



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-033
Appellant:	Swardquin Pty Ltd t/as Bundy Sheds
Respondent (Assessment Manager):	Rick Drew of Burnett Country Certifiers
Co- Respondent (Concurrence Agency):	Bundaberg Regional Council (Council)
Site Address:	16 Elkington Avenue, Bargara QLD 4670 and described as Lot 173 on SP102435 (the subject site)

Appeal

Appeal made under Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(a) of the *Planning Act 2016* (PA) against the decision of the Assessment Manager to refuse part of the Development Application (DA), as directed by the Concurrence Agency, in accordance with provisions of Schedule 9, Division 2, Tables 1 and 3 of the Planning Regulations 2017 and Bundaberg Regional Council 'Amenity and Aesthetics, Building Works involving Removal and Rebuilding Policy (November) 2017' (Council Policy).

Date and time of hearing:	Proceedings were decided by the Tribunal on the basis of written submissions received. A hearing was not held.
Place of hearing:	Not Applicable
Tribunal:	John Bright – Chair David Job – Member Kate Isles – Member Kelly Alcorn – Member
Present:	Not Applicable

Decision:

The Development Tribunal (Tribunal), in accordance with Section 254(2)(a) of the *Planning Act 2016* (PA) confirms the decision of the Assessment Manager to refuse that part of Development Application (DA) relating to Structure 1 – Carport.

Background

1. The subject site at 16 Elkington Avenue Bargara (Lot 173 on SP102435) has an area of 791sqm and is zoned 'Low density residential'. The site is a corner allotment with flat topography and

frontages of approx. 39 metres and 20 metres to Elkington Avenue and Baker-Finch Drive, respectively.

The existing residence is single storey, slab on ground construction with flat roof and includes a semi-attached double garage and inground swimming pool. Existing building setbacks are approx. 6 metres and 10 metres from Elkington Avenue and Baker-Finch Drive, respectively. Existing driveway access is off Elkington Avenue, approx. 37 metres back from the streets' intersection. Existing site coverage is approx. 30%.

2. On 23 March 2021, a Development Application (DA4452/21) was received by the Assessment Manager, Mr Rick Drew (Private Building Certifier – A90244, Burnett Country Certifiers). The Applicant was Bundy Sheds (Swardquin Pty Ltd) on behalf of the Owners, Neil and Joanne Engel. The application sought approval to erect two (2) new structures.
 - Structure 1 was an unenclosed double Carport (6000W x 5745D x 3200H) to be erected in front of the existing garage with setbacks of approx. 50mm to the Elkington Avenue frontage and 1500mm to the adjacent side boundary.
 - Structure 2 was an unenclosed Awning (3160W x 7500D x 3000H) being a roofed infill between the existing residence and garage.
3. On 21 April 2021, a Confirmation Notice was issued by the Assessment Manager referring the application to Bundaberg Regional Council (Council) for concurrence agency review of 'Amenity and Aesthetics' and "Design and Siting' matters.
4. On 02 June 2021, Council confirmed its decision that the Assessment Manager be advised as follows –
 - *The approval is only for part of the development being the 24.09m² (7.625m x 3.160m) structure identified as structure 2 on the development application plans. No conditions are imposed in relation to the structure 2; and*
 - *The development relating to structure 1 on the development application plans must be refused.* Council's decision was accompanied by its 'Referral Agency Reasons for Refusal of Structure 1', which included –
 - The proposal failed to meet the Performance Outcome PO1 of Table 5.2 (Domestic Outbuildings) of the Bundaberg Regional Council Amenity and Aesthetics, Building Works involving Removal or rebuilding Policy (November) 2017 on the following grounds:
 - *There are no similar examples of a significantly reduced setback in the immediate vicinity. The area generally consists of single storey detached dwellings with all properties providing setback of approximately 6 metres being consistent with the dwelling located on the site. Council's records indicate there are no approved reduced QDC setbacks issued for any properties along this section of road and it is therefore considered that the proposed structure would introduce an irregular built form outcome and have an unacceptable impact on the streetscape.*
 - *It is considered that the proposed setback of structure 1 would have a detrimental effect on the neighbouring outlook/views, given that the proposed setback is inconsistent with the setbacks of surrounding development, with adjoining dwellings providing a compliant road boundary clearance significantly more than the 0.05m metre setback proposed.*
 - *The Elkington Avenue streetscape and broader locality gives respect to the provisions of the QDC MP1.2 and provides a strong narrative of the prevailing character of the locality; being detached dwelling houses consistent with the 6 metre setback. It is considered that the reduced setback is in contrast with the existing fabric of the neighbourhood, with the proposed location of structure 1 not perpetuating the bet interest and intent of the policy applied to this locality.*
 - *The outlook and views of neighbouring residents will result in a carport imposing on the streetscape while providing for increased vehicle storage within this setback. It is considered that the proposed site has satisfied the provisions of the QDC MP1.2 in its current configuration and with proposed structure 2 in respect to the road frontage setback. The setback of structure 1 would have a negative effect on the neighbouring outlook/views, with increased vehicle storage, exacerbated by the diminished setback proposed.*

- The proposal failed to meet the Queensland Development Code (QDC) MP1.2 Performance Criteria P1 (a), (b), (c) and (d) on the following grounds –
 - *There are no similar examples of a significantly reduced setback in the immediate vicinity. The area generally consists of single storey detached dwellings with all properties providing setbacks of approximately 6 metres being consistent with the dwelling located on the site. Council's records indicate there are no approved reduced QDC setbacks issued for any properties along this section of road and it is therefore considered that the proposed structure would introduce an irregular built form outcome and have an unacceptable impact on the streetscape.*
 - *It is considered that the proposed setback of structure 1 would have a detrimental effect on the neighbouring outlook/views, given that the proposed setback is inconsistent with the setbacks of surrounding development, with adjoining dwellings providing a compliant road boundary clearance significantly more than the 0.05m metre setback proposed.*
 - *The Elkington Avenue streetscape and broader locality gives respect to the provisions of the QDC MP1.2 and provides a strong narrative of the prevailing character of the locality; being detached dwelling houses consistent with the 6 metre setback. It is considered that the reduced setback is in contrast with the existing fabric of the neighbourhood, with the proposed location of structure 1 not perpetuating the best interest and intent of the policy applied to this locality.*
 - *The outlook and vies of neighbouring residents will result in a carport imposing on the streetscape while providing for increased vehicle storage within this setback. It is considered that the proposed site has satisfied the provision of the QDC MP1.2 in its current configuration and with proposed structure 2 in respect to the road frontage setback. The setback of structure 1 would have a negative effect on the neighbouring outlook/views, with increased vehicle storage, exacerbated by the diminished setback proposed.*
5. On 10 June 2021, the Assessment Manager issued a 'Decision notice refusal' advising the Applicant that the development application for proposed Carport (Structure 1) was refused. A separate 'Decision notice approval' was also issued for proposed Awning (Structure 2).
 6. On 29 June 2021, the Tribunal Registrar noted receipt of the fee payable in association with the 'Form 10 – Notice of Appeal'. The actual 'Form 10' was not receipted until 05 July 2021. The grounds for appeal were generally as follows –
 - *The basis of Council's decision is wrong at law as they have included alternative provisions for Design and Siting in an Amenity and Aesthetics Policy (Council Policy) instead of in Council's planning scheme, in accordance with clause 33 of the Building Act 1975.*
 - *.... the proposed development (should be approved because it) complies with the relevant provisions of Part MP1.2 of the Queensland Development Code.*
 7. On 12 September 2021, a Tribunal was established to consider the appeal.
 8. On 25 October 2021, the Registrar advised the Appellant that the Tribunal required a site inspection (together with payment of the relevant fee) in conjunction with a hearing, in order to properly consider the merits of the application. On 02 November 2021, the Appellant responded that – *'...this appeal is based on a point of law that does not require a site visit...we are not willing to pay a fee for an unnecessary site visit'*.
 9. On 15 November 2021, the Registrar again contacted the Appellant restating the Tribunal's requirement for a site inspection (together with payment of the relevant fee). A response was received later that day from the Assessment Manager (Mr Drew) advising that – *'The basis of the Applicants appeal is purely a matter of law that can be determined on the documentation that the tribunal has before it. Nothing identified on site will change the outcome.'*
 10. On 19 November 2021, the Tribunal advised all parties that *'The Tribunal is concerned that, arguably at least, it has no authority to determine this anterior or collateral question of law'* and cited previous cases to support this contention. The Appellant and Respondent (Assessment Manager) were further directed (under section 250 of PA) to provide either separate or joint written submission(s) within fourteen (14) days, as to the authority of the Tribunal to decide the

legal question raised by the Appellant in its Notice of Appeal, having regard to the relevant legislation and case law.

11. On 29 November 2021, a response (Submission 1) was received by the Registry from Mr Drew and provided to the other parties. This advised -
'Clearly the matter to be considered is a question of fact and not law. The FACTS are that BRC must comply with the provisions of Clause 33 of the Building Act 1975..... Review of the BRC planning scheme will confirm that no alternative provisions exist and as such the appeal must be upheld. In addition, nothing is gained by the tribunal putting the applicant to the cost of a site inspection that will result in BRC still having to comply with the Act over and above anything identified on site.'
12. On 03 December 2021, the Tribunal directed Council to provide its written submission within fourteen (14) days as to the authority of the Tribunal to decide the legal question raised by the Appellant in its Notice of Appeal, having regard to the relevant legislation and case law.
13. On 03 December 2021, a response (Submission 2) was received by the Registry from Council and provided to the other parties. This advised twenty (20) points in clarification of Council's understandings with respect to –
 - The Appeal (1-3)
 - The Council's Position (4-14)
 - Anterior or Collateral Questions of Law (15-17)
 - Alternative Provisions for the Purpose of Section 33 of the Building Act 1975 (18-20)
14. On 03 December 2021, Mr Drew (Assessment Manager) contacted the Registry, advising –
'Today is the first time the Applicant has seen the Councils response to the appeal. A number of new matters have been raised that I feel should be addressed by the applicant that will assist the Tribunal in making its decision on this matter. I therefore request the applicant be permitted a further 14 days to respond to the Councils submission.'
The Tribunal agreed to the request and all parties were advised accordingly.
15. On 17 December 2021, a further response (Submission 3) was received from Mr Drew. This advised –
 - *The Applicant agrees that the Tribunal cannot address questions of law... For the purposes of this appeal the Applicant withdraws that aspect of its submission.*
 - *The Applicant has no understanding of why the proposed development was referred to Council for Design and Siting (assessment). The carport achieves the Performance Criteria contained in P1 of Part MP1.2 of the Qld Development Code by complying with Acceptable Solution A1(c).*
 - *'...the Tribunal now only has to determine whether the non-compliance with the Acceptable Outcomes of the councils amenity and Aesthetics policy, in particular that the height of the carport is proposed to be 3200mm instead of the specified 3000mm does or does not achieve the Proposed Outcomes, the Applicant will be willing to drop the height to 3000mm to make it fully compliant with Councils Amenity and aesthetics policy and the matter will be at an end.'*
16. On 10 January 2022, the Tribunal enquired of Council whether it sought to make further comment in relation to Mr Drew's latest submission. Council's request to be allowed until 31 January 2022 to respond was approved.
17. On 27 January 2022, a further response (Submission 4) was received from Council. This advised twenty-three (23) points in support of its conclusion that – *'The appeal should be dismissed'*

Jurisdiction

The Tribunal considers that the original grounds for appeal, contained in the Notice of Appeal (Form 10), sought review of two (2) separate questions –

1. Question of Law, it being contended that Council's decision was wrong at law

2. Question of Merit, it being contended that the proposed development complied with the relevant provisions of Queensland Development Code (QDC) MP1.2

The Tribunal considers that it has no jurisdiction to decide an anterior or collateral question of law and will therefore not comment further on this aspect of the appeal.

The Tribunal has jurisdiction to review the question of merit under Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(a) of the Planning Act 2016 (PA).

Decision Framework

It is noted in this matter -

1. The Appellant must establish that the appeal should be upheld (s. 253(2) of the PA);
2. 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 (s. 253(4) of the PA);
3. The Tribunal may, but need not, consider other evidence presented by a party with leave of the Tribunal or any information provided to the Registrar (s. 253(5) of the PA);
4. The Tribunal must decide the appeal by either confirming, changing, replacing or setting aside the appealed decision (s. 254(2) (a to d) of the PA); and
5. The Tribunal may decide the proceedings on submissions (s249(2) of the PA).

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' and associated grounds of appeal, received by Tribunal Registrar 29 June and 05 July 2021.
2. Development Application (DA4452/21) received by the Assessment Manager on 23 March 2021.
3. Concurrence Agency referral confirmation notice, issued by the Assessment manager on 21 April 2021.
4. Concurrence Agency decision notice issued by Council on 02 June 2021.
5. Decision notice refusal issued by the Assessment Manager on 10 June 2021.
6. Tribunal advise to Appellant on 25 October 2021 requiring site inspection in conjunction with hearing (and payment of relevant fee) subsequently rejected by Appellant on 02 November 2021.
7. Tribunal further advice to Appellant on 15 November 2021 again requiring a site inspection, rejected by Assessment Manager on same day.
8. Tribunal correspondence to all parties on 19 November 2021, setting out bases for concerns that it had no jurisdiction to decide questions of anterior or collateral law and directing the Appellant/Respondent to make written submission(s) as to the authority of the Tribunal to decide the legal question raised by the Appellant.
9. 'Submission 1' to the legal question, received from the Assessment Manager on 29 November 2021.
10. 'Submission 2' to the legal question, received from Council on 03 December 2021.
11. 'Submission 3' in response to 'Submission 2', received from Assessment Manager on 17 December 2021.
12. 'Submission 4' in response to 'Submission 3', received from Council on 27 January 2022.
13. Tribunal advice to all parties on 04 February 2022 that the appeal was to be decided on the basis of submissions received and that a hearing would not be held.
14. Bundaberg Regional Council Planning Scheme 2015.
15. Bundaberg Regional Council 'Amenity and Aesthetics and Building Work involving Removal or Rebuilding Policy (November) 2017'.
16. Queensland Development Code Mandatory Part – MP1.2.
17. Planning Act 2016
18. Planning Regulation 2017.
19. Building Act 1975.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The Applicant (on behalf of the Owner) sought approval to erect two (2) new structures, being –
 - Structure 1 – An unenclosed, double carport (6000W x 5745D x 3200H) to be sited in front of an existing garage with setbacks of 50mm and 1500mm to the adjacent street frontage and side boundary respectively.
 - Structure 2 – An unenclosed infill roof awning (3160W x 7500D x 3000H) sited between the existing residence and existing garage.
2. The application part relating to Structure 2 was approved by the Assessment Manager with conditions.
3. The application part relating to Structure 1 was refused by the Assessment Manager as directed by the Concurrence Agency (Council).
4. 'Form 10 – Notice of Appeal' was received by the Tribunal within twenty (20) business days of issuing of Decision notice refusal (Carport) Structure 1. Stated grounds for appeal were generally as follows –
 - *The basis of Council's decision is wrong at law as they have included alternative provisions for Design and Siting in an Amenity and Aesthetics Policy (Council Policy) instead of in Council's planning scheme, in accordance with clause 33 of the Building Act 1975.*
 - *..... the proposed development (should be approved because it) complies with the relevant provisions of Part MP1.2 of the Queensland Development Code.*
5. The Tribunal held concerns that it lacked jurisdiction to decide the legal question raised in the Notice of Appeal. Accordingly Appellant/Respondent and Concurrence Agency were each directed to provide written submissions as to the authority of the Tribunal to decide an anterior or collateral matter of law.
6. 'Submission 1' (received from Mr Drew) was considered a somewhat emotive response that generally restated the position of the Appellant/Respondent, but did not address the specific matter of the Tribunal's authority to decide.
7. 'Submission 2' (received from Council) was considered a comprehensive response that sought to explain particulars of the referral assessment process and the reasoning for Council's position that – *'...there is no necessity for the Tribunal to decide any anterior or collateral question of law about whether or not the Council has treated the provisions in its Amenity and Aesthetics, and Building Work Involving Removal or Rebuilding Policy as alternative provision for design and siting. The simple answer is that the Council has not done so.'*
8. 'Submission 3' (received from Mr Drew) was considered a re-assessment of the Appellant/Respondent position after consideration of explanations presented in Council 'Submission 2'. The Tribunal was advised that –
 - *'The Applicant agrees that the Tribunal cannot address questions of law...'*
 - *For the purposes of this appeal the Applicant withdraws that aspect of its submission.*
 - *'The carport (proposed Structure 1) achieves the Performance Criteria contained in P1 of Part MP1.2 of the Qld Development Code by complying with Acceptable Solution A1(c).*
 - *'...the Applicant will be willing to drop the height (of proposed Structure 1 – Carport from 3200mm) to 3000mm to make it fully compliant with Councils Amenity and Aesthetics policy and the matter will be at an end.'*
9. 'Submission 4' (received from Council) was considered a substantial restatement of the Council position but expanded upon to express concerns that having agreed that the Tribunal had no jurisdiction to decide the legal matter – *'The Appellant now seeks through its additional written submissions, dated 17 December 2021, to agitate new issues not articulated in the Grounds of Appeal. This is notwithstanding that the Appellant does not seek the Tribunal's leave to amend*

the Grounds of Appeal (nor does it seek to rely upon amended Grounds of Appeal as none have been provided). The Appellant simply makes alternative arguments for why its appeal should be upheld.'

10. The Tribunal, on two (2) separate occasions (25 October 2021/15 November 2021), advised the Appellant that a site inspection (including payment of the relevant fee) was required to allow proper re-consideration of the evidence that was before the Assessment Manager. In both instances the Tribunal's request was declined.

Reasons for the Decision

After reconsideration of such of the available evidence as was before the person who made the decision appealed against, the Tribunal now confirms the decision of the Assessment Manager to refuse that part of Development Application (DA) relating to Structure 1 – Carport.

The Tribunal's rationale for its decision is as follows -

1. The Tribunal considers that it has no jurisdiction to decide an anterior or collateral question of law. This contention was ultimately agreed by all parties.
2. The Tribunal considers that the Concurrence Agency (Council), in its Referral Notice of 02 June 2021, provided comprehensive grounds for its assessment that the proposed Carport (Structure 1) failed to meet either –
 - The Performance Outcome PO1 of Table 5.2 (Domestic Outbuildings) of the Bundaberg Regional Council Amenity and Aesthetics, Building Works involving Removal or Rebuilding Policy (November) 2017; or
 - Queensland Development Code (QDC) MP1.2 Performance Criteria P1(a), (b), (c) and (d).
3. The Tribunal considers that the Appellant/Respondent (Mr Drew) in 'Submission 3' of 17 December 2021 failed to substantiate the fact of its assertions that –
 - *'The carport (Structure 1) achieves the Performance Criteria contained in P1 of Part MP1.2 of the Qld Development Code by complying with Acceptable Solution A1(c)'*
 - *'.....the Tribunal now only has to determine whether the non-compliance with the Acceptable Solutions of councils Amenity and Aesthetics policy, in particular that the height of the carport is proposed to be 3200mm instead of the specified 3000mm does or does not achieve the Proposed (Performance) Outcomes, ...'*
4. After consideration of submissions, the Tribunal is of the view that the Appellant has not discharged its onus of establishing that the Assessment Manager's decision, as directed by Council in its role as Concurrence Agency, ought to be altered in any way.

John Bright

Development Tribunal Chair

Date: 17 February 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:

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