



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-036
Appellant:	Mary Puhar
Respondent (Assessment manager):	Luke Owen-Jones
Co-respondent (Concurrence agency):	Noosa Shire Council
Site address:	41 Cooran Court, Noosa Heads Qld 4567 and described as Lot 212 on N21857 – 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 refusal of a Development Application for carrying out Building Work assessable under the *Building Act 1975* for a Class 10a structure, being a carport, on a residential site. The decision followed a Referral Agency Response by the Noosa Shire Council, directing refusal of the application on the grounds that a carport does not comply and cannot be conditioned to comply with performance criteria PO9 of the Low Density Residential Zone Code under the provisions of the *Noosa Plan 2020*.

Date and time of hearing:	11.00am on 17 October 2023
Place of hearing:	The subject site
Tribunal:	Samuel le Noble – Chairperson Catherine Baudet – Member Beth Winkle – Member
Present:	Mary Puhar – Appellant Eddie Puhar – (for the Appellant) Marcus Brennan – Brennan Planning (for the Appellant) Luke Owen-Jones – EarthCert (Assessment Manager) Brad Geaney – Noosa Shire Council (for the Concurrence Agency) Jarrad Postle – Noosa Shire Council (for the Concurrence Agency)

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 made on 26 May 2023 with another decision, namely, to approve the siting of the proposed carport on the subject site as

shown on Drawings A102_A05; A103_A05; A202_A05; A301_A05; A401_A05; A402_A05 prepared by Collins Building Designs and dated 10 November 2023.

Background

1. The subject site of this appeal is irregular in shape with a 38.5 metre frontage to Cooran Court. It comprises an area of 816m² and contains a part single and part double-storey dwelling house including an integral garage and landscaped grounds. The garage on the site is setback 4.9 metres from the road boundary and is accessed via an existing driveway.
2. The subject site fronts Cooran Court on a bend of the 'U-shaped' court and is fenced along the street frontage by way of a masonry wall approximately 1.9 metres in height.
3. It is proposed to establish a carport within the front setback of the subject site, co-located with the existing driveway and:
 - having a width of 4.553 metres;
 - having a length of 5.1 metres;
 - set back 0 and 0.68 metres to the street frontage;
 - presenting a height of 3.82 metres to its apex and 2.71 metres to its eave;
 - having a floor area of 23m²; and
 - being a simple gable design, which matches the existing dwelling roof design.
4. The proposed carport triggered assessment against the relevant performance criteria of the *Noosa Plan 2020* (Noosa Plan) due to the proposed siting within the 6m front setback. Brennan Planning lodged a Request for a Referral Agency Response pursuant to Schedule 9, Division 2, Table 3 of the *Planning Regulation 2017* (PR) for building work relating to carport within the front setback over the subject site with the Noosa Shire Council on 21 October 2022 (Council ref: RAB22/0194).
5. On 17 April 2023, Council issued a Referral Agency Response directing the Assessment Manager to refuse the application for the reasons stated as follows:

The application is refused as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:

*Noosa Plan 2020 – Low Density Residential Zone Code
P09 Buildings and structures are designed and sited to;*

f) be consistent with the predominant character of the streetscape

It has been considered that the design and location of the proposed carport is not consistent with the predominant character of the streetscape.

It is Council's view that the existing predominant character of the streetscape, with respect to the design and location of building and structures, is represented by buildings and larger structures being setback at least 6.0 metres from the road frontage.

Furthermore, the design of the carport provides for an exceedingly dominant structure within the prescribed road boundary setback.

6. The Appellant engaged a private building certifier in May 2023 and submitted a development application for carrying out building works assessable under the *Building Act 1975* (BA) on 9 May 2023 (Council ref: PC23/0543). The Assessment Manager for this

application was a private certifier and the application included the Council's Referral Agency Response (issued under Council ref: RAB22/0194).

7. Accordingly, the Assessment Manager issued a Decision Notice on 26 May 2023 refusing the proposed development based exclusively on Council's Referral Agency Response.
8. The Appellant subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 23 June 2023.
9. The hearing for the appeal was held at the subject site on 17 October 2023 where the Tribunal had the opportunity to view the positioning of the proposed structure from the subject site, neighbouring properties, and the streetscape more generally.

Material considered

10. 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 23 June 2023;
 - b. Amended plans which included annotated dimensions of the proposed carport and received by the Tribunals Registrar on 10 November 2023;
 - c. The *Planning Act 2016* (PA);
 - d. The *Planning Regulation 2017* (PR);
 - e. The *Building Act 1975* (BA);
 - f. The *Building Regulation 2006* (BR);
 - g. The Queensland Development Code (QDC) Part MP 1.2;
 - h. *Noosa Plan 2020* (Noosa Plan);
 - i. Noosa Plan 2020 – Low Density Residential Zone Code (the Code); and
 - j. The verbal submissions made by the parties at the hearing and during the site inspection.

Jurisdiction

11. The Tribunal has jurisdiction to hear an 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.
12. Accordingly, the Tribunal has jurisdiction to decide this appeal.

Decision framework

13. 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 decision maker.

14. 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 Tribunal's Registrar may require information for tribunal proceedings).
15. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.
16. Section 33 of the BA (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) allows a planning scheme to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover.
17. Table 6.3.1.3 of the Code contains alternative provisions to the QDC. As the proposed carport does not meet the acceptable outcomes set out in AO 9.1, which, as applied to the subject site, requires buildings and structures to have a setback of 6m from the street frontage, assessment is made against the list of performance outcomes stated at PO9 of the Code. For the purposes of this appeal only performance outcome PO9(f) streetscape is relevant.

Consistency with predominant character of the existing streetscape

18. The first ground for refusal identified by Council is 'the design and location of the proposed carport is not consistent with the predominant character of the streetscape'. Council contends that 'the existing predominant character of the streetscape, with respect to the design and location of building and structures, is represented by buildings and larger structures being setback at least 6.0 metres from the road frontage'.
19. Performance outcome PO9(f) and Council's basis of refusal contains several key words critical to determining this appeal, of which none are defined in the Code. These terms, relevant to this appeal, are:
 - a. Consistent.
 - b. Predominant; and
 - c. Streetscape.
20. Plain ordinary meanings from relevant case law can be used to define these terms in a planning context. At the hearing Council did not object to the use of these definitions by the Tribunal in deciding this appeal.
21. In relation to this component of the grounds for refusal, the Appellant, in the main, contends that the proposal complies with performance outcome PO9(f) of the Code for the following reasons:
 - d. 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 carport is open and lightweight and in keeping with the existing house in that it will have a gable roof pitched to suit.*
 - e. The proposed building works will maintain an existing dwelling that contributes to the character of the streetscape.*
22. Council's position is that the existing predominant character of the streetscape with respect to the design and location of buildings and structures is represented by the majority of buildings and 'larger structures' being behind the 6m setback. At the hearing Council

contended that a carport setback of 0.5m from the front boundary of the subject site is inconsistent with the existing visual continuity and pattern of buildings and 'larger structures' in the street - therefore failing to comply with Performance Outcome PO9(f) of the Code.

23. Based upon the site inspection conducted at the hearing, the Tribunal finds that while Cooran Court exhibits a landscaped street appearance, it presents varied 'streetscapes' comprising varied building patterns and landscape elements along the extent of the entire street.
24. The Tribunal accepts the elasticity that comes with the term 'consistent' as adopted by Her Honour Judge Bowskill QC in *Lake Maroona Pty Ltd v Gladstone Regional Council*¹ and by Her Honour Judge Kefford in *The Planning Place Pty Ltd v Brisbane City Council*.²
25. Applying this definition with some elasticity it is evident that the pattern of buildings and entry structures is characterised by considerable 'visual clutter' in the streetscape generally attributed to the presence of assorted structures such as solid fences (up to 2m high).
26. These structures, in the opinion of this Tribunal, detract from the Council's intention of having visual continuity and a consistent pattern of buildings and landscape elements. A clear pattern of the streetscape, defined primarily by built form, is therefore not apparent.

Design considerations

27. The second component of Council's reasons for refusal was that the location and design of the proposed carport means that it would amount to an 'exceedingly dominant structure within the prescribed road boundary setback.' In relation to the design considerations, at the hearing Council advised they would not accept a simple gable design in the proposed location, but instead would accept a skillion roof design to reduce the form of the carport.
28. The Tribunal is not persuaded by this alternative on the basis that it is not sympathetic with the existing dwelling's roof form which is a gable design. A skillion roof is not consistent or sympathetic with the existing dwelling.
29. The subject site, when viewed from the street immediately in front, features landscaped grounds enclosed with a high fence. The street frontage of the subject site is 38.5 metres. The proposed carport will have a width of 4.553 metres which is approximately 11.5% of the length of the street frontage. The adjoining residential property to the east cannot readily be seen from the footpath due to the height of the fence.
30. The Tribunal therefore finds that the carport itself, with a simple gable design which would be sympathetic in form to the existing dwelling, is unlikely to have a detrimental impact on the visual amenity of the streetscape and that it would effectively maintain the existing visual continuity and pattern of building elements already evident in the street.

Impact on neighbours

31. The Tribunal notes that, as stated by the Appellant at the hearing, written submissions had been made to immediately neighbouring property owners seeking any objections prior to the application being made and that as a result, no objections were raised, and two written indications of support were received by the Appellant.

¹ [2017] QPEC 25; (2017) LGERA 166, 171-2 [14]-[26]

² [2018] QPEC 62; (2018) 75

32. The Tribunal therefore considers that those parties likely to be most directly affected by the development evidently have no concerns with the siting and design of the proposed carport.

Existing car accommodation

33. The Appellant contends that the existing double garage is currently unusable for the intended purpose of parking a large vehicle due to the garage length constraints.

34. The Tribunal finds that modification of the existing garage for the intended purpose would be costly and would not achieve the desired result of accommodating an additional vehicle.

Reasons for the decision

35. The Tribunal found that substantial curvature of the road alignment, together with existing structures, presents varied 'streetscapes' comprising varied building pattern and landscape elements along the extent of the entire street.

36. Council's intent, through the focus on the design and siting of buildings and structures in the framing of PO9 of the Code, that garages and carports do not dominate the streetscape, is clear.

37. However, while it may be the case that garages and carports are predominantly set back at least 6m from the street frontage, it is also evident that the pattern of built form is characterised by considerable 'visual clutter' in the streetscape, generally attributed to the presence of assorted structures such as solid high fences and entry structures.

38. With respect to the second component of Council's reasons for refusal, that is, the design of the carport provides for 'an exceedingly dominant structure within the prescribed road boundary setback' and Council's preference for a skillion roof, the Tribunal finds that the design of the proposed carport is subordinate to the existing dwelling's pitched roof and overall structure and therefore would not result in a detrimental impact on the visual values of the streetscape.

39. Council contends the streetscape is defined by the structures which are visible to a person when only viewing the subject site. The Tribunal rejects this definition, instead, adopting the definition presented by His Honour Judge Dodds in *Gelling & Ors v Cairns City Council & Anor.*³ The streetscape is therefore defined by the buildings, other development, open space, vegetation etc that exist within Cooran Court, not simply exclusively those that are only visible when viewing the subject site. Council's argument ignores the structures that frame the entire street.

40. In the Tribunal's view the proposed structure is capable of existing in harmony with the entire streetscape of Cooran Court. It is the visual clutter, the mix of high fences, entry structures and varying roof structures that frames Cooran Court as a street with varying aspects of character. This mix of character is the predominant built form of Cooran Court.

41. The Tribunal considers the Appellant has satisfied the onus of demonstrating the appeal should be upheld.

42. Therefore, the Tribunal, in accordance with section 254(2)(c) of the PA, replaces the decision of the Assessment Manager made on 26 May 2023 with another decision, namely, to approve the siting of the proposed carport on the subject site as shown on Drawings

³ [2008]; QPEC 38; (2008) 30

A102_A05; A103_A05; A202_A05; A301_A05; A401_A05; A402_A05 prepared by Collins Building Designs and dated 10 November 2023.

Samuel le Noble
Development Tribunal Chair

Date: 20 March 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:

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