



Development Tribunal – Decision Notice

Planning Act 2016, Section 229

Appeal Number:	21-025 - 2021
Appellant:	Ian Michael Kirby and Annette Susan Kirby
Respondent (Assessment Manager):	Alister Marr, Fastrack Building Certification
Co-respondent (Referral Agency):	Sunshine Coast Regional Council (SCRC)
Site Address:	9 Parkway Drive, Mooloolaba - the subject site

Appeal

Appeal under section 229 and schedule 1 of the Planning Act 2016 (PA) against the refusal of an Application for approval for Building Work for additions to a Dwelling House (Patio) against the refusal of the Respondent, as directed by the Referral Agency, Sunshine Coast Regional Council (SCRC). Council stated that the Patio does not meet Queensland Development Code (QDC), namely performance criteria P2 (b): Allow adequate light and ventilation to habitable rooms of buildings on adjoining lots and performance criteria P2 (c): Do not adversely impact on the amenity and privacy of residents on adjoining lots.

Date and time of hearing:	10:30am, 23 September 2021
Place of hearing:	The subject site
Tribunal:	Adjunct Professor Victor Feros OAM – Chair Catherine Brouwer - Member
Present:	<u>For the Appellant:</u> Ian and Annette Kirby <u>For the Co-Respondent:</u> Kristy Lamb – Sunshine Coast Regional Council Mitchell Schwieso – Sunshine Coast Council

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 dated 22 April 2021 with another decision, namely to approve the additions to a Dwelling House (Patio), subject to a minimum side boundary setback of 1.0 metre, any external patio lighting is to be downward directed, the edge landscaping between the patio structure and the adjoining residence is to be provided with appropriate plant species and treatments and subject also to such other reasonable and relevant conditions as may be imposed by the assessment manager.

Background

1. The subject site; described as Lot 29 on RP92601, situated at 9 Parkway Drive, Mooloolaba Q4557, has an area of 587m², with frontages to Parkway Drive (approximately 32m) and to Anthony Avenue (approximately 18.3m).
2. The site is developed as a single-level detached house, with an unenclosed patio (attached) adjacent to 23 Anthony Avenue. The patio is setback 450mm from the eastern boundary.
3. It is proposed to demolish the existing patio and to replace it, with an identical setback. There is no record of any approval having been granted for the existing patio.
4. Refusal of the subject application was decided by the Co-Respondent to the Assessment Manager on 17 February 2021. Subsequently, on 22 April 2021, the Assessment Manager refused the Application.
5. An appeal to the Development Tribunal was duly instituted.

Jurisdiction

6. This Appeal has been made under section 229 of the PA, as a matter that may be appealed to a Tribunal.
7. Schedule 1 of PA, section 1(2) however states Table 1 may apply to a Tribunal only if the matter involves one of the circumstances set out in paragraphs (a) to (l) of that section. Paragraph (g) of section 1(2) states: "a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under the Act that may or must be decided by the Queensland Building and Construction Commission".
8. The Tribunal has determined 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 section 33 of the Building Act 1975, which allows alternative provisions to QDC boundary clearance and site cover provisions for particular buildings.
9. The 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.
10. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

11. Section 246 of the PA provides as follows:

The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.

The person must give the information to the registrar within 10 business days after the registrar asks for the information.

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.

12. Section 254 of the PA deals with how an Appeal such as this may be decided and the first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal (not relevant here) and 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.

Material Considered

The material considered in arriving at this decision comprises:

1. Proposed patio plans prepared by Altec - Proposed Patio identified as Job No. 131867E Drawing Nos. 001A, 002B and 003C issued 22 October 2020.
2. Referral Agency Response dated 17 February 2021 directing refusal.
3. Fastrack Building Certification (Assessment Manager) Decision Notice refusing the Application (Project No. 20201443) dated 22 April 2021.
4. Form 10 – Appeal Notice, grounds for Appeal and correspondence accompanying the Appeal lodged with the Tribunals Registrar, received 13 May 2021.
5. Google and Queensland Globe view images.
6. Planning and Development Online information for the subject site.
7. The Planning Act 2016 (PA)
8. The Planning Regulation 2017 (PR)
9. The Development Application Rules
10. The Building Act 1975 (BA)
11. The Building Regulation 2006 (BR)
12. The Queensland Development Code (QDC) Part MP1.2
13. The Sunshine Coast Planning Scheme 2014 (SCPS)

13. Documents provided by Sunshine Coast Regional Council in response to request of the Tribunals Registrar, 27 September 2021, comprising
 - 14.1 Letter of Support, Brett Stanford, formerly 23 Anthony Avenue, 6 May 2020
 - 14.2 Information Request, Referral Agency, 14 December 2020
 - 14.3 Response to Information Request, 6 January 2021
 - 14.4 Show Cause Notice, notified 2 March 2021
 - 14.5 Letter of Objection, 29 March 2021
 - 14.6 Enforcement Notice, notified 9 April 2021
14. Exhibit A, tabled at the Hearing by the Applicants, comprising 14 photographs of the existing patio, dated 9 March 2021.
15. Series of five (5) photographs provided by Catherine Brouwer, Tribunal Member, 23 September 2021.

Findings of Fact

16. The Hearing of the Appeal was held at the Appellant's residence, the subject site, on 23 September 2021.
17. The originally proposed side boundary clearance of 450mm to 23 Anthony Avenue is considered to be insufficient, and does not meet the relevant performance criteria of the applicable Queensland Development Code, namely
 - 1) Performance Criterion P2(b)
"Allow adequate light and ventilation to habitable rooms of buildings on adjoining land"
 - 2) Performance Criterion P2(c)
"Do not adversely impact on the amenity and privacy of residents on adjoining lots"
18. An increase of the side boundary clearance to minimum 1.0m is considered to be sufficient to demonstrate the potential for compliance with the stated performance criteria, particularly having regard to matters including overshadowing and adequate access to light to habitable rooms in the adjoining building at 23 Anthony Avenue, and having regard to noise and night-time noise impacts.
19. Any proposed lighting of the patio must not be directed at the adjoining property and must be downward-facing and not in any way intrusive.
20. Any intervening space between the patio and the property boundary should be landscaped to the extent practicable with plant species selected to enhance softening of any adverse neighbour impacts, however maintaining adequate access to light.
21. Evidence of the Co-Respondent Council was adduced to the effect that a setback from adjoining property boundary to the east of a new patio roof structure set to a minimum of 1 metre would be acceptable in this instance, having regard to all physical and amenity considerations.
22. The Tribunal, responding to section 254(3) "*Deciding Appeals to Tribunal*" of the Planning Act determines that such proposed change, as consequence of the plans to be amended, is a "*Minor Change*", as defined in the Act, as the change does not result in a substantially different development, would not cause the inclusion of a prohibited development or cause referral to a referral agency or an additional referral agency or cause public notification if public notification were not required for the development application.

Reasons for the Decision

23. The Tribunal finds that the design of the proposed patio, providing for a 1.0m minimum side boundary clearance to 23 Anthony Avenue would be in keeping with the existing house on the subject site, effecting enhanced amenity to its residents.
24. The Tribunal finds that the amenity of the adjoining house at 23 Anthony Avenue would not be adversely affected provided that a side boundary clearance of a 1.0m minimum is imposed upon any proposed patio.
25. In particular the Tribunal finds that the patio, as amended, would not result in undesirable overshadowing of the neighbouring dwelling, would not prevent adequate access to light and would not have the potential to impact adversely upon the amenity of residents on the adjoining lot.
26. Having regard to the above and foregoing, the Tribunal finds that the development of a patio, with increased side boundary clearance to 23 Anthony Avenue, from 450mm to 1.0m meets the relevant requirements of the Queensland Development Code, MP1.2 – Design and Siting Standard for single detached housing – on lots 450m² and over, Performance Criteria P2 (b) and (c).
27. Any external patio lighting must be downward directed; and
28. Edge landscaping between the patio structure and the adjoining residence is to be provided with appropriate plant species and treatments.

Professor Victor Feros OAM

Development Tribunal Chairman

Date: 19 November 2021

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

Email: registrar@hpw.qld.gov.au