



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	23-039
Appellant:	Julie Gerhardt
Assessment Manager:	Rob Wibrow (Building Approvals United Qld)
Co-respondent (Concurrence Agency):	Sunshine Coast Regional Council
Site Address:	37 Edwardson Drive Pelican Waters and described as Lot 266 SP110570 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* against the decision of the Assessment Manager refusing a Development Permit for Building Works (storage room extension and block wall), as directed by the Concurrence Agency to refuse the application. The Council directed refusal on the grounds that the proposal does not meet the provisions of the Queensland Development Code P2 (b) and (c).

Date and time of hearing:	12-00 noon 14 September 2023
Place of hearing:	The subject site
Tribunal:	Anthony Roberts – Chair Kym Barry – Member
Present:	Suzanne Bosanquet – Member Trevor Gerhardt (Sunshine Coast Building Approvals) – for Appellant Angus McKinnon (Sunshine Coast Building Approvals) – observer Stephen Whitby and John Hernando – Sunshine Coast Regional Council

Decision

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016*, confirms the decision of the Assessment Manager, as directed by the Concurrence Agency, to refuse the application.

Background

1. The subject site is:
 - a. a level canal-front allotment with a 22m canal frontage;
 - b. 983m² in area containing a substantial single-storey dwelling with a pool and outbuildings;
 - c. zoned Low Density Residential under the Sunshine Coast Planning Scheme 2014.
2. The proposed dwelling addition has the following components:
 - a. a storage room extension (3.7m long and 3.5m high) with a 0.3m setback from the northern side boundary;
 - b. a 1.8m long and 3.5m high block wall with a 0.3m setback from the northern side boundary;
 - c. a 4.2m long and 3.5m high block wall with a 0.3m setback from the northern side boundary.
3. The proposed work forms part of other extensions to the existing dwelling house (involving pool deck, staircase and block wall setback relaxations) for which development approval has been issued.
4. As the proposed development (together with pool deck work) triggers assessment against the Queensland Development Code due to the proposed siting within the required side boundary setbacks, the Assessment Manager lodged a request for a referral agency response for building work on 13 January 2023.
5. On 31 March 2023, Council issued a Referral Agency Response recommending approval for the pool deck, staircase and associated block wall setback relaxations and directing refusal for the development components identified in paragraph 2 above for the following reasons:

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 storage room extension and block walls would be located within very close proximity to the northern side boundary (300mm in lieu of 1.5 metres) and would be immediately adjacent to windows and habitable rooms on the northern neighbour's dwelling (noting two bedrooms with windows, a kitchen and outdoor living space face the common boundary, as shown in the applicant's application material and illustrated below). The proposed height of the storage room extension and block walls at 3.5 metres tall when combined with the already approved 9m long storage room within the boundary setback would total in excess of 19m in length within the boundary setback. Such a long and high structure is likely to impede access to light and ventilation to the habitable rooms of the buildings on adjoining lots. As such, the proposed storage room extension and block walls 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 proposed height of the storage room extension and block walls at 3.5 metres tall when combined with the already approved 9m long storage room within the boundary setback would total in excess of 19m in length within the boundary setback. These walls would protect the privacy of the adjoining premises. However, this structure would be visually imposing and would leave no opportunity for the provision of any form of landscaping to soften the visual impact of the structure on the adjoining premises. The cumulative walls along the boundary for a length in excess of 19m would be imposing in terms of height, bulk and scale. In conjunction with its limited setbacks to the northern neighbouring boundary, the structure would adversely impact upon the amenity of residents on the adjoining lot to the north particularly given the close relationship of the habitable rooms,

windows and outdoor living area of the adjoining neighbour's dwelling. As such, the proposed storage room extension and block walls would not meet compliance with P2 (c).

6. The Assessment Manager issued a Decision Notice on 6 July 2023 refusing the proposed development based exclusively on the Referral Agency Response from Council directing refusal.
7. The Appellant subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 20 July 2023.
8. The hearing for the appeal was held at the subject site on 14 September 2023 at noon. The Tribunal had the opportunity to view the design and positioning of the proposed work from within the subject site and in the context of neighbouring properties and the streetscape more generally.

Material considered

9. The Tribunal considered the following material:
 - a. Form 10 – Appeal Notice, grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar 20 July 2023
 - b. The *Planning Act 2016* (PA)
 - c. The Planning Regulation 2017 (PR)
 - d. The *Building Act 1975* (BA)
 - e. The Building Regulation 2006 (BR)
 - f. The Queensland Development Code (QDC) Part MP 1.2
 - g. The Sunshine Coast Planning Scheme 2014 (the Plan)
 - h. Sunshine Coast Council Assessment Report (CAR22/0975) dated 24 March 2023
 - i. Development Tribunal Decisions 21-066 (12 May 2022) and 22-060 (9 February 2023)
 - j. The verbal submissions made by the parties at the hearing and site inspection.

Jurisdiction

10. The Tribunal has jurisdiction to hear the 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 Appellants against the refusal of the development application by the Assessment Manager at the direction of the Concurrence Agency.
11. Pursuant to section 253(4) of the PA, the Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Assessment Manager. 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 the PA (pursuant to which the registrar may require information for tribunal proceedings).
12. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Decision framework

13. 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.
14. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and is not relevant here) 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
 - (e) [not relevant].
 - (3) However, the tribunal must not make a change, other than a minor change, to a development application.
15. As the proposed northern side boundary setbacks do not comply with Acceptable Solution A2 of the QDC MP 1.2 they must be shown to meet Performance Criteria P2 of the QDC.

Matters in dispute

16. The focus of the disputed matters at the hearing was on the ‘neighbouring amenity’ considerations of the QDC MP 1.2 only in relation to the likely impacts on the northern neighbouring property.
17. At the hearing, the discussions centred on the potential amenity impacts of the proposed block wall components of the development and specifically the proposed height. Both parties confirmed a preparedness to enter into post-hearing negotiations focussed on this issue and to subsequently provide the Tribunal with an agreed submission. Accordingly, the Tribunal issued a direction allowing a time interval for this to occur. As a submission did not eventuate the Tribunal considered the matter without the benefit of an agreed outcome by the parties.

Findings of fact

18. The Tribunal makes the following findings of fact:

Amenity and privacy impacts on northern neighbour (39 Edwardson Drive)

19. In relation to the grounds for refusal relating to the likely impact on the northern neighbour, the Appellant contends that:
 - a. Only one habitable room (bedroom) window would potentially be affected as other habitable rooms (and outdoor living areas) already inter-face with a certifier approved and constructed 9m long storeroom setback 0.3 from the northern boundary and therefore the windows of these rooms do not have a ‘close relationship’ to the proposed development as claimed by Council;
 - b. The actual distance between the proposed block walls and the affected inter-facing bedroom window is 2.5m (comprising 0.3m on the subject site and 2.2m on the adjoining site);
 - c. The block walls would provide privacy for the subject site and protect the privacy of the northern neighbour;
 - d. Landscape elements along the boundary could be introduced to soften the impact of the proposed structures and these would augment the landscape elements on the adjoining property;

- e. The block wall at 3.5m would only exceed the existing fence by 1.5m and would result in minimal additional impact in terms of light quality and visual amenity;
 - f. The northern neighbouring property has built to boundary walls exceeding 19m.
20. In relation to the grounds for refusal relating to the likely impact on the northern neighbour, Council contends that:
- a. A combination of the 3.5m height, bulk and scale of the development will likely impact the amenity and enjoyment of the northern neighbouring dwelling;
 - b. The proposed structures would be located within very close proximity to the northern side boundary (0.3m in lieu of 1.5 m) and the proposed 3.5m height when combined with the already approved 9m long storage room within the boundary setback would total in excess of 19m in length within the boundary setback. Such a long and high structure is likely to impede access to light and ventilation to the habitable rooms of the northern neighbour – failing to satisfy QDC MP 1.2 P2 (b);
 - c. While the proposed structures would protect the privacy of the adjoining premises, the cumulative walls (exceeding 19m) would be visually imposing (in terms of height, bulk and scale) and would leave no opportunity for the provision of landscaping to soften the visual impact. In conjunction with the intended limited setbacks, the structures would adversely impact the amenity of the northern neighbour’s dwelling - particularly given the close relationship of the habitable rooms, windows and outdoor living areas of that dwelling - failing to satisfy QDC MP1.2 P2 (c);
 - d. Council’s concerns relate predominantly to the proposed block wall structures.
21. Based upon the site inspection conducted at the hearing and submissions made by the parties, the Tribunal finds that the overall intended development of the site is not inconsistent with the style and extent of development of canal-front lots in the Queensland coastal context. However, like Council, the Tribunal holds concerns in relation to the ‘neighbouring amenity’ impacts resulting from the positioning, design and intensity of development along the northern side boundary.
22. While privacy (both visual and acoustic) between the subject site and the northern neighbour may actually be enhanced by the development, the resulting detrimental quality of light, ventilation and visual amenity impacts of the proposed development are likely to reduce the use and enjoyment of the northern neighbour’s dwelling.
23. The most pronounced impacts are attributable to the proposed height of the block walls. However, there is a likely cumulative impact associated with the extent of existing approved development (including the existing 9m long and 3.5m high storage structure) in combination with the proposed development (9.7m long and 3.5m high) in close proximity to the north side boundary - which is potentially excessive.
24. In this regard, the Tribunal notes (as a point of reference) that while Acceptable Solution A2 of QDC MP 1.2 contemplates particular setback relaxations for class 10a buildings, it specifically requires the conjunctive satisfaction of three criteria, namely: height of not more than 4.5m and 3.5m mean height; total length not more than 9m; and, not located closer than 1.5m from a required window in a habitable room of an adjoining dwelling.
25. The Appellant has demonstrated that the proposed development satisfies the height and habitable room window separation elements. However, the proposed development would result in a total cumulative length of Class 10 structures within the required 1.5m northern side setback greater than 19m which is well in excess of the allowable 9m maximum length stipulated in Acceptable Solution QDC MP 1.2 A2 (d) (ii).

26. In this light, the Tribunal finds that the Council's concerns with the potential impact of the development on the amenity of the northern neighbour are legitimate. The overall design, positioning and intensity (particularly height) of the development does not enable it to satisfy the Performance Criteria P2 (b) and (c) set out in QDC MP1.2. This is the case because the development would likely impede ventilation, diminish light quality to a habitable room and adversely impact the visual amenity of the northern neighbour. Further, there is no practical ability to soften the visual impact of the development by introducing landscape elements.

Reasons for the decision

27. In this appeal, the Tribunal considers the Appellant has not satisfied the onus of demonstrating the appeal should be upheld. Therefore, the Tribunal has determined to confirm the decision of the Assessment Manager, as directed by the Concurrence Agency, to refuse the application.
28. The Tribunal found that the Council's concerns with the potential impact of the development on the amenity of the northern neighbour are substantiated. The overall design, positioning and intensity (particularly height) of the development does not enable it to satisfy Performance Criteria P2 (b) and (c) set out in QDC MP1.2. The design, scale, bulk, height and positioning of the development, when added to the existing development already within the required side boundary setback, is excessive and likely to diminish the amenity of the northern neighbour's dwelling.

Anthony Roberts
Development Tribunal Chair

Date: 24 October 2023

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:

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