



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-006
Appellant:	Kristy Bruggy and Hayden Bruggy
Respondent (Assessment manager):	Rob Wibrow
Co-respondent (Concurrence agency):	Noosa Shire Council
Site address:	80 Oriole Avenue Peregrin Beach Qld 4573, described as lot 541 on P93121 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the refusal of a Development Application for approval of Building Works being extensions to a class 1 dwelling for a garage. The decision followed a referral agency response by the Noosa Shire Council, directing refusal of the application. Council stated that the garage extension does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2006, Low Density Residential Zone Code 9.3.1, PO9 (f) *Building and structures are designed to be consistent with the predominant character of the streetscape.*

Date and time of hearing:	2.30pm, 23 March 2023
Place of hearing:	The subject site
Tribunal:	Debra Johnson – Chair Elisa Knowlman – Member
Present:	Kristy Bruggy and Hayden Bruggy – Appellants Marcus Brennan, Brennan Planning – Appellant’s representative Bradley Geaney and Jarrad Postle – Council representatives

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) replaces the decision of the Assessment Manager dated 14 December 2022 with another decision namely, to approve the siting of the proposed garage extension on the subject land as shown on drawings numbered 21133-01, 02, 05 and 06, Revision P, dated 19 September 2022 as prepared by PJ Concepts and Designs, subject to:

- maintaining the existing vegetation adjacent to the location of the proposed garage; and

- 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 approximately 566sq/m in area and rectangular in shape. The site is situated on an inside corner, fronting Oriole Avenue to the north. The secondary street frontage is also on Oriole Avenue as the road wraps around the allotment's western boundary. While the site is truncated along the road at the north-western corner, the property effectively has a 30m frontage to the north and a 19m exposure to the western frontage. The subject site has a noticeable slope of 13%, with the eastern boundary alignment being 4m higher than the land along the western boundary.
2. While the property consumes the entire inside corner of Oriole Avenue, diagonally opposite, the outer corner boasts an extra wide, landscaped street verge. This widening provides frontage and enables vehicular access to each of the three properties splayed around the outer bend.
3. The appellants purchased this property in the last twelve months but found that the existing double garage could not readily accommodate their two vehicles. The previous owners had demolished the original beach house and built a contemporary two storey/split level home with a double garage. However, the floor area of the garage is compromised by the stairs to the level above and while they own a jet ski and trailer, they also have teenagers likely to be driving soon. Hence the need for an additional garage space, preferably located along the western wall of the home.
4. The western portion of the site features a 3.5m wide band of mature native vegetation. The trees significantly screen and shade the western wall of the appellant's two storey home. The home is barely visible when viewed from the street at this point, due in part to this vegetation, however, the fall across the site is also a contributing factor.
5. The appellants engaged PJ Concepts to prepare building design drawings documenting the new garage. The garage location is setback 3.4m from the western and 7.5m from the northern road boundaries. The 3.4m setback is less than that stipulated in the Noosa Planning Scheme, Low Density Residential Zone code, acceptable outcome provisions. On behalf of the appellants, Brennan Planning lodged a request for a referral agency response (design and siting), to the Noosa Council on 16 October 2022.
6. On 14 December 2022, Council issued their Referral Agency Response directing the assessment manager to refuse the application. Council stated that the proposed carport did not comply and could not be conditioned to comply with the provisions of the Noosa Plan 2006, Low Density Residential Zone Code 9.3.1, PO9(f) *Buildings and Structures are designed to be consistent with the predominant character of the streetscape*.
7. The neighbouring homes in Oriole Avenue are significantly varied in design due to the nature of changes to residential building over the last 40-50 years. There are still a few homes here from the 1970s but the majority appear to have been built in the 1980 and 1990s. Given the demand for property in recent times and that values have increased significantly, many homes have been being significantly renovated and/or extended
8. The assessment manager issued a Decision Notice refusing the carrying out of building works assessable under the *Building Act 1975* for an application for a garage extension that required referral for Design and Siting. The decision was issued by the assessment manager on 1 February 2023. The decision stated the following reason- *The refusal is solely because of the direction of the referral agency*.

9. On 10 February 2022, the appellants stated their grounds for appeal, completed and submitted the Form 10 – Notice of Appeal to the Registrar.

Jurisdiction

10. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
11. Schedule 1 of PA, section 1(2) however states Table 1 may apply to a tribunal only if the matter involves one of the circumstances set out in paragraphs (a) to (l) of that section. Paragraph (g) of section 1(2) states: 'a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under the Act that may or must be decided by the Queensland Building and Construction Commission'.
12. The Tribunal is satisfied that the application lodged with the Assessment Manager and the referral of the development application to Council satisfies that requirement being, a development application for approval of building works under the section 33 of the *Building Act 1975*, which allows alternative provisions to QDC boundary clearance and site cover provisions for particular buildings.
13. That application was subsequently refused by the assessment manager as directed by Council as the referral agency. Table 1 item 1(a) in Schedule 1 of the PA states that for a development application an appeal may be made to a tribunal against the refusal or all or part of the development application.
14. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

15. Section 246 of the PA provides as follows (omitting the examples contained in the section):
(1) The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.
(2) The person must give the information to the registrar within 10 business days after the registrar asks for the information.
16. Section 253 of the PA sets out matters relevant to the conduct of this appeal. Subsections (2), (4) and (5) of that section are as follows:
(2) Generally, the appellant must establish the appeal should be upheld.
(4) The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.
(5) However, the tribunal may, but need not, consider— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.
17. Section 254 of the PA deals with how an appeal such as this may be decided and the first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal (not relevant here) and are as follows:
(1) This section applies to an appeal to a tribunal against a decision.
(2) 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; or

[not relevant].

(3) However, the tribunal must not make a change, other than a minor change, to a development application.

Material considered

18. The material considered in arriving at this decision comprises:
- (a) Proposed building works plans prepared by PJ Concepts identified as drawing number 21133-01, 02, 05 and 06, Revision P, dated 19 September 2022.
 - (b) Referral Agency Response dated 19 December 2022 directing refusal.
 - (c) Decision Notice Refusal - Planning Act Form 3 for building works described as dwelling additions garage. The assessment manager being Rob Wibrow of Building Approvals United. Reference number 23-4013 - dated 1 February 2023.
 - (d) Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 10 February 2023.
 - (e) Document prepared by Marcus Brennan, Brennan Planning, dated 10 February 2023, titled Concurrence Referral Response, that included Appendix A titled Grounds for Appeal.
 - (f) Google maps and street view images.
 - (g) Nearmaps satellite images from 2010 to current date.
 - (h) Planning and Development Online information for the subject site.
 - (i) The Planning Act 2016 (PA).
 - (j) The Planning Regulation 2017 (PR).
 - (k) The Development Application Rules.
 - (l) The Building Act 1975 (BA).
 - (m) The Building Regulation 2006 (BR).
 - (n) The Queensland Development Code (QDC) Part MP 1.2.
 - (o) The Noosa Plan 2020.
 - (p) The National Construction Code 2019 (NCC).
 - (q) The verbal submissions made by the parties at the hearing and during the site inspection.

Findings of fact

19. The hearing for the appeal was held at the appellants' home and therefore at the subject site, on 23 March 2023. It was evident that the home and garden were stepped and designed to accommodate the sloping site. Similarly, the built form is well articulated with the building line setback increasing as it approaches the corner of the property.
20. The proposed location for the garage is set even further back alongside the western wall of the home. The garage would largely be accessible from the existing driveway. The area set aside for the garage is approximately 4m wide and effectively level.

21. Although there is a second street frontage along the western boundary, neither vehicular nor pedestrian access is available due to the 3.5m wide band of landscape along this frontage. In addition, there is a 1.5m fall (42% grade) down to the road verge across this part of the site.
22. Oriole Avenue loops from Lorikeet Drive at the northern end and runs parallel between the David Low Way and Lorikeet Drive for a distance of about 900m before it re-enters Lorikeet Drive again on the south. In considering the predominate streetscape around the subject site the Tribunal considered that portion of Oriole Avenue between Lorikeet Drive in the north, along Oriole Avenue until it intersects Jabiru St. This is a distance of approximately 300m.
23. The Tribunal found that setbacks varied substantially and this is attributed to the period of time since these homes were established. At least six properties in this location have added verandas, garages, carports or other structures within the street setbacks. There is considerable variety in typography, size and shape or allotment and the extent of landscaping, both on the verge and within the privately owned allotments.
24. At the hearing, the Council's representatives reiterated the reasons for their decision as outlined in the Referral Agency Response:

It has been considered that the design and location of the proposed garage provides an insufficient road boundary setback and is not consistent with the predominant character of the streetscape. While there are limited examples within the streetscape of buildings and structures within the road boundary setback, it is Council's view that the predominant character of the streetscape consists of buildings and structures providing a greater road boundary setback than that of the proposal.

The Queensland Development Code (QDC)

25. The Low Density Residential Zone Code Table 6.3.1.3, contains some alternative provisions to the QDC. The QDC Part MP1.2 is the standard for the Design and Siting requirements applicable to Class 1 Dwellings and Class 10 structures on residential sites over 450 m² in area. The provisions of the QDC apply to the extent that a local planning scheme does not opt to provide alternative provisions. In this instance the Low Density Residential Zone code Table 6.3.1.3 PO9 provides some alternative siting provisions to the QDC A1(a), therefore the 6m setback provisions (for a garage or a carport) of the Low Density Residential Zone code apply to the proposed development.

The Noosa Plan 2020

26. The Low Density Residential Zone Code Table 6.3.1.3, contains some alternative provisions to the QDC.
27. Acceptable outcome AO9.1 states:

Buildings and structures have a setback of 6m from the road frontage, provided that the setback may be reduced to 4.5m where the lot:

- (a) has frontage to more than one road;*
- (b) is less than 600sq/m in area; or*
- (c) is less than 15m in width.*

28. The proposed garage extension has a minimum setback of 3.4m. The subject site is on a corner, therefore having two street frontages. The site has an area which is 565sq/m, that is less than 600sq/m, however the width of the site is approximately 19m.

29. As the proposal does not meet the acceptable outcomes of AO9.1, assessment is made against the performance outcomes stated at PO9 which states:

Buildings and structures are designed and sited to:

- (a) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual privacy and acoustic privacy and access to sunlight;*
- (b) not unreasonably obstruct views or cause overlooking of private open space or habitable areas of adjoining premises;*
- (c) provide adequate distance from adjoining land uses;*
- (d) preserve existing vegetation that will help buffer development;*
- (e) allow for space and landscaping to be provided between buildings including adequate area at ground level for landscaping with trees, shrubs and outdoor living;*
- (f) be consistent with the predominant character of the streetscape; and*
- (g) protect the natural character and avoid adverse impacts on ecologically important areas such as national parks, waterways and wetlands.*

30. Council's referral agency response directed the assessment manager to refuse the building application stating the proposal didn't comply and couldn't be conditioned to comply with Noosa Plan 2020 – Low Density Residential Zone Code:

PO9 Buildings and structures are designed and sited to:

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

A note on Performance Outcomes and Acceptable Outcomes

31. At the hearing, Council representatives repeatedly noted that the proposed works did not comply with the acceptable outcome relevant to the disputed performance outcome, namely AO9.1, which provides that a 6m front boundary setback complies with PO9 for front boundary purposes.

32. The Noosa Plan 2020 Low Density Residential Zone Code, immediately preceding 'Table 6.3.1.3 - Criteria for assessment', the very table which contains P09, non-compliance with which the Council relies on to direct refusal of the application, notes that:

*Acceptable outcomes are provided for some, but not all, performance outcomes, and identify ways in which performance outcomes **can** be met. Compliance with the performance outcome should be demonstrated and the acceptable outcomes are considered as **one way** to satisfy the corresponding performance outcome. (emphasis added)*

33. Clause 5.3.3(4) of the Noosa Plan 2020 provides that:

*Code assessable development... (c) that complies with the performance **or** acceptable outcomes complies with the purpose and overall outcomes of the code; (emphasis added)*

34. The use of performance-based criteria, with (if possible) 'deemed to comply' acceptable outcomes, is completely consistent with the operation of all town planning schemes in Queensland.

35. In the present case, there has never been any suggestion that the applicant relied on AO9.1, nor that it was complied with. Much time was spent at the hearing labouring the fact that AO9.1 was not complied with, when such non-compliance was accepted by the applicant and was not in dispute.

Reasons for the decision

36. The task before the parties – the *only* task before the parties - was to demonstrate compliance or otherwise with PO9(f), as this was the only issue in dispute.
37. As none of the key words in PO9(f) are defined in the Noosa Plan 2020, plain ordinary meanings and case law are relevant:

Consistent

In *The Planning Place Pty Ltd v Brisbane City Council* [2018] QPEC 62, at [75], Kefford DCJ held that: ‘the term **‘consistent’** in a town planning context was considered by Her Honour Judge Bowskill QC (as she then was) in *Lake Maroona Pty Ltd v Gladstone Regional Council* held: ‘... there is a **certain elasticity** about the expression ‘consistency ... with’. In my view, the requirement of performance outcome PO2 of the Dwelling house (small lot) codes will be satisfied if the bulk and scale of the proposed lot 1 dwelling house is **‘compatible with, in the sense of being capable of existing in harmony with’** the built form in the street and local area.’ (emphasis added)

Predominant

Collins dictionary online: If something is predominant, it is more important or noticeable than anything else in a set of people or things.

In *Ko v Brisbane City Council & Anor* [2018] QPEC 35, at [79], Williamson DCJ held that: ‘It has been recognised that ‘predominance’ is a term that connotes **flexibility rather than rigidity**. It is not intended to convey exclusivity.’ (emphasis added)

Streetscape

‘In *Gelling & Ors v Cairns City Council & Anor* [2008] QPEC 38 at [30] Dodds DCJ defined the term ‘streetscape’ to mean, **‘the presentation offered by a street in its context by which I mean the buildings, other development, open space, vegetation, etc which may reasonably be considered as framing it.’** ‘cited with implicit approval in *WAW Developments Pty Ltd v Brisbane City Council* [2010] QPEC 69 at [17]. (emphasis added).

38. The Tribunal finds that the predominant streetscape consists generally of typical eighties-to-current beachside residences, with setbacks to a mix of carports and garages varying widely, from nil to six metres or more. Site vegetation also varies widely, from dense to sparse to no vegetation.
39. The Tribunal further finds that the proposed addition is consistent with that predominant streetscape. It is very much compatible with the development, open space, and vegetation in the area, and is capable of existing in harmony with it. The proposed form and setbacks are not at all incompatible with those existing in the street and the general area. The design of the proposed extensions for the garage is in keeping with the existing house in that it will have a gable roof pitched to suit.
40. The vegetation that currently exists between the location of the Western wall of the proposed garage and the adjacent street contributes further to the finding of consistency above, and a condition to require retention of a reasonable amount of it is appropriate.
41. The Tribunal finds the amenity on adjoining and opposite properties would not be adversely affected as the location of the proposed garage extension is well concealed. Neighbouring

properties to the north and to the west will have limited visibility into the subject site, due to their respective orientations and the landscaping if retained, between the street verge and the garage location.

42. The Tribunal is satisfied that the proposed development meets the relevant performance criterion stipulated in the Noosa Plan 2020, Low Density Residential Zone Code Table 6.3.1.3 at PO9(f) and that as this was the only criterion put in issue by the second respondent, the appeal must be allowed, the original decision set aside, and the application approved subject to a condition that a reasonable amount of vegetation be retained to screen the western garage wall.

Debra Johnson
Development Tribunal Chair
Date: 30 May 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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