



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	19-01
<b>Appellant:</b>	Jason Lawson and Andrew Lawson
<b>Respondent (Assessment Manager, Concurrence Agency):</b>	Brisbane City Council
<b>Site Address:</b>	71A Newman Road, Wavell Heights, Lot 87 RP25136 – the subject site

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### **Appeal**

Appeal under section 229 of the *Planning Act 2016* (PA) against the Decision Notice of Brisbane City Council, to refuse a Class 10a roofed patio as the building did not comply and could not be conditioned to comply with the Brisbane City Plan 2014, Dwelling House (small lot) Code and Low Density Residential Zone Code.

More specifically the Appellant seeks:

1. *The Appeal be allowed;*
  2. *The part of the development application for a development permit for building work for a dwelling house extension (roofed patio) be approved subject to lawful conditions;*
  3. *Such further or other order as the Development Tribunal deems fit.*
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<b>Date and time of hearing:</b>	3 May 2019 at 10am
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Richard Prout – Chair Anne-Maree Ireland - Member Jane Grimmond – Member
<b>Present:</b>	Jason Lawson – Appellant Andrew Lennox – Appellant representative Elizabeth Lloyd – Adjoining property owner  Roger Greenway – Council representative Simon Grice – Council representative

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### **Decision:**

For the reasons set out below, the Development Tribunal (Tribunal), in accordance with section 254 of the PA **confirms** the decision of Brisbane City Council (Council) to refuse the development application for the construction of a Class 10a roofed patio.

## Background

The subject site is a 405m<sup>2</sup> allotment located at 71A Newman Road, Wavell Heights and is zoned Low Density Residential Zone under the Brisbane City Plan 2014. The allotment is rectangular in shape with a street frontage of 9.437m.

Council issued a Preliminary Approval for Building Work for the existing dwelling on the site in November 2003 and at the time of its approval included a roofed verandah at the rear of the dwelling with a 6m setback from the eastern rear boundary.

The Appellant advised the Tribunal that the Class 10a roofed patio at the rear of the property the subject of the Appeal, was built in 2010 without the required development approvals having been obtained. This is confirmed by the Council air photography for the subject site which shows the building appearing sometime between 2009 and 2011.

In September 2017 the development came to the attention of the Council following an enquiry from the property owner to the east of the subject site, as the roofed patio was encroaching over the property boundary by 140 mm.

After investigating the matter, Council issued a letter to the property owners on 25 September 2017 advising the following:

*Council has been contacted regarding building work on your premises at the above address.*

*Concerns have been raised that a roofed deck has been constructed on your premises without the necessary building approvals having been obtained.*

Following this letter and subsequent discussions with Council officers the Appellant arranged for the roofed patio to be shortened in length so that it no longer encroached the adjoining allotment and was setback 906 mm from the rear eastern boundary.

In 2018, the property owners engaged a planning consultant who subsequently lodged a Development Application for Building Work Assessable Against the Planning Scheme in October 2018 with the Council for the retrospective dwelling house extension (roofed patio and shade sail poles).

The Council issued a Decision Notice on 10 December 2018, approving the shade sail poles at the front of the dwelling and refusing the roofed patio as it did not, and could not be conditioned to meet, the requirements of the Brisbane City Plan, namely:

- The purpose overall outcome 5a and 5d of the Low Density Residential Zone Code;
- The purpose overall outcome 2b and 2d of the Dwelling House (Small Lot) Code; and
- The performance outcome PO2 and PO7 of the Dwelling House (Small Lot) Code.

The Registrar of the Development Tribunal (Tribunal) received application for appeal Form 10 from the Appellants on 11 January 2019.

## Jurisdiction

The Appellant, lodged the Appeal with the Tribunal under section 229 of the PA, against the Decision Notice of the Assessment Manager (Brisbane City Council) to refuse a Class 10a roofed patio. The refusal was on the basis that the development did not, and could not be conditioned to meet, the performance outcomes of the Dwelling House (Small Lot) Code 9.3.8 and the purpose overall outcomes of the Low Density Residential Zone Code 6.2.1.1 of the Brisbane City Plan 2014.

Section 1(1) and section 1(2)(a)(ii) of Schedule 1 of the Planning Act 2016 (**PA**) provide as follows:

### *1 Appeal rights and parties to appeals*

*(1) Table 1 states the matters that may be appealed to—*

*(a) the P&E court; or*

(b) a tribunal.

(2) However, table 1 applies to a tribunal only if the matter involves—

(a) the refusal, or deemed refusal of a development application, for—

(i) a material change of use for a classified building;

In assessing the issue of Jurisdiction the Tribunal noted the following:

**1. Does this appeal fall within the matters referred to in Table 1 (Appeals to the P&E Court and, for certain matters, to a tribunal) of the PA:**

This appeal falls within Item 1(a) of Table 1 (Appeals to the P&E Court and, for certain matters, to a tribunal) of the PA because the relevant development approval:

- is a “development approval” as defined in Schedule 2 (Dictionary) and section 49(1) (A development Approval) of the PA (i.e. the relevant development approval is the development permit titled “Dwelling House Extension (Patio and Shade Sail Poles)” Decision Notice issued 10 September 2018); and
- is not an excluded application i.e. section 1(3) of Schedule 1 does not apply.

**2. Are any of the preconditions (in schedule 1, section 1(2) of the PA) for the application of table 1 for a Development Tribunal satisfied:**

The building work proposed by the development application was required to be assessed under the *Building Act 1975*, as well as under relevant parts of the planning scheme. In these circumstances, the precondition in section 1(2)(g) of schedule 1 of the PA for the application of table 1 for the Tribunal is satisfied.

The appeal also falls within section 1(2)(a)(i) of schedule 1 of the PA, as it relates to a material change of use for a classified building, namely a Class 10a roofed patio.

**Conclusion regarding jurisdiction**

The Tribunal finds that the Appeal meets the required tests of Schedule 1 (Appeals) of the PA for a matter that may be appealed to a *tribunal* and as such the Tribunal has jurisdiction to hear the Appeal.

**Decision framework**

The Tribunal notes:

- The onus rests on the appellant to establish that the appeal should be upheld (s. 253(2) 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 person who made the decision appealed against (s. 253(4) of the PA) however the tribunal may, but need not, consider other evidence presented by a party to the appeal with leave of the tribunal (s.253(5) of the PA);
- The Tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

**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 11 January 2018;
2. ‘DA Form 2 – Building Work Details’, Applicant Jason Lawson and Andre Lawson;

3. Assessment Manager Decision Notice, (Brisbane City Council) reference A005038264, dated 11 December 2018, part approval part refusal (refusal patio);
4. Brisbane City Council 'Development Application Lodgement Form' dated 5 October 2018, lodged by Lennox Planning and Development Pty Ltd;
5. Letter dated 4 October 2018 from Lennox Planning and Development Pty Ltd to Council;
6. Report addressing performance outcomes and acceptable outcomes of the Dwelling House (Small Lot) Code 9.3.8 of the Brisbane City Plan 2014;
7. Information Request dated 31 October 2018 from the Council to Appellant;
8. Letter dated 2 November 2018 from Lennox Planning and Development Pty Ltd responding to Council Information Request of 4 October 2018;
9. Letter dated 14 November 2018 from Lennox Planning and Development Pty Ltd responding to Council Information Request of 4 October 2018;
10. Letter of support dated 2 November 2018, from the owner of 73 Newman Road, Wavell Heights;
11. Letter of support dated 2 November 2018, from the owner of 71 Newman Road, Wavell Heights;
12. Letter of support dated 14 November 2018, from the owner of 155 Main Avenue, Wavell Heights;
13. Quotation dated 13 November 2018 from Environ Landscape Solutions for the supply of a privacy screen;
14. Letter dated 25 September 2017, reference 6838244, from the Council to Appellant re nonconforming building work roofed deck;
15. Email dated 9 December 2017 from Appellant to Council re nonconforming building work roofed deck;
16. Email dated 12 December 2017 from Council to Appellant re nonconforming building work roofed deck;
17. Email dated 18 January 2018 from Council to Appellant re nonconforming building work roofed deck;
18. Email dated 21 January 2018 from Appellant to Council re nonconforming building work roofed deck;
19. Email dated 13 March 2018 from Appellant to Council re nonconforming building work roofed deck;
20. Email dated 27 May 2018 from Council to Appellant re nonconforming building work roofed deck;
21. Email dated 29 May 2018 from Appellant to Council re nonconforming building work roofed deck;

22. The following drawings by W.H Wilson, dated 31/8/2018, General Notes, Drawing No W14294, Sheet 2 of 4 (Site Plan), Drawing No W14294, Sheet 3 of 4 (Floor Plan, Elevation Views and Section View);
23. Untitled drawing detailing method of tie down and general bracing details;
24. Form 15 (Compliance Certificate) signed by Paul Wilson of W.H Wilson certifying drawings by William H Wilson and Associated, i.e. Drawing No W14294, Sheets 1-4;
25. Photographs of the subject site and subject building;
26. Email dated 11 January 2019 from Jason Lawson to the Tribunal Registrar advising that he acts on behalf of Andrew Lawson in representing his interests in this Appeal;
27. Letter dated 20 December 2018 from Andrew Lawson to the Tribunal Registrar authorising Jason Lawson to act on his behalf in this Appeal;
28. Letter/submission dated 11 January 2019 from the Appellant to the Tribunal detailing the grounds for the Appeal;
29. Verbal submissions at the Hearing from all parties to the appeal and adjoining neighbour (given leave for their presentation by Tribunal);
30. The Brisbane City Plan 2014;
31. The Queensland Development Code MP 1.2;
32. The *Planning Act 2016*;
33. The *Building Act 1975*.

**Information provided by the parties following the Hearing:**

1. (With leave), Letter and Survey Plan dated 31 October 2017 from DTS Group QLD Pty Ltd detailing the original encroachment of the roofed patio over boundary onto Lot 2 RP74633, 155 Main Street, Wavell Heights;
2. Letter dated 13 May 2019 from Andrew Lennox of Lennox Planning and Development to the Tribunal addressing section 33 (alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) of the *Building Act 1975*, in relation to the following reasons for refusal:
  - The purpose overall outcome 5a and 5d of the Low Density Residential Zone Code; and
  - The purpose overall outcome 2b and 2d of the Dwelling House (Small Lot) Code.
3. Letter dated 16 May 2019 from Council to the Tribunal addressing section 33 (alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) of the *Building Act 1975*, in relation to the following reasons for refusal:
  - The purpose overall outcome 5a and 5d of the Low Density Residential Zone Code; and
  - The purpose overall outcome 2b and 2d of the Dwelling House (Small Lot) Code.

**Verbal submissions at the Hearing**

The parties to the Appeal and the adjoining neighbour were given leave at the Hearing by the Tribunal to provide verbal submissions.

The parties to the Appeal reiterated their written submissions to the Tribunal and the adjoining neighbour stated that they had no objections to the roofed patio in its present location.

### **Findings of Fact**

1. The subject site is a 405m<sup>2</sup> allotment located at 71A Newman Road, Wavell Heights, Brisbane and is zoned Low Density Residential Zone under the Brisbane City Plan 2014;
2. The allotment is rectangular in shape with a street frontage of 9.435m and is not constrained by any infrastructure or easements;
3. The allotment was created in December 1923;
4. The following buildings were noted onsite at the Hearing:
  - A detached dwelling;
  - A sail structure at the front of dwelling i.e. carport; and
  - A Class 10a roofed patio at the rear of the dwelling, the subject of the Appeal.
5. Council issued a Preliminary Approval for Building Work for the existing dwelling on the site in November 2003 and at the time of its approval included an open roofed veranda at the rear of the dwelling with a 6m setback from the eastern rear boundary. It was noted at the Hearing that the roofed veranda had been fully enclosed without a Development Approval for Building Work having been obtained. The Appellant advised that this work had been carried out prior to his purchasing the property;
6. The Class 10a roofed patio the subject of the Appeal had been built without the required development approvals having been obtained sometime between 2009 and 2011.

### **Application Process**

1. In September 2017 the Appellants received a letter from Council (dated 25 September 2017, reference 6838244) regarding a Class 10a roofed veranda at the rear of the property. The letter stated:

*Council has been contacted regarding building work on your premises at the above address. Concerns have been raised that a roofed deck has been constructed on your premises without the necessary building approvals having been obtained.*
2. The Class 10a roofed patio triggered a Development Approval for Building Work as the building did not comply with the following Acceptable Outcomes of the Brisbane City Planning Scheme 2014, Dwelling House (Small Lot) Code 9.3.8.1, Table 9.3.8.3, namely:
  - AO2(a)(ii), AO2(b) and AO7(a), AO7(c) which states:

*Development results in a minimum rear boundary setback that is:*  
*(a) 6m, where on a lot with an average depth of more than 25m;*
  - AO8(a) which states:

*Development results in a maximum site cover of:*  
*(a) 50% where the lot is 400m<sup>2</sup> or more;*
  - AO10 which states:

*Development results in a combined total length of the building or building components of a dwelling house, secondary dwelling and domestic outbuilding that does not exceed 25m.*

3. In October 2018 the Appellants lodged a Development Application for Building Work Assessable Against the Planning Scheme with the Council for the retrospective dwelling house extension (roofed patio and shade sail poles).
4. On 31 October 2018 the Council issued an Information Request to the Appellants stating:
 

*The proposal in its current form, is unlikely to be supported due to the development impact on adjoining residential amenity. Accordingly, a significantly greater rear boundary setback is required.*
5. On 2 November 2018, the Appellants responded to the Council Information Request of 31 October 2018.
6. On 10 December 2018 the Council issued a Decision Notice, approving the shade sail poles at the front of the dwelling and refusing the roofed patio on the basis that it did not, and could not be conditioned to meet, the requirements of the Brisbane City Plan 2014, namely:
  - The purpose overall outcome 5a and 5d of the Low Density Residential Zone Code;
  - The purpose overall outcome 2b and 2d of the Dwelling House (Small Lot) Code; and
  - The performance outcome PO2 and PO7 of the Dwelling House (Small Lot) Code.
7. On 11 January 2019 the Development Tribunal received an application for appeal Form 10 from the Appellants.

### **Relationship Between QDC and Brisbane City Plan 2014**

Section 33 (alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) of the *Building Act 1975* 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 Queensland Development Code's for boundary clearance and site cover. Namely:

#### **33 Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings**

- (1) This section applies for work (**relevant work**) that—
  - (a) is building assessment work or accepted building work; and
  - (b) is for a single detached class 1 building or a class 10 building or structure located on the same allotment as a single detached class 1 building.
- (2) A planning scheme or PDA instrument may include provisions (**alternative provisions**) that, for relevant work, are alternative or different to the QDC boundary clearance and site cover provisions.
- (3) However, a planning scheme or PDA instrument may include alternative provisions only if the provisions are a qualitative statement or quantifiable standard.
- (4) If there are alternative provisions for relevant work, the QDC boundary clearance and site cover provisions only apply to the extent the alternative provisions do not apply to the work.
- (5) Alternative provisions can not be made other than under a planning scheme or PDA instrument.
- (6) In this section—

**PDA instrument** means a relevant development instrument for a priority development area, made under the *Economic Development Act 2012*.

**qualitative statement** means a statement about a performance or outcome sought to be achieved when applicable buildings or structures are completed.

**quantifiable standard** means a standard that achieves a performance or outcome sought under a qualitative statement.

At the Hearing the issue of the relationship between the Queensland Development Code MP1.1 (Design and siting standards for single detached housing on lots under 450m<sup>2</sup>) (QDC MP1.1) and the Brisbane City Plan 2014 was discussed.

It was noted that the Class 10a roofed patio did not comply with the following Acceptable Outcomes of the Brisbane City Planning Scheme 2014, Dwelling House (Small Lot) Code 9.3.8.1, Table 9.3.8.3, which in turn triggered the Development Application for Building Work Assessable Against the Planning Scheme namely:

- AO2(a)(ii), AO2(b) and AO7(a), AO7(c) which states:  
*Development results in a minimum rear boundary setback that is:*  
*(b) 6m, where on a lot with an average depth of more than 25m;*
- AO8(a) which states:  
*Development results in a maximum site cover of:*  
*(b) 50% where the lot is 400m<sup>2</sup> or more;*
- AO10 which states:  
*Development results in a combined total length of the building or building components of a dwelling house, secondary dwelling and domestic outbuilding that does not exceed 25m.*

The Tribunal notes that AO2(a)(ii), AO2(b), AO7(a), AO7(c) and AO8(a) are alternative provisions to the QDC MP1.1, but AO10 is not. Table 1.6.1 (Building assessment provisions in the planning scheme for an assessment manager) of the Brisbane City Plan 2014 also confirms this position.

As per section 33(3) of the *Building Act 1975* an alternative provision within a planning scheme must be written as a qualitative statement or quantifiable standard defined with reference to a qualitative statement.

The Tribunal accepts that AO2(a)(ii), AO2(b), AO7(a), AO7(c) and AO8(a) have been written in the Dwelling House (Small Lot) Code in a format that meets the requirements of section 33 of the *Building Act 1975* namely they include an acceptable measure and a performance outcome.

However, the Tribunal notes that as part of the reasons for refusal the Council used the following overall outcomes of the Brisbane City Plan 2014, namely:

- The purpose overall outcome 5a and 5d of the Low Density Residential Zone Code; and
- The purpose overall outcome 2b and 2d of the Dwelling House (Small Lot) Code.

The Tribunal notes that these provisions of the Brisbane City Plan 2014 do not incorporate an acceptable measure and performance outcome and as such do not meet the provisions or the intent section 33 of the *Building Act 1975*.

The Tribunal also noted that the Decision Notice and the Assessment Report issued by the Council refusing the roofed patio, made no reference to Performance Outcome 10, as part of the reasons for refusal.

As such the Tribunal is of the opinion that the reasons for the Council refusal of the roofed patio relates only to the alternative provisions of the QDC MP1.1 namely: the allotment site cover and the rear boundary setback.



Given the above the Tribunal has only given consideration to the reasons for refusal that meet the provisions of the section 33 of the *Building Act 1975* namely AO2(a)(ii), AO2(b), AO7(a), AO7(c) and AO8(a).

It is noted that even if the tribunal were to consider and decide the 'overall outcomes' (*i.e.* 5a and 5d of the Low Density Residential Zone Code and 2b and 2d of the Dwelling House (Small Lot Code)) aspects and find in favour of the appellants on those aspects, the final outcome of this appeal, as set out below, would remain the same.

### **Reasons for the Decision**

The Committee confirms the decision of the Assessment Manager to refuse the Class 10a roofed patio for the following reasons:

The Tribunal is of the opinion that the development does not comply and cannot be conditioned to comply with the Performance Outcomes of the Brisbane City Planning Scheme 2014, Dwelling House (Small Lot) Code 9.3.8.1, Table 9.3.8.3, namely the development does not comply with the relevant acceptable outcomes, nor the following performance outcomes:

#### **PO2(b)**

The proposed roofed patio creates an overbearing development for adjoining dwelling houses and their existing and future private open space due to its bulk, scale and close proximity to the rear boundary.

#### **PO2(c)**

The proposed roofed patio will impact on the amenity and privacy of residents in adjoining dwelling houses due to its bulk, scale and close proximity to the rear boundary.

#### **PO2(e)**

The proposed roofed patio will impact on the natural light, sunlight and breezes of residents in adjoining dwelling houses due to its close proximity to the rear boundary.

#### **PO7(a)**

Due to the size and location of the existing dwelling on the allotment, the roofed patio takes up the only area on the site that is suitable to provide open space and landscaping.

#### **PO7(b)**

The proposed roofed patio will impact on the amenity and privacy of residents in adjoining dwelling houses due to its close proximity to the rear boundary.

#### **PO7(c)**

The proposed roofed patio will impact on the natural light, sunlight and breezes of residents in adjoining dwelling houses due to its close proximity to the rear boundary.

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**Richard Prout**  
**Development Tribunal Chair**  
**Date: 10 June 2019**

## **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:

The Registrar of Development Tribunals  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**

**Email: [registrar@hpw.qld.gov.au](mailto:registrar@hpw.qld.gov.au)**