



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	22 - 010
Appellant:	Allison Marti
Respondent (Assessment Manager):	Ben Weston of All Construction Approvals
Co-respondent (Concurrence Agency):	Cairns Regional Council (“Council”)
Site Address:	19 – 21 Villa Street, Bayview Heights and described as Lot 188 on RP 731417 – (“the subject site”)

Appeal

Appeal under section 229(1)(a)(i) of the *Planning Act 2016* (“the PA”) against the assessment manager’s decision to refuse the appellant’s application, as directed by the concurrence agency for the construction of a Class 10a Shed.

Date and time of hearing:	Wednesday 18 May 2022 at 10:00am
Place of hearing:	The subject site
Tribunal:	Stephanie Raven– Chair Patrick Clifton – Member Angie Hanson - Member
Present:	Allison Marti – Appellant Luke Holzhauser - Supporter Ben Weston – Respondent Claire Simmons - Council representative Ben Santagiuliana- Council representative

Decision:

The Development Tribunal (“the tribunal”), in accordance with section 254(2)(a) of the PA, confirms the assessment manager’s decision to refuse the Development Permit for Building Works - Class 10a Shed.

Background:

The Subject Site is located at 19 – 21 Villa Street, Bayview Heights, more formally described as Lot 24 on RP 803964.

The subject site is a single lot with an area of 2,188m² and with frontage to Villa Street of 52.36m. The site is improved by a single detached dwelling house that is located approximately centrally

on the site. The balance of the site is maintained as curtilage to the dwelling house and is either manicured lawn or garden beds.

The application is for the development of a shed in the south-eastern corner of the site to the rear of the existing dwelling house. The shed is proposed 300mm to the outermost projection from the side (eastern) boundary and approximately 379mm to the outermost projection from the rear (southern) boundary. The shed would have a height of 5.17m at the outermost projection and an overall height of 6.36m. The shed comprises a ground floor area of 140.39m² for storage of vehicles, office space and a bathroom with a mezzanine area above totalling 25.42m².

The application was subject to a concurrency agency referral due to non-compliance with Acceptable Solution A2 (side and rear boundary clearance) contained in the Queensland Development Code (QDC) MP1.2 – Design and Siting Standard for Single Detached Housing on Lots 450sqm and over.

Acceptable Solution A2 of the QDC requires a minimum side and rear boundary clearance of 2.0m measured from the outermost projection of the building or structure based on the abovementioned height, the application proposal sought to vary this to a minimum of 300mm.

The application made to All Construction Approvals, as the assessment manager, was referred to Cairns Regional Council (Council) as a Concurrence Agency under the Planning Regulation 2017, Schedule 9, Part 3, Division 2, Table 3.

On the 2 March 2022 the Council directed the refusal of the application on the basis, in summary:

- that the proposed siting of the shed is anticipated to have an adverse impact on the amenity and privacy of residents on the adjoining lot, being Lot 1 on SP121901;
- that it would result in a degree of overshadowing and is generally overbearing in nature;
- that the building lacks aesthetic value;
- that there is no opportunity for landscaping with screening qualities to act as a visual buffer;
- that no signed letter of support was provided by the adjoining residents of Lot 1 on SP121901.

The application was subsequently refused by All Construction Approvals on 16 March 2022 and the appeal lodged with the Tribunal the same day.

Jurisdiction

This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.

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 *Building Act 1975* which is assessed against the Queensland Development Code (QDC) side and rear boundary clearance for buildings and structures.

The Local Government (Council) is a concurrence agency as per Schedule 9, Table 3 of the Planning Regulation 2017.

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 of all or part of the development application.

The precondition in section 1(2) of schedule 1 for the application of table 1 is satisfied in this instance as paragraph (g) of section 1(2) applies – *i.e.* the matter involves building work assessable under the *Building Act 1975*.

The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision Framework

For this appeal, the onus generally rests with the appellant to establish that the appeal should be upheld (section 253(2) of PA).

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 (section 253(4) of PA); however, 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 PA.

The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA and the tribunal's decision takes the place of the decision appealed against (section 254(4)).

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 16/03/2022
2. Decision Notice – Refusal for Development Permit for Building Works (Shed) dated 16/03/2022
3. Cairns Regional Council Concurrence Agency Response (3776/2022) directing the assessment manager to refuse the application dated 02/03/2022
4. Shed Proposal Plans including Site Plan, Floor Plan and Elevations, Sections and Working Drawings prepared by Dibden Constructions dated Nov 2021
5. Report to Regulatory Services prepared by All Construction Approvals dated 7 Feb 2022
6. The Planning Act 2016
7. The Planning Regulation 2017
8. The Building Act 1975 (BA).
9. The Building Regulation 2006 (BR).
10. The Queensland Development Code (QDC) Part MP 1.2.
11. The verbal submissions made by the parties at the hearing and during the site inspection.

Findings of Fact

- The hearing for the appeal was held at the appellants' home and therefore at the subject site, on 18 May 2022. The Tribunal had the opportunity to inspect the location, including the surrounding area, of where the Shed is proposed.
- The Queensland Development Code, Acceptable Solution A2, requires that a building or structure with a height greater than 4.5m but not more than 7.5m is to be sited 2.0 metres from

the side and rear boundary to the outermost projection. Alternatively, the building or structure must demonstrate compliance with the relevant Performance Criteria (P2).

- The Shed is proposed in the south-eastern corner of the site with a minimum setback of 300mm from the side (east) boundary and a minimum setback of 379mm from the rear (south) boundary, in lieu of the 2.0m requirement. As the Shed was not able to meet the boundary clearance prescribed by A2 of the QDC, the application was referred to Council as a concurrence agency for the assessment of the proposal against Performance Criteria (P2) of the QDC.
- The subject site has a gentle slope from the west to the east resulting in the dwelling house being single storey at the western end and two-storey at the eastern end.
- Towards the south, the site adjoins an area of Council reserve and open space that contains tall and established vegetation.
- Towards the east, the site adjoins a residential lot which is located downslope from the subject site and as a result the boundary fence is a fence located on top of a retaining wall of approximately 500mm in height.
- This neighbouring lot, formally known as Lot 1 on SP121901, comprises a land area of 600m² and provides its private open space to the rear of the dwelling house in proximity to where the Shed is proposed.
- Access to the subject site is provided by two dropped kerbs at the site frontage, with one dropped kerb having a formalised concrete driveway to the garage associated with the dwelling house at the western end of the site frontage and the other at the eastern end of the site frontage. No concrete driveway is associated with the eastern dropped kerb and a power pole is located at the edge of this dropped kerb.
- During the site inspection the respondent advised the tribunal that earthworks would be undertaken to cut the ground floor of the shed into the site; however, it was accepted at the site visit that ground level of the shed would be at the level of the ground at the common boundary between the appeal site and the adjoining site to the east.
- During the hearing the appellant advised the tribunal that the reason for the siting of the proposed shed was so that they could keep the rear of the dwelling house clear for a future dwelling house extension and a potential swimming pool. The appellant also advised the tribunal that the Shed would be used to store vehicles (such as a boat and jet-ski), as well providing space for an ancillary home-based office.

Reasons for the Decision

The QDC sets out performance-based criteria for buildings and structures located within the side and rear boundary, the Tribunal considered the proposal against the performance requirements, as follows:

- (a) whether the proposed development would affect the provision of adequate daylight and ventilation to habitable rooms;
- (b) whether the proposed development would allow adequate light and ventilation to habitable rooms of building on adjoining lots;
- (c) whether the proposed development would adversely impact on the amenity of adjoining lots.

The Tribunal determined that the substantive issue is whether the proposed development would have any adverse impact on the amenity of the adjoining residence.

The meaning of amenity has been the subject of a number of Planning and Environment Court cases. A case often cited is *Broad v Brisbane City Council & Baptist Union of Queensland [1986] QSCFC 27* where the concept of amenity was considered to be a wide-ranging concept that contains many aspects that are difficult to articulate. Some aspects were considered practical and tangible such as traffic generation, noise, nuisance, appearance and even the way of life of the

neighbourhood and others were considered more elusive such as the standard or class of the neighbourhood and the reasonable expectations of the neighbourhood.

Based on the above, the Tribunal considered that in determining the impacts on amenity it is appropriate to take into account the reasonable expectations of the adjoining residents.

The Tribunal considered instances where the QDC MP1.2 allows for Structures to be sited within the boundary clearances, specifically Acceptable Solution A2 (b) – (d). The Tribunal determined that the examples provided were too dissimilar from the Shed proposed and therefore did not provide any bearing on what may be considered a 'reasonable expectation of the neighbourhood' (Broad v Brisbane City Council).

In terms of amenity, the Tribunal also found it appropriate to consider the reasonable expectations of a resident in regard to the impacts of overshadowing of the recreation area and the impacts that this would have on the use of the area and the 'feel' of the area that the resident may perceive (Broad v Brisbane City Council).

The Tribunal determined that the proposed development would result in a degree of overshadowing, particularly in the afternoon, of the adjoining dwelling house and the recreation area in the rear private open space. The tribunal is of the opinion that the proposed Shed would result in a sense of enclosure that would adversely affect the 'feel' of the adjoining neighbours private open space.

The tribunal took the context of the adjoining site into consideration and found that the impact on amenity is made greater as the ground level of the shed would result in approximately 500mm higher than the ground level of the adjacent property. During the hearing, both parties to the appeal confirmed that the neighbours to the east had not been contacted regarding the Shed proposal and how it may impact their amenity.

The Tribunal is of the view that, in the absence of any evidence to the contrary, the proposed shed would have an adverse impact on the amenity of the adjoining property to the east and therefore confirms Councils decision to refuse the application. The Tribunal has considered all the information provided and is of the view that the Appellant has failed to discharge the onus of establishing that the proposed Shed sited within the boundary clearance complies with Performance Criteria P2.

Stephanie Raven

Development Tribunal Chair
Date: 07/06/2022

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 (07) 1800 804 833