



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-038
Appellant:	Gemeah Louise Howarth
Assessment Manager:	Joshua Reade of Building Certification Consultants Pty Ltd
Concurrence Agency:	Brisbane City Council
Site Address:	5 Twenty-Second Avenue, Brighton, formally described as Lot 5 on S2750 ('the subject site')

Appeal

Appeal under section 229 and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1(a), of the *Planning Act 2016* ("the PA") against the assessment manager's refusal of the appellant's development application, made under section 51 of the PA for a building works development permit for a new car port and storeroom within the subject site ("the application").

Date and time of site inspection:	Thursday 18 February 2021 at 11:00am
Place of hearing:	Subject Site
Tribunal:	Neil de Bruyn – Chairperson Dr Christopher Robertson – Member
Present:	Gemeah Howarth – appellant Joe McShane – Council Representative Hubert Toś – Council Representative

Decision

The Development Tribunal ('the tribunal'), in accordance with section 254(2)(d) of the *Planning Act 2016* ('the PA'), **sets aside** the decision of the assessment manager to refuse the application, and orders the assessment manager to:

- Remake the decision within 20 business days of the date of this decision notice; and
- if applicable, to include the following additional condition in any development permit thus given:

The building works are to be generally in accordance with the following drawings:

Author	Drawing No.	Sheet No.	Revision	Date
Wink and Co	233-18	1/12	C	19/02/21

Author	Drawing No.	Sheet No.	Revision	Date
		2/12	C	19/02/21
		7/12	C	19/02/21
		8/12	C	19/02/21
		9/12	C	19/02/21
		10/12	C	19/02/21
		11/12	C	19/02/21

Background

1. The appellant made the application to the assessment manager under section 51 of the PA, for a building works development permit for the construction of a Class 10a building, comprising of a two-bay carport and storeroom, to be located within the south-eastern corner of the subject site.
2. The proposed building was to be sited to zero setbacks (as measured to the outermost projections) to the frontage of the subject site to Twenty-Second Avenue and to the eastern side boundary of the subject site. The proposed building was to be 6m wide along the frontage and 8.94m long along the eastern boundary of the subject site. On the original plans for the proposed building, no dimension was given for the maximum height measured to the ridgeline of the roof, but this is estimated to be approximately 4.5m.
3. Pursuant to schedule 9, part 3, division 2, table 3 of the Planning Regulation 2017 (“the PR”), the application required referral to Brisbane City Council (“Council”) as a concurrence agency in relation to the design and siting of the proposed building. The application was duly referred to Council and such referral included a signed confirmation from the landowner of the adjoining property immediately to the east (and most affected by the proposed building) that he had no particular concerns regarding the proposed development.
4. In a notice dated 18 November 2020, Council directed the assessment manager to refuse the application, on the following stated grounds:
 - a) The proposed building was not considered to be compliant with the purpose of the relevant part of the Queensland Development Code (“QDC”), being Part MP1.2, to provide good residential design with an acceptable amenity to residents.

In particular, Council’s notice stated that the double-width carport, together with an existing single-bay carport within the subject site also located to a zero front setback, would create an unacceptable bulk to the streetscape, which would not provide good residential design within a low-density neighbourhood. The notice went on to state that the proposed development would be inconsistent with residents’ expectations that any given site would have only one carport within the front setback area and would not create an acceptable amenity for residents of the area.
 - b) The location of the proposed building would fail to achieve relevant performance criteria of the QDC to facilitate an acceptable streetscape, in relation to its bulk, road boundary setback, impacts on the outlooks and views of neighbouring residents and nuisance and safety to the public.
5. The assessment manager duly issued a decision notice dated 8 December 2020, refusing the application. The sole reason given for this decision was that it was based on Council’s concurrence agency response. No other reasons for this decision are reflected on the decision notice.
6. On 9 December 2020, the appellant lodged this appeal against the decision of the assessment manager to refuse the application. The appellant lodged a lengthy statement of the grounds of appeal, individually addressing the Council’s reasons for directing the

refusal of the application and including a range of photographs of double carports within the local and wider area, similarly located on lot frontages or within the usual 6m front setback area. For reasons that will become clear later herein, it is not considered necessary to detail the appellant's grounds of appeal.

7. A site inspection and hearing were held by the tribunal on the subject site on Thursday, 18 February 2021. At the inspection and hearing, the representatives of Council proposed an alternative design of the proposed building that Council would be prepared to support. In particular, the alternative design was to entail the following design changes:
 - a) Deletion of the attached storeroom;
 - b) deletion of the walls enclosing the northern (rear) and eastern sides of the proposed carport; and
 - c) a reduction in the height of the proposed garage door to the carport, to a maximum of 2.4m.
8. On 23 February 2021, the tribunal issued the following directions to the parties:

At the hearing of this appeal on 18 February 2021, the representatives of the Brisbane City Council ("Council") proposed an alternative development design for the proposed carport, which Council would support. This proposal involved making the following amendments to the development proposal under appeal:

- *Deletion of the attached storeroom;*
- *deletion of the walls enclosing the northern (rear) and eastern (side) of the proposed carport; and*
- *reduction in the height of the proposed garage door to a maximum of 2.4m.*

The tribunal invites the appellant, Ms Gemeah Howarth, to consider the Council's above-mentioned proposal and to provide written confirmation to the Registrar as to whether or not she agrees to the Council's proposed amendments, as outlined above. In the event that the appellant agrees to make the amendments proposed by Council, the development plans are to be amended accordingly.

*The appellant's written response, including the amended plans (if applicable), is to be submitted to the Registrar by **4:00pm on Friday 5 March 2021**. The Registrar will then forward a copy of the appellant's submissions to the Council for information.*

9. The appellant's response to the tribunal's above-mentioned directions was received by the registrar on 23 February 2021. The response included a letter of acceptance (of the proposed design amendments) and an amended set of design plans (including those listed in the Decision above) reflecting these design amendments.
10. By email on 10 March 2021, Council advised the tribunal that, having reviewed the amended plans and been satisfied that its concerns had been satisfactorily addressed, it raises no objections to the proposed development as amended.

Jurisdiction:

11. Section 229(1) of the PA provides that Schedule 1 ("the schedule") of the PA states the matters that may be appealed to a tribunal.
12. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule ("Table 1") are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in section 1(2).

13. Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the Building Act 1975, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission. Table 1 thus applies to the tribunal in this appeal.
14. Item 1(a) of Table 1 provides that an appeal may be made to a tribunal against the refusal of all or part of a development application.
15. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision Framework:

16. For this appeal, the onus rests on the appellant to establish that the appeal should be upheld (section 253(2) of PA).
17. 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.
18. 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

19. The following hardcopy material:
 - a) 'Form 10 – Notice of Appeal' lodged by the appellant with the tribunal's registrar on 9 December 2020, and the following attachments:
 - i. Appellant's statement of 30 November 2020, outlining the grounds of appeal, and associated attachments,
 - ii. a copy of the assessment manager's decision notice dated 8 December 2020, refusing the application,
 - iii. a copy of Council's referral agency response dated 18 November 2020, directing the refusal of the application,
 - iv. a copy of the completed Brisbane City Council concurrence agency application form dated 26 August 2020, identifying that the neighbouring landowner at 7 East Avenue, Brighton had reviewed the design plans of the proposed development and had no concerns with the proposals,
 - v. a copy of the DA Form 2 for the application,
 - vi. a set of the design plans that accompanied the application.
 - b) Written submissions and attachments, made in response to the tribunal's directions of 23 February 2021, received from the appellant on 23 February 2021.
 - c) Email dated 10 March 2021 in response to the tribunal's directions of 23 February 2021, received from Council on 10 March 2021.
 - d) The *Planning Act 2016* and *Planning Regulation 2017*.
 - e) The Queensland Development Code, Part MP1.2.
 - f) Development Assessment Rules (Version 1.3, commenced 11 September 2020).

Findings of Fact

- 20.** The tribunal finds that the parties have agreed on an amended design that the appellant has agreed to proceed with, and that Council has no objections to. This amended design is as shown on the amended design plans listed above under the tribunal's Decision.
- 21.** The tribunal also finds that the assessment manager's decision to refuse the application was based solely on Council's referral agency response, and that no other reasons for this decision were reflected in the decision notice.
- 22.** The tribunal finds further that the change to the proposed development constitutes a minor change, as defined under the PA, for the following reasons:
 - a) The changes do not result in a substantially different development, insofar as the criteria set out in schedule 1 of the Development Assessment Rules (Version 1.3, commenced 11 September 2020) are concerned.
 - b) The changed application would not cause the inclusion of prohibited development, require referral to any extra referral agencies, introduce any additional referral agency assessment matters or require public notification of the changed application.

Reasons for the Decision

- 23.** The tribunal, in accordance with section 254(2)(d) of the PA, has decided this appeal as set out under the heading 'Decision' at the beginning of this decision notice.
- 24.** The reasons for this decision are:
 - a) The parties are in agreement regarding the amended design of the proposed building;
 - b) the tribunal has reconsidered the evidence that was before the assessment manager at the time of his decision on 8 December 2020 and also the proposed minor changes as put forward by the appellant and agreed to by Council and considers that the proposed development satisfies performance criterion P1 under QDC Part MP1.2, in that the proposed building, as amended, will facilitate an acceptable streetscape;
 - c) the change to the application to reflect the agreed, amended design is a minor change as defined under the PA, which therefore satisfies the requirements of section 254(3) of the PA; and
 - d) the assessment manager had no reasons to refuse the application, other than Council's concurrence agency response directing its refusal.

Neil de Bruyn

Development Tribunal Chair

Date: 23 March 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