



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-031
Appellant:	Richard John Eggins and Melissa Leanne Eggins
Assessment Manager:	Trevor Gerhardt of Sunshine Coast Building Approvals
Concurrence Agency:	Sunshine Coast Regional Council
Site Address:	6 Elinya Street, Battery Hill QLD 4551 and described as Lot 678 on Plan 92819 – 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 part of a development permit for construction of a class 10a carport within the road boundary setback and a patio within the side boundary setback and the imposition of certain conditions on the approved part of the application.

Date and time of hearing:	10.30 am on Friday 3 September 2021
Place of hearing:	The subject site
Tribunal:	John O'Dwyer – Chair Nicole Prentice – Member Lindy Osborne Burton – Member
Present:	Melissa Eggins, Richard Eggins – Appellants Trevor Gerhardt – Sunshine Coast Building Approvals and Inspection Services – Assessment Manager Tracey Douglas – Sunshine Coast Regional Council (Council) representative Mitchell Schwieso – Council representative Greg Roberts – Council representative Other – Angus McKinnon – Observer on behalf of the Appellant (with leave of the Tribunal)

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **replaces** the approval including the conditions set out in the Amended Referral Agency Response 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.
- B. Screening is to be provided on the north-western side of the carport to minimise overspill of carport lighting onto the windows of the dwelling at 8 Elinya Street.

- C. Landscaping on the north-western boundary is to be established and maintained for the life of the development, between the side of the patio and the fence.
- D. The carport roof and structure must have non-reflective finished surfaces and in colours that blend in with the existing dwelling e.g. Colorbond Surf Mist.
- E. The carport may have a roller door (or similar door) constructed on the entry to the carport and is to be in colours and materials as per Condition D.
- F. Any additional conditions attached to the building approval by the building certifier to address the requirements of the Building Act 1975.

Attendance of Greg Roberts - Council Representative

- 1 At the start of the Appeal, Mr Gerhardt challenged the presence of Mr Greg Roberts as he came from the section of Council that had issued an enforcement notice regarding the development.
- 2 The Hearing was adjourned temporarily, and the Tribunal considered the challenge. The Tribunal determined that Mr Roberts should be allowed to remain, on the condition that he could not use his presence to obtain evidence for any subsequent enforcement action.
- 3 The hearing was recommenced and the Tribunal's decision and condition were delivered to the hearing and accepted by the parties.

Background

- 4 The allotment is a regular shaped allotment on the south-west side of Elinya Street. The site contained a garage and a patio on the north-western side of the main dwelling. The Appellants advise that patio incorporated a wood burning fireplace.
- 5 A new carport has been constructed in the northern corner of the site. A replacement patio has been constructed adjacent to the north-western boundary with setbacks from the fascia of 210mm at the south-western end and 470mm at the north-western end. These setbacks were provided after the hearing by the Appellants on 8 September 2021, following a site survey. The patio includes a stand-alone fireplace on the north-western side, with a chimney that extends through the patio roof with flashing surrounds, but the roof provides no structural support.
- 6 Elinya Street is a 15 metre wide residential street. Properties at 1, 3, 4, 5, 10, 11, 13 and 15 Elinya Street have carports and garages within the 6 metre setback.
- 7 Council approved a two-storey storage building on the north-western boundary at the rear of the property at 4 Elinya Street adjoining the south-western boundary of the subject site. This building dominates the subject site and impacts on the amenity of the subject site by light reflection and its dominance of the subject site. The Appellants had given an adjacent owner's agreement as a good neighbour as they were friends with the owners.
- 8 The Appellants sought and obtained letters of support from the owners of the properties at 4, 5, 7, 9, 12, 13, 15 and 16. They also obtained an initial letter of support on 30 October 2020 from the adjoining owner at 8 Elinya Street subject to screening of lighting overspill from the carport into the bedroom at the eastern corner of the dwelling on that property. That letter also expressed concern about noise from parties in the patio. By email on 9 November 2020, the owner of the property at 8 Elinya Street withdrew that letter of support.
- 9 In mid-2020, the Appellants started construction of the carport and patio. On 7 August 2020, Council issued an enforcement and stop work notice. The Appellants stopped work.
- 10 On 30 October 2020, the Appellants applied for a building permit for a carport and patio as shown in four drawings prepared by the landowners.
- 11 On 27 November 2020, an application for a Referral Agency Response was made by the Assessment Manager to Council.

- 12 On 19 January 2021, Council issued a Referral Agency Response. That response approved the carport as proposed subject to three conditions relating to roof materials, prohibiting a roller door and requiring the carport to remain open on all sides apart from screening to a height of 1.8 metre on the side adjacent to the property at 8 Elinya Street. The patio was refused on the grounds of not meeting Queensland Development Code (QDC) MP1.2 Performance criteria P2 (a), (b) and (c). This decision did not address the proposed fireplace.
- 13 On the same day 19 January 2021, Council issued an infringement notice for contravention of an enforcement notice, imposing a penalty of \$2669-00. The notice does not contain reasons. The Appellants consider it was issued because there was a part refusal of the application. This infringement notice has had the effect of creating antipathy between Council and the Appellants as the infringement notice was issued prior to any final development permit being issued and appeal period lapsing.
- 14 The Appellants, in correspondence with Council between 21 January and 2 February 2021, objected to this Referral Agency Response as it did not properly reflect the actual situation on the site. As the internal rooms on site had access to lighting and ventilation, there was no change in access to lighting and ventilation on an adjoining property, as the proposed patio replaced an existing patio and there was no real change to the amenity and privacy of the adjoining landowner. As part of this correspondence, the Appellants requested a site meeting with Council officers as this was an opportunity provided in the Referral Agency Response. This was originally refused by Council but subsequently a meeting was held on site on 1 February 2021 at which the only reason given for the part refusal was the letter from the adjoining owner at 8 Elinya Street objecting to the development, on the basis her amenity might be negatively impacted.
- 15 The Appellants also objected to the infringement notice being issued. Following the site visit, Council rescinded the infringement notice on 3 February 2021.
- 16 On 18 February 2021, Council issued an Amended Referral Agency Response approving the carport and patio as shown on owners drawings 1-3 of 3, but with conditions as set out below.

I refer to your application and council's notice of its intention to change its referral agency response. You are advised that:-

0mm setback from outer most projection of the carport to the road/property boundary.

1000mm - 1315mm setback from the outermost projection of the patio to the north western side boundary.

The application seeks the following type of development approval:

Additions to a Dwelling House (Carport & Patio)

The following conditions must be attached to any development approval:

Patio

- The patio is to be altered to remove any encroaching elements (including eave soffit and brick fireplace*) within the approved side boundary setbacks of 1000mm - 1315mm as per the approved plans. (*Refer to advisory notes)

Carport

- The carport roof and structure must have non-reflective finished surfaces and in colours that blend in with the existing dwelling.
- The carport must remain completely open at all times and not be enclosed or partly enclosed with walls, screens, lattice, shutters or the like.

- The carport must not have a roller door (or similar door) constructed on the entry to the carport.

Landscaping

- A minimum 500mm wide landscaping buffer is to be established between the patio and the side boundary fence for a minimum length of 6.0m and maintained for the life of the development, and in a manner that ensures healthy, sustained and vigorous plant growth suitable to provide adequate screening to the adjoining premises. All plant material must be allowed to grow to full form and be refurbished when its life expectancy is reached.

- 17 On 31 May 2021, the development permit was issued for a carport and patio as shown in owner drawings 1-2 and ENG Consulting DWG-20-423X-SK01 and SK02 subject to general conditions and to conditions imposed in the amended Referral Agency Response.
- 18 On 17 June 2021, Form 10 Notice of Appeal initiating this appeal was lodged.

Jurisdiction

- 19 The 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.
- 20 The appeal was made in time, thus enlivening the Tribunal's jurisdiction.

Decision framework

- 21 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.
- 22 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.
- 23 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.
- 24 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.
- 25 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

- 26 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 17 June 2021 comprising the documents set out in the table below:

Attachment A	Detailed appeal reasons (this document)
Attachment B	Application to SCRC for referral agency response
Attachment C	Part-refusal by SCRC referral agency response
Attachment D	Fine and breach notice by SCRC
Attachment E	Email from Steven Tucker rescinding (attachment D) fine
Attachment F	Submission by the appellant for representation
Attachment G	Email from SCRC to appellant refusing site visit as part of representation
Attachment H	Email from appellant to SCRC reiterating promise of site visit
Attachment I	Email from appellant to SCRC providing legislation demonstrating fireplaces are exempt development
Attachment J	Amended SCRC referral agency response
Attachment K	Email from appellants to SCRC requesting representation
Attachment L	Email from SCRC refusing representation
Attachment M	Building permit with conditions issued from referral agency
Attachment N	Submission to SCRC regarding Building Tribunal precedents
Attachment O	Email from SCRC to appellant disagreeing with submission
Attachment P	Letter of support from neighbour 8 Elinya St
Attachment Q	Email from neighbour 8 Elinya St withdrawing support

- B. Sunshine Coast Planning Scheme 2014;
- C. Department of Resources – Queensland Globe mapping;
- D. Queensland Building and Construction Commission Licence Search;
- E. The Planning Act 2016 (PA);
- F. The Planning Regulation 2017 (PR);
- G. The Development Assessment Rules 2017;
- H. The Building Act 1975 (BA);
- I. The Building Regulation 2006 (BR);
- J. The Queensland Development Code (QDC) Part MP 1.2;
- K. The verbal submissions made by the parties at the hearing and during the site inspection as referred to in the body of the decision;
- L. Three appeals cited by the Assessment Manager (Appeal 19-003, Appeal 20-024 and Appeal 20-028) during the hearing of this appeal; and
- M. Email dated 8 September 2021 from the Development Tribunal Registry advising the Appellant had provided information clarifying the patio setback dimensions.
- 27 The Tribunal in reaching this decision has considered all the above material but only identifies in this decision the material on which it has specifically relied to reach its decision.

Findings of Fact

- 28 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.
- 29 The minimum 0 (zero) metre setback to the road frontage and side boundary of the proposed 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.
- 30 The carport complies with the provisions of Dwelling house code PO2.
- 31 The side boundary setback of the carport and the patio comply with the provisions of QDC MP1.2 P2.
- 32 The patio and fireplace replace a former patio and fireplace.

Reasons for the Decision

- 33 The issues facing the Tribunal are:
- Compliance with relevant building assessment provisions being the Sunshine Coast Planning Scheme Dwelling house code PO1 and PO2 and QDC MP1.2 performance criteria P1 and P2.
 - Is the screening of the carport needed on the north-western side to provide protection at windows on the property at 8 Elinya Street from direct carport light overspill?
 - Is it reasonable to allow a door on the carport?
 - Will the projection of the current eaves adversely impact on the amenity of the residents of the property at 8 Elinya Street?
 - Does the proposed fireplace come within the provisions of the: BR Schedule 1 – section 5 – Work for particular heating devices; or BR Schedule 2 section 1 Work for particular class 10b structures or special structures?
- 34 The Appellants have submitted supporting information and have argued at the hearing that the development as proposed is consistent with the various Dwelling house code and QDC MP1.2 provisions and accordingly the application as lodged should be approved. The Assessment Manager has supported the Appellants' case.
- 35 At the hearing, the Assessment Manager as representative for the Appellants, drew the Tribunal's attention to previous Development Tribunal decisions in Appeal 19-003, Appeal 20-024 and Appeal 20-028 and requested the Tribunal to consider generally the three Appeal Decisions and in particular Appeal 20-003 paragraph 58 of the Reasons for the Decision as guidance in deciding this appeal. The Tribunal has noted as relevant considerations in reaching its decision in this case, both the Findings of fact in paragraphs 41-44, 46-47 and 49-52 of Appeal Decision 19-003 and the Reasons for the Decision in paragraph 58 of Appeal Decision 19-003. These provisions provide guidance as they set out the relationship between the PA and BA in relation to building assessment provisions under the QDC MP1.2 under the BA and in relation to alternative provisions to the QDC MP1.2 in Planning Scheme provisions.
- 36 The Tribunal Chair in this Appeal was the Tribunal Chair in Appeal 20-024 and Appeal 20-028. The Tribunal has noted the two decisions, but neither was of direct assistance in this case. Both appeals were for carports within the 6 metre setback and both were decided on the merits of the particular circumstances of the relevant site.
- 37 Dwelling house code Performance outcome PO1 provides:
- The height of the dwelling house is consistent with the preferred character of a local area and does not adversely impact on the amenity of neighbouring premises having regard to:-

- (a) overshadowing;
- (b) privacy and overlooking;
- (c) views and vistas;
- (d) building appearance; and
- (e) building massing and scale as seen from neighbouring premises.

38 It is considered that the proposed patio and fireplace complies with Dwelling house code PO1 as the proposed patio has a height consistent with other dwellings in the locality and does not adversely impact on the amenity of neighbouring premises as it:

- cannot cause overshadowing being to the south of the property at 8 Elinya Street;
- will not adversely impact on privacy or overlooking of the property at 8 Elinya Street due to the 2 metre high side fence preventing overlooking from the subject site;
- does not affect views or vistas as it is not visible from the street due to the other structures on the subject site and vegetation on the property at 8 Elinya Street;
- has a building appearance consistent with the rest of the development on the subject site; and
- has a building mass that replaces a previous patio and fireplace and would not present a significant massing of the structure as seen from adjoining premises due to the height of the boundary fence and the existing mass of the dwelling and garage rising above the patio.

39 Dwelling house code Performance outcome PO2 provides:

Garages, carports and sheds:-

- (a) preserve the amenity of adjacent land and dwelling houses;
- (b) do not dominate the streetscape;
- (c) maintain an adequate area suitable for landscapes adjacent to the road frontage; and
- (d) maintain the visual continuity and pattern of buildings and landscape elements within the street.

40 It is considered that the proposed carport complies with Dwelling house code PO2 as the proposed carport

- does not impact on the amenity of adjacent land and dwelling houses as the majority of properties at the southern end of Elinya Street have carports and garages that are generally built to the frontage or are less than 6 metres from the frontage;
- is designed to be consistent within the design of the overall structures on the subject site;
- leaves space for landscaping elsewhere on the frontage; and
- will maintain the visual continuity and pattern of buildings and landscape elements within the street as it helps maintain the visual continuity and pattern of buildings and landscape elements with a built to the frontage element and the carport reflects the design of the balance of the dwelling on the site.

41 QDC MP1.2 P1 provides:

The location of a building or structure facilitates an acceptable streetscape, appropriate for –

- (a) the bulk of the building or structure; and

- (b) the road boundary setbacks of neighbouring buildings or structures; and
- (c) the outlook and views of neighbouring residents; and
- (d) nuisance and safety to the public

42 It is considered the carport and patio are consistent with the existing streetscape given that:

- most of the properties at the southern end of Elinya Street have structures extending to the frontage or within the 6 metre setback;
- the owner of the adjoining property at 8 Elinya Street has requested screening of the carport lighting to prevent overspill of the lighting onto windows on that premises;
- the design of the carport in a style that reflects the design of the dwelling and other elements presents a pleasing outlook; and
- the carport allows view of traffic leaving the site, there should be no nuisance or safety hazard for the public.

43 QDC MP1.2 P1 provides:

Buildings and structures –

- (a) provide adequate daylight and ventilation to habitable rooms; and
- (b) allow adequate light and ventilation to habitable rooms of buildings on adjoining lots.
- (c) do not adversely impact on the amenity and privacy of residents on adjoining lots.

44 It is considered the carport and patio (including the fireplace) are consistent with QDC MP1.2 P2 as:

- the location of the carport and patio allows daylight and ventilation to the rooms within the dwelling on the subject site;
- they also allow adequate light and ventilation to habitable rooms of the dwelling on the property at 8 Elinya Street, as the windows of those rooms are approximately 3 metres from the side boundary of the subject site and the patio eaves are only 600mm higher than the boundary fence;
- screening of the carport lights will protect the amenity of residents in the rooms on the adjoining premises;
- the 2 metre high fence on the boundary beside the patio will prevent overlooking and protect the privacy of the adjoining property at 8 Elinya Street; and
- the retention of the eaves reduces the gap through which noise and vibrations can flow unhindered towards the adjoining premises and the fact that there was a prior patio and fireplace in this location means that there would not be any significant change in amenity impacts between the previous and current patio and fireplace.

45 The application is for a carport. A door (roller door or otherwise) is not considered to be inconsistent with a carport as defined in QDC MP1.2 and other carports in the street have doors. The Appellants had raised security concerns about pedestrians coming from licensed premises at the southern end of Elinya Street.

Carport means a class 10a building, other than a garage, providing covered vehicular parking. Note 3 - Also refer to open carport and garage.

Garage means an enclosed class 10a building, providing covered vehicular parking.

Open Carport means a carport with –

- (a) two sides or more open, and a side is also considered open where the roof covering adjacent to that side is not less than 500mm from another building or a side or rear allotment boundary; and
 - (b) not less than one-third of its perimeter open.
- 46 The proposed fireplace is stated by the Appellants as replacing a pre-existing fireplace and is accepted development under the BR, schedule 1 section 5 being a heating device. Council argue that the fireplace is not covered by the BR Schedule 1 section 5 as it comes within QDC MP1.2 A2(c)(ii) where a structure may be exempted from side boundary setbacks provided it is not used for entertainment, recreational purposes or the like. BR Schedule 1 is specific about fireplaces, whereas QDC MP1.2 A2(c)(ii) is generic in its wording about a structure for entertainment and recreation purposes and the like. The Tribunal considers it appropriate to be guided by the specific wording of BR Schedule 1 rather than the more generic provisions of QDC MP1.2.
- 47 The Tribunal notes that QDC MP1.2 A2 is an acceptable solution relating to design and siting and operates separately to and independently of BR schedule 1. Non-compliance with an acceptable solution can be permitted where performance criteria are met. In this case, the Tribunal considers the performance criteria are met as indicated above, and so QDC MP1.2 A2(c)(ii) does not apply.
- 48 During the hearing, amenity impacts on adjoining owners was discussed at length. The Appellants asked how Council could approve the two storey high structure on their south-western boundary given the obvious impact it would have on the Appellants amenity, but then refuse a patio eave that will be a just above the side boundary fence (600mm higher and set back an average of 300mm), and approximately 3 metres from the wall of the adjoining premises. Council's case was adversely impacted by the officer who wrote the decision, advising he had not visited the site and that if an adjoining owner objects or does not object directly influences the Council decision. It is the Tribunal's position that a decision on design and siting matters should be based on a site visit by the author of the decision and a professional assessment of the actual amenity impacts that are likely to occur, regardless of any inputs from adjoining owners.

John O'Dwyer

Development Tribunal Chair
Date: 3 March 2022

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 Energy and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au