the road frontage and the building plan approved showed the carport with a setback of 1.0 metres and the patio with a setback of 4.5 metres. At 4.5 metres the carport then became accepted development.
14. The Tribunal requested the Registry to issue a Directions Notice under section 246 of the PA on its jurisdiction to consider matters in the original application where there was no documentation of the changes in the Appeal material provided to the Tribunal prior to the hearing.
15. Following submissions from the parties on the matter of the discrepancies, the Tribunal determined that it did have jurisdiction to take into account the details of the original development application where there was no documentation setting out the reasons for the change in building details provided to the Tribunal.

Material Considered:

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 21 September 2020. This includes:
 - Request for Concurrence Agency Response (Building Work) dated 21 July 2020
 - Referral Agency Response from Council dated 24 August 2020, directing refusal of the carport
 - Preliminary Approval Decision Notice dated 11 September 2020 refusing the part of the application for the carport.
 - Document A attached to Form 10 setting out the reasons for the Appeal.
- B. The *Planning Act 2016* (PA)
- C. The Planning Regulation 2017
- D. The *Building Act 1975* (BA)
- E. The Building Regulation 2006
- F. The Sunshine Coast Planning Scheme 2014 – Dwelling House Code
- G. Queensland Development Code Mandatory Part 1.2 – Design and Siting Standard for Single Detached Housing - on Lots 450m² and over (QDC MP-1.2)

- H. Copy of Appeal 19-003 tendered at the Appeal by the Assessment Manager
- I. Verbal Submissions from the Assessment Manager on behalf of the Appellants at the hearing
- J. Verbal Submissions from the Council representatives at the hearing
- K. Verbal Submissions from the Appellants directly at the hearing
- L. Directions Notice to the Parties by email from the Development Tribunal Registry dated 27 November 2020 seeking a submission from the parties on the jurisdiction of the Tribunal to consider the patio setback of 3.2 metres as set out in the original development application as neither the Referral Agency Response nor the Decision Notice discussed the change in setbacks for the patio and the carport and there were foundations for a structure that had previously been at a setback of approximately 3.2 metres.; and that if the Tribunal did have that jurisdiction the Tribunal requested the submissions address the factors for and against approving that 3.2 metre setback.
- M. Response to the Tribunal's Directions from the Appellant by email dated 3 December 2020. This was forwarded to the Council on 3 December 2020 for consideration in their response.
- N. Response to the Tribunal's Directions from Council by email dated 9 December 2020.

Findings of Fact:

- 16. The subject land is an irregularly shaped, relatively flat lot on a curve on the south-west side of Barwon Street in an older residential area in Currimundi.
- 17. The Appellants purchased the site in 2012 and at that time there was a single storey dwelling with a single garage located within the northern corner of the dwelling and there was a patio along the front of the rest of the dwelling and there was a pergola in front of the south-eastern half of that patio. The patio was set back approximately 4.5 metres from the road frontage and the pergola was set back approximately 3.2 metres from the road frontage.
- 18. The Appellants have been renovating the single storey dwelling and the former single garage has been closed and converted into part of the dwelling leaving no covered car parking on site.
- 19. The subject site is zoned Low Density Residential under the Sunshine Coast Planning Scheme 2014 and a carport is subject to the Dwelling House Code in this zone.
- 20. The setback to road frontage of the proposed double carport does not comply with the Acceptable Outcome AO2.1 of the Dwelling House Code which is an alternative provision to QDC MP1.2 and is the applicable assessment benchmark for initial consideration by Council, as Performance Outcome PO2 is not identified as an alternative provision to QDC MP1.2.
- 21. As the development is not accepted development under AO2.1, the Dwelling House Code PO2 and QDC MP1.2 become the relevant assessment benchmarks for the carport.

22. On 21 July 2020, the Assessment Manager requested from Council a Referral Agency Response (Building Work) in relation to design and siting of a carport and patio on the subject land.
23. On 24 August 2020, Council issued its Referral Agency Response directing refusal of the part of the application for the carport for the reason that the proposed development did not comply with PO2 paragraph (d). There was no mention of the patio in the referral agency response.
24. On 11 September 2020, the Assessment Manager issued a Decision refusing the part of the application for the carport. There was no mention of the patio in the decision notice.

Reasons for the Decision:

25. The Tribunal has had regard to all the material presented during the Appeal and the submissions made during and after the Appeal. However, only relevant parts of the material affecting the decision are specifically noted herein.
26. At the hearing, the Assessment Manager as representative for the Appellants, drew the Tribunal's attention to Appeal 19-003 (the Brockwell Appeal) and requested the Tribunal to consider that appeal in general and in particular section 58 of the Reasons for the Decision as guidance in deciding this appeal. The Tribunal has noted and accepted the Findings of fact in paragraphs 41-44, 46-47 and 49-52 of the Brockwell Appeal and the Reasons for the Decision in paragraph 58 of that appeal as relevant considerations in reaching its decision in this case. These provisions set out the relationship between the PA and BA and building assessment provisions under the QDC MP1.2 under the BA and alternative provisions to the QDC MP1.2 in Planning Scheme provisions.
27. AO2.1 of the Dwelling House Code is a quantifiable standard that is an alternative provision to the QDC MP 1.2. Where a development cannot comply with that quantifiable standard, the assessment defaults to consideration of the performance outcome for that Acceptable Outcome. In this case Council have relied on PO2(d) as the basis for its decision.
28. The Tribunal has noted that the Council and the Appellant accepted that a greater setback than 0.8 metres was needed. At the Appeal Council advised that there were approvals in this street for carports set back 3.3 and 4.5 metres from the road frontage and that one of the sites quoted by the Appellant as having a minimal setback did not have an approval on Council's records.
29. Council's referral agency response advised the visual continuity and pattern of buildings in the street comprises predominantly of dwellings and car accommodation approximately 6 metres from the road frontage with the continuity of the built form generally being maintained. Council's representatives affirmed Council's referral advice that it considered the location of the carport within the 6 metre setback would not maintain the visual continuity and pattern of legal buildings in the street.
30. Council also advised that the existing parking on the site complies with the requirements of the dwelling house code and could not see any reason to depart from the planning scheme requirements to approve this structure.

31. The Appellants explained that the previous garage was too small for their vehicles, which are a large model car and a large model work utility and they were having difficulty in opening their car doors in the small space. As a result, they converted the garage to part of the dwelling during the renovations. They requested this approval of the carport to provide weather protection for their vehicles having had one car suffer severe damage in a hailstorm.
32. The Appellants and their representative indicated that they considered that the carport would not adversely affect the visual continuity or pattern of the street, noting the variety in setbacks at the northern end of the street.
33. The Tribunal has viewed Barwon Street. It is a gently curving road, and at the southern end, most of the dwellings and structures are set back the 6 metres. However, at the northern end, a combination of carports and high fences break up the visual continuity and that pattern of setbacks, such that the Tribunal considers Performance Outcome PO2(d) has been satisfied in relation to the carport.
34. The Tribunal also noted there appear to be no other possible locations for covered parking on the site that are not within the 6m frontage setback.
35. During the Referral Agency assessment period, the Appellants offered an increase in the setback from 0.8 metres to 1.0 metres setback from the road to maintain a 6 metre deep carport. The Tribunal considers this setback is sufficient in the circumstances.
36. The Tribunal notes that the plans do not set any side boundary setback. During the site inspection the Tribunal formed an opinion that a minimum of 0.5 metre setback from the northern side boundary should be imposed on the carport, to ensure retention of existing vegetation on that boundary that will provide visual screening of the carport from the north.
37. At the hearing the Appellants offered to provide landscaping along the road frontage to provide screening of the carport from the south. The Tribunal is of the opinion that such landscaping is required.
38. The Tribunal noted at the hearing that the original application had proposed a patio with a 3.2 metre setback. The parties advised that during the Referral Agency assessment period agreement had been reached on a 4.5 metre setback for the patio, which made the patio accepted development and so not requiring further consideration as part of the referral.
39. The Tribunal is of the opinion that a referral agency response should note such agreements and their impacts on the referral agency response, so that future Tribunals have a documented trail of agreed changes.
40. Due to the lack of such documentation of the agreements reached about the patio, the Tribunal issued a Direction seeking submissions on the Tribunal's jurisdiction in considering the patio and the original proposal for a setback of only 3.2 metres given there had been an earlier structure on the site that was setback approximately 3.2 metres from the frontage.
41. The Tribunal received submissions from both parties. The Council's submission clearly demonstrated that the original patio was setback approximately 4.5 metres from the frontage, and that there had been an additional pergola that was setback only 3.2 metres from the frontage and only in front of the southern part of the patio.

42. The Tribunal decided that there was no precedent established by the pergola for allowing the patio to extend to within the 3.2 metres of the frontage. Therefore, the Tribunal affirms the agreement between Council and the Appellants to having the patio with a 4.5 metres setback from the frontage. The Tribunal notes that in this position, the patio is accepted development and does not require an approval under the Dwelling House Code provisions.
43. In the circumstances, the Tribunal has decided this appeal as set out under the heading 'Decision' on page 1.

John O'Dwyer

Development Tribunal Chair
Date: 15 January 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