



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-046
Appellant: (Applicant)	Andrew Hodges – ATH Projects
Respondent: (Assessment Manager)	Luke Owen-Jones of EarthCert, Private Certifier
Co-respondent: (Referral Agency)	Sunshine Coast Regional Council
Site Address:	120 Tepequar Drive, Maroochydore described as Lot 99 on RP 861880 – the subject site

Appeal

Appeal against the refusal of a Development Permit (CAR 21/047) for dwelling house extension for Building Work for a Class 10a structure, being a roofed BBQ area and fence.

That decision followed a referral agency response by the Sunshine Coast Regional Council, directing refusal of the application on the grounds that it does not comply with the performance criteria for buildings and structures to be adequately set back from canals and other artificial waterways and water bodies and the performance criteria not to adversely impact the amenity and privacy of residents on adjoining lots.

Date and time of hearing:	Tuesday 23 November 2021 at 2.00 pm
Place of hearing:	The subject site
Tribunal:	Derek Kemp – Chair Catherine Baudet – Member
Present:	Tracy Ryan (Town Planner) – agent representing the Appellant pursuant to s. 248 of the Planning Act and representing Perpetual Trustees the Trustee for the owner (Lachlan Felber) Luke Owen-Jones (EarthCert Building Approvals) – Respondent Certifier, Assessment Manager (excused himself and left early at 2.25pm) Ray Ward – Builder Jason Ward – Builder Dean Felber – Property Owner's Representative Tracey Douglas - Planner, Sunshine Coast Regional Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (Planning Act) replaces the decision to refuse the application with a decision approving the proposed development, provided it is amended in scope so as to conform with the plan Blackburn and Jackson Design 'Roof Plan/Elevations/Section - BBQ' (4608 AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 and subject to any reasonable further conditions imposed by the assessment manager to ensure compliance with the building assessment provisions under the Building Act.

Background

The Proposal

1. The subject site is rectangular and flat having an area of 826 square metres with a river canal meeting its rear boundary. The lot has been developed for residential purposes with a two storey detached house with garage and associated improvements such as fencing, landscaping, paving, pool and a pontoon with access ramp extending onto the Maroochy River canal system.
2. The proposed covered BBQ area was documented as 5.0 metres long running along the proposed property boundary masonry wall (as viewed from the adjoining property) and 3.6 metres deep with a maximum height of 2.79 metres (providing a covered area of approximately 18 square metres) with a skillion roof sloping at an 3 degree angle away from the proposed masonry wall running along the property boundary (Ward Builder's Plan TE 120 refers).

Previous Approval

3. An existing 'as built' thatched gazebo and stud walls were retrospectively approved within the 4.5 metre set back from the canal boundary by the Maroochy Shire Council on 22 June 2004 (BA 02/0676).
4. This approved gazebo was 'open sided' and set back 700mm from the subject property side property boundary, with a length of 2.63 metres and a depth of 2.63 metres (providing a covered area of approximately 6.92 square metres).
5. The approved gazebo had a pitching height of 2030mm to its eaves, with an equal sided 35 degree, pyramid style, high pitched, thatched roof rising to approximately 3100mm (2030mm pitching height plus 150 rafters and 921mm pitching to its peak).
6. The approved 'existing' 70mm wide stud walls were 1180mm above the deck height.

Actions Since the Previous Approval

7. Evidence was adduced at the Hearing that a 1170mm high boundary fence was constructed above the previously approved retaining wall built to 1800mm (giving a maximum fence and retaining wall height of 2970mm).
8. The existing approved gazebo, stud walls and boundary fence had deteriorated and have been removed (confirmed on-site by the Members at the Hearing).
9. The previous timber deck has been replaced with a concrete deck (finished at a lower RL than the original timber deck).

10. Work commenced on building a masonry boundary wall above the approved retaining wall (presently built to a height of approximately 1480mm above the new concrete deck) and steel support posts have been located in this concrete deck to support the roof of the proposed covered BBQ area (confirmed on-site by the Members at the Hearing).
11. Council contacted the owners and issued an Enforcement Notice after receiving a complaint about the works (confirmed by Council officer at the Hearing).
12. A Building Application was lodged to EarthCert for Additions to a Dwelling (roofed BBQ and Fence).
13. This application (CAR 21/0187) was referred to the Sunshine Coast Council in its role as a 'Referral Agency'.

Refusal of the Application

14. On the 28 May 2021 the Sunshine Coast Regional Council directed refusal of this Building Application (CAR 21/0187) based on non-compliance with the Sunshine Coast Planning Scheme 2014 Dwelling Housing Code (DHC) and the Queensland Development Code (QDC).
15. The relevant 'performance outcomes' of that Dwelling Housing Code (DHC) being:
 - Setbacks to Canals and Artificial Waterways**
 - PO6** Buildings and structures are adequately setback from canals and other artificial waterways or water bodies (e.g. lakes) to:-
 - (b) ensure no unreasonable loss of amenity to adjacent land and dwellings occur having regard to :-
 - privacy and overlooking
 - views and vistas
 - building character and appearance: and
 - (c building massing and scale as seen from neighbouring premises.
16. The relevant 'performance criteria' of the Queensland Development Code (QDC) being:
 - P2 (c)** Do not adversely impact on the amenity and privacy of residents on adjoining lots
17. On 20 July 2021 the private certifier (EarthCert) issued a Decision Notice *refusing* the Building Application (CAR 21/0187) to the applicant (Ward Builders) as directed by Council, stating *inter alia* that the reason for refusal was “.. due to the lack of referral agency support for the reduced side setbacks.” (EarthCert Refusal Letter to Ward Builders dated 20 July 2021).

Grounds for Appeal

18. The Trustee for the Owner (Andrew Hodges, of Perpetual Trustees acting as Trustee for the owner Lachlan Felber) lodged a Form 10 appeal received by the Tribunal Registrar on 18 August 2021 against the Decision to Refuse, stating the grounds for the appeal to be (in summary):
 - a. The structure in question has previously been approved by Maroochy Shire Council (under BA /02/0676 dated 22 June 2004)
 - b. We were purely upgrading the structure due to safety concerns with rotten timber.

Matters Raised at the Hearing

19. During the Hearing the builder (Ray Ward of Ward Builders), agreed and supported by the applicant's representatives, produced a letter on Ward Builder's letterhead with an attached amended plan (TE 120) purporting to be signed by the neighbour at 122 Tepequar Drive, Maroochydore dated 14 April 2021 stating that they 'except' (sic) the proposed covered BBQ area and masonry wall as described in the letter and shown on plan TE 120.
20. The Builder, Ray Ward, stated that the neighbours accepted the proposed full height wall and that they had said they would only sign the letter if the boundary wall was built to the full height of 2.8 metres above the retaining wall and new concrete deck to protect their privacy and provide some reduction in noise from the proposed BBQ area.
21. The Tribunal gave leave for that letter with plans TE 120 (as seen by those attending the Hearing), being admitted into evidence, provided a copy was submitted to the Registry (which it subsequently was on 1 December 2021).
22. Tracy Ryan, the planner for the applicant and owner, advised that she had considered alternative designs if the proposed full height masonry wall was unacceptable. The Chair agreed for this further information to be lodged with the Tribunal Registry within 10 working days of the Hearing. This and further information was lodged by PPlan on behalf of ATH Projects with the Tribunal Registry on 1 December 2021.

Nearby Developments

23. Surrounding development comprises detached houses with ancillary structures and landscaping.
24. Most buildings, on this side of the canal, appear to be set back more than 4.5 metres from their rear boundary to the Maroochy River canal system with boat ramps, landscaping and boundary fencing extending down to the canal at their rear boundary.
25. A concrete boat ramp/slipway abuts the property boundary separating the recreational and pool areas of the neighbouring property (122 Tepequar Drive) from the existing retaining wall and proposed masonry wall on the boundary of the subject site (120 Tepequar Drive).
26. The nearby property at 116 Tepequar Drive appears to have a pyramid roofed gazebo of similar size and location as the gazebo, retrospectively approved but later demolished, at 120 Tepequar Drive. It is not known whether that gazebo at 116 Tepequar Drive was ever approved.

Further Information Requested

27. Prior to the Hearing the Tribunal requested further information to more clearly identify:
 - the nature and extent of the proposed works and approval sought
 - the nature and extent of any previous approval of the previous gazebo and fence.
28. This further information was provided to the Tribunal by letter to the Registry from Andrew Hodges on PPlan letterhead dated 18 November 2021.
29. During the Hearing the Tribunal requested the Council to provide details of the previous approval of the gazebo and fence (if any).
30. This further information was provided to the Tribunal by email to the Registry from Tracy Douglas, Senior Development Planner, on 24 November 2021. This information comprised:

- i. Photographs of the previously approved (now demolished) gazebo. (Identified as the email file 'Photographs of existing approved structure.pdf').
- ii. Approval of previously approved (now demolished) gazebo. (Identified as the email file 'Approval of existing structure bali hut and retaining wall.pdf').
- iii. Aerial photographs of the subject property with previously approved gazebo; the property with the demolished gazebo, and the property with the partly completed works the subject of this appeal. (Identified as the email file 'Nearmap images of approved bali hut and current pdf').
- iv. The amended plan that was considered by Council before directing the refusal. (Identified as Plan TE120, provided in the email file 'Amended plan considered in refusal-120 Tepequar Drive.pdf').
- v. An amended artist's impression of the perspective of the proposed covered BBQ in its recreational and canal setting. Viewed from beyond the existing swimming pool, looking towards the neighbouring property. (Identified as email file 'Amended perspective considered in refusal-120 Tepequar Drive.pdf').
- vi. Council Assessment Report CAR 21-0187. (Identified as email file 'CAR Assessment Report – CAR21 0187.pdf').

31. During the Hearing the Tribunal agreed to the builder providing the letter he tendered for all those at the Hearing to see, purporting to be from the adjoining resident supporting the proposed covered BBQ area and a full height masonry wall up to and marginally higher than the roof of the covered BBQ area (referred to in that letter as TE120 and sketch I).
32. This further information was provided to the Tribunal by email from Andrew Hodges of ATH Projects on PPlan letterhead to the Registry on 1 December 2021.
33. The Tribunal noted that this proposed boundary wall was higher than the wall proposed in previous plans and that the proposed skillion roof shown in plan TP 120 now raked down towards the subject property (whereas it raked down towards the masonry wall in previous plans).
34. The builder explained during the Hearing that was because of the difficulty of collecting and disposing of the storm water from the roof if this was directed towards the masonry wall erected on the property boundary.
35. During the Hearing the Tribunal agreed that the representative for the appellant and owner should be permitted to provide further information in relation to the application and possible alternative building work.
36. This further information was provided to the Tribunal by email to the Registry on 1 December 2021.
37. This information is identified as:
 - A covering letter from Tracy Ryan of Planning Partnership on PPlan letter head (identified as 'Appellant Submission Cover Letter -120 Tepequar Drive.pdf')
 - Amended Plans from Ward Builders (identified as 'Amended Plans – TP120 prepared by Ward Builders and Neighbours.pdf')
 - The email file 'Appellant Submission -120 Tepequar Drive.pdf (with no title and all the pages having the footnote "APPELLANT SUBMISSION 120 TEPEQUAR DR. MAROOCHYDORE PPLAN) ON BEHALF OF ATH PROJECTS")'.
38. After the Hearing the Tribunal requested the respondent, Luke Owen-Jones of EarthCert, to provide a copy of the plans that accompanied the Building Application (CAR 21/0187) submitted to Council for the work that Council, as the Referral Agency, had required the respondent to refuse.

39. A series of fourteen plans and two sketches were provided to the Tribunal in response to this request by email to the Registry from *EarthCert* on 6 December 2021. (These are identified with an asterisk “*” in the section of this decision headed ‘Materials Considered’).

40. The Tribunal noted that some of these plans clearly identified the BBQ area and masonry wall as “*Not Part of Certification*”.

Further Contact With The Parties

41 On the 8 December the Tribunal requested the Registry to advise the parties as follows:

“The Tribunal acknowledges that the previously existing gazebo, with sides of 2360mm and a pyramid roof with a maximum height of approximately 3100mm, set back 700mm from the side property boundary was retrospectively approved by the Maroochy Shire Council on the 22 June 2004 (BA 02/0676).

The Tribunal finds that a covered BBQ area with a low pitched skillion roof which has any part of its structure located within 4500mm of the rear (canal) property boundary that is of a similar size will have less impact than the previously approved gazebo (that has now been demolished), given the considerations set out in:

i. The relevant ‘performance outcomes’ of the Dwelling Housing Code (DHC) that:

Setbacks to Canals and Artificial Waterways

PO6 Buildings and structures are adequately setback from canals and other artificial waterways or water bodies (e.g. lakes) to:-

(b) ensure no unreasonable loss of amenity to adjacent land and dwellings occur having regard to :-

(i) privacy and overlooking

(ii) views and vistas

(iii) building character and appearance: and

(d) building massing and scale as seen from neighbouring premises.

ii. The relevant ‘performance criteria’ of the Queensland Development Code (QDC) that structures:

P2 (c) Do not adversely impact on the amenity and privacy of residents on adjoining lots

The Tribunal finds that the plans identified as TE120 and the sketch identified as Detail ‘1’ to be a minor variation to the plans for the covered BBQ area identified as the Blackburn and Jackson Design ‘Roof Plan/Elevations/Section - BBQ’ (4608 AO2-04 02) Issue 02 dated 27/09/18.

(The Blackburn and Jackson Design ‘Roof Plan/Elevations/Section - BBQ’ (4608 AO2-04 02) plans were submitted to the Tribunal by the Building Certifier EarthCert on 6 December 2021 in response to the further information request from the Tribunal requesting copies of the plans that were submitted to Council in respect to the Building Application (CAR 21/0187) that Council directed was to be refused. The plans TE120 and the sketch identified as Detail ‘1’ were in the letter on the Ward Builder letterhead that was tendered by Ward Builders at the Hearing, which the Tribunal granted approval to admit which was submitted to the Registry on 1 December 2021).

The Tribunal is of the opinion that the proposed parts of the covered BBQ area and proposed high masonry boundary wall within the 4500mm set back from the rear (canal) boundary of the subject property will contravene the relevant ‘performance outcomes’ and ‘performance criteria’ set out above.

- The Tribunal considers a roofed area encroaching in to the 4500mm setback area by not more than 2630mm (east/ west) in length and 3330mm in width (north /south) is acceptable (this north south dimension being equivalent to the dimension of the previously approved gazebo plus that gazebo’s side boundary setback of 700mm).*
- The Tribunal considers a maximum height for the skillion roof over the BBQ area (within the 4500mm set back from the rear (canal) property boundary) should be no more than 2800mm (equivalent to that shown in the elevations accompanying Plan TE 120).*
- The Tribunal considers a maximum height of 1500mm (above the RL of the new concrete deck) is acceptable for the presently partly built masonry boundary wall being built along the side property boundary.*

The Tribunal considers any such changes would be a ‘minor change’ that it could consider under section 254(3) of the

Planning Act 2016.

Should you wish to submit any revised Plans, please provide them to the Tribunal via the Registry, with a copy to the parties, within 10 business days.

For clarity such plans should separately clearly identify the 4500mm set back from the rear (canal) property boundary and clearly dimension the parts of the covered BBQ area that will be within that 4500mm set back from the rear (canal) property boundary.

The Tribunal will then give further consideration to the appeal."

42. This information was conveyed by the Registry to the parties by email on 9 December 2021. Andrew Hodges (Director) ATH Projects submitted the following revised plans by email to the Registry on 15 December 2021:

- i. Blackburn and Jackson Design 'Plans/Elevations/Section - Deck/BBQ' (4608_AO2-03_C) Issue C 'BBQ Area Updated' dated 14-12-21 (annotated "BUILDING APPROVAL NOT FOR CONSTRUCTION").
- ii. Blackburn and Jackson Design 'Roof Plan/Elevations/Section - BBQ' (4608_AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 (annotated "BUILDING APPROVAL NOT FOR CONSTRUCTION").

Jurisdiction

43. The appeal is made pursuant to section 229 of the Planning Act. Specifically the appeal is made against the refusal of a development application for building work in accordance with sections 1(1) and 1(2)(g) and Table 1 of Schedule 1 of the Act.

Decision framework

44. Pursuant to section 253(2) of the Planning Act the onus rests on the appellant to establish that the appeal should be upheld.

45. Pursuant to section 253(4) of the Planning Act 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.

46. Pursuant to section 246 of the Planning Act the Tribunal, through the registrar, may request any information it reasonably requires to decide the appeal.

47. The Tribunal can decide the appeal in one of the ways mentioned in section 254(2) of the Planning Act.

Material Considered

The material considered in arriving at this decision comprises:

- a. Blackburn and Jackson Design 'Location and Site Plans' (4608 AO1-01 05) Issue 05 dated 27/09/18.*
- b. Blackburn and Jackson Design 'Plans/Elevations/Section - Deck/BBQ' (4608 AO2-03 05) Issue 05 dated 27/09/18.*
- c. Blackburn and Jackson Design 'Roof Plans/Elevations/Section - BBQ' (4608 AO2-02) Issue 02 dated 27/09/18.*
- d. Blackburn and Jackson Design 'Plans/Elevations/Section - Deck/BBQ' (4608 AO2-03 _B) Issue B dated 21/10/18 (annotated "Not Part of Certification").*

- e. Blackburn and Jackson Design *'Roof Plan/Elevations/Section - BBQ'* (4608 AO2-04 02) Issue 02 dated 27/09/18.*
- f. SCG *'Framing Plan and Details'* (Drawing number 28220-S31) September 2018 (annotated with "*Limit of Works*" and "*Not Part of Certification*").*
- g. Blackburn and Jackson Design *'Plans/Elevations/Section - Deck/BBQ'* (4608 AO2-03 _B) (sic) Building Approval Issue A dated 15/11/2018(sic), Issue B dated 21/10/18 (annotated "*Not Part of Certification*").*
- h. Ward Builders Plan TE 120 *'Amendment to BBQ area, boundary wall & roof. Revised engineering plan Drg.2820 SCG Consulting Engineers'*. Undated.*
- i. Artist's Impression of Covered BBQ Area and Wall in its recreational setting (undated and untitled) – received by the Tribunal on the 6 December in response to the further information request.*
- j. Original BA.jpg *'As Constructed Site Plan'* Job No. 4085 for Michelle Ming dated 24/05/2004 (showing 'existing gazebo' stamped "Approved" by Maroochy Shire Council BA 02/0676 22 June 2004).*
- k. Blackburn and Jackson Design *'Location and Site Plans'* (4608 AO1-01 05) Issue 05 dated 27/09/18. (Stamped approved by Sunshine Coast Regional Council OPW 19/0485 16 Jan 2020). (Identified as APPROVED PLANS OPW 19/0485.pdf). *
- l. Blackburn and Jackson Design *'Roof Plans/Elevations/Section - BBQ'* (4608 AO2-04 - A) Issue A *Building Approval Issue* dated 15/11/18. (Annotated 'limit of works', delimiting Section E on the plan, with plan 'O1' the BBQ area roof struck out in red). (Identified as BBQ Plan.pdf). *
- m. Ward Builders Plan TE 120 *'Amendment to BBQ area, boundary wall & roof. Revised engineering plan Drg.2820 SCG Consulting Engineers'*. Undated. (Annotated *Detail '1'*). (Identified as BBQ Plan2.pdf). *
- n. Un-named plan (outwardly similar in presentation to Ward Builders Plans) undated with the letter 'F' on the top right corner. Showing the location of the existing fence and proposed roof and the dimensions of the proposed roof.(Identified as BBQ Plan3.pdf) *
- o. Sketch plan (outwardly similar in presentation to Ward Builders Plans). Undated. (Annotated *Detail '1'*). Showing dimensioned detail of where the BBQ roof meets the masonry wall (identified as BBQ Plan4.pdf). *

(Note: All the material marked with an asterisk '*' above was received by the Tribunal on the 6 December 2021 in response to the Tribunal's 'further information request' for a copy of the plan that accompanied Building Application (CAR 21/0187) submitted to Council for the work that Council, as Referral Agency', required refusal).

- p. Letter dated 12 April 2021 on Ward Builder's letterhead purporting to be signed by the nearest neighbour claiming to be in support of Plans TE 120 and Detail '1'. With referencing to the attached plan TE120; plan TE 120 referencing Detail '1'; un-named plan undated with the letter 'F' on the top right corner, showing the location of the existing fence and proposed roof and the dimensions of the proposed roof, and sketch plan labelled Detail "1" (sic).
- q. Further information provide to the Tribunal by letter to the Registry from Andrew Hodges on PPlan letterhead dated 18 November 2021.
- r. Photographs of the previously approved (now demolished) gazebo. (Identified as the email file 'Photographs of existing approved structure.pdf').
- s. Approval of previously approved (now demolished) gazebo. (Identified as the email file 'Approval of existing structure bali hut and retaining wall.pdf').
- t. Arial photographs of the subject property with previously approved gazebo; the property with the demolished gazebo, and the property with the partly completed works the subject of this appeal. (Identified as the email file 'Nearmap images of approved bali hut and current.pdf').

- u. The amended plan that was considered by Council before directing the refusal. (Identified as Plan TE120, provided in the email file 'Amended plan considered in refusal -120 Tepequar Drive.pdf').
- v. An amended artist's impression of the perspective of the proposed covered BBQ in its recreational and canal setting. Viewed from beyond the existing swimming pool, looking towards the neighbouring property. (Identified as email file 'Amended perspective considered in refusal -120 Tepequar Drive.pdf').
- w. Council Assessment Report CAR 21-0187. (Identified as email file 'CAR Assessment Report – CAR21 0187.pdf').
- x. A covering letter from Tracy Ryan of Planning Partnership on PPlan letter head. (Identified as 'Appellant Submission Cover Letter -120 Tepequar Drive.pdf')
- y. Amended Plans from Ward Builders (identified as 'Amended Plans – TP120 prepared by Ward Builders and Neighbours.pdf')
- z. The email file 'Appellant Submission -120 Tepequar Drive.pdf, (With no title, with all the pages having the footnote "APPELLANT SUBMISSION 120 TEPEQUAR DR. MAROOCHYDORE PPLAN ON BEHALF OF ATH PROJECTS").
- aa. Decision Notice-Approval-210025 dated 20/07/2021 from EarthCert to Ray Ward, of Ray Ward Builders.
- bb. Sunshine Coast Council letter to Earth Cert Building Approvals dated 28 May 2021 conveying the 'Referral Agency Response Planning Act 2016'.
- cc. Set of Plans including plans for the 'as built' gazebo stamped "Approved by Maroochy Shire Council BA02/0676 22 February 2004".
- dd. Set of 'Proposal Plans' for a pontoon, ramp, another deck and other work stamped "Sunshine Coast Regional Council Approved OPW19/0485 16 January 2020".

(The Tribunal noted that all but one of these plans annotated and outlined with the words "Limits of Works" in red (that are stamped "Sunshine Coast Regional Council Approved OPW19/0485 16 January 2020") related to works other than the covered BBQ area and proposed masonry boundary wall.

The Tribunal noted that Blackburn and Jackson Design 'Roof Plan/Elevations/Section - BBQ' (Plan 4608 AO2-04 02) Issue A 'Building Approval' dated 15-11-18 (stamped "Sunshine Coast Regional Council Approved OPW19/0485 16 January 2020") with the "Limits of Works" annotation shows the roof of the proposed BBQ area struck out in red and the delimited 'Limits of Works bubble' to only apply to cross section identified as "E Section".

The Tribunal noted that this cross section shows the works for the ramp, slab and deck and only a cross section of the proposed BBQ structure and proposed masonry wall.

The Tribunal noted that the Blackburn and Jackson Design 'Roof Plan/Elevations/Section - BBQ' (Plan 4608 AO2-04 02) Issue A 'Building Approval' dated 15-11-18 (stamped "Sunshine Coast Regional Council Approved OPW19/0485 16 January 2020") included other plans, cross sections and elevations that related to the proposed covered BBQ area and masonry wall. But none of these other plans, cross sections and elevations that related to the proposed covered BBQ area and masonry wall were included in the identified 'limits of works bubble' with the "Limits of Works" annotation shown in red).

- ee. The Sunshine Coast Planning Scheme 2014 Dwelling Housing Code (DHC) **Setbacks to Canals and Artificial Waterways 'Performance Outcome' PO6** "Buildings and structures are adequately setback from canals and other artificial waterways or water bodies".
- ff. The Sunshine Coast Planning Scheme 2014 Dwelling Housing Code (DHC) **Setbacks to Canals and Artificial Waterways PO6 'Acceptable Outcome'** (summarised here as)

“Buildings and structures exceeding 1 metre in height above ground level...are setback more than 4.5 metres from the property boundary adjacent to the canal ...”

gg. The Queensland Development Code (QDC) '**Performance Criteria' P2 (c)** (summarised here as) structures *“Do not adversely impact on the amenity and privacy of residents on adjoining lots.”*

hh. Blackburn and Jackson Design '*Plans/Elevations/Section - Deck/BBQ*' (4608_AO2-03_C) Issue C 'BBQ Area Updated' dated 14-12-21 (annotated *“BUILDING APPROVAL NOT FOR CONSTRUCTION”*). (Identified as '4608_AO2-03_C.pdf').

(The Tribunal noted that the above plan (hh) included design works for considerable other work including decking, filling behind retaining walls and ramps and the only part of that plan that relates to this application is the dotted line outlining the extent of the covered BBQ Area).

ii. Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (4608 AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 (annotated *“BUILDING APPROVAL NOT FOR CONSTRUCTION”*). (Identified as '4608_AO2-04_B.pdf').

Findings of Fact

48. The Tribunal finds that the now demolished gazebo identified in BA 02/0676 **was retrospectively approved** by the Maroochy Shire Council on the 22 June 2004. (This approval can be identified by Council's stamped approval on the '*As Constructed Site Plan*' Job No. 4085 for Michelle Ming dated 24/05/2004, held by the Registry as the email titled 'Original BA.jpg').
49. The Tribunal finds that the Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (Plan 4608 AO2-04 02) Issue A 'Building Approval' dated 15-11-18 (stamped "Sunshine Coast Regional Council Approved OPW19/0485 16 January 2020") **does not** give approval for the proposed covered BBQ area and masonry wall.
50. The Tribunal finds that the amended plan TE 120 to be the **amended plan that was considered by Council** when it directed refusal of the Building Application (CAR 21/0187).
51. The Tribunal finds that the plans identified as TE120 and the sketch identified as Detail '1' to be a **minor variation** to the plans for the covered BBQ area identified as the Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (4608 AO2-04 02) Issue 02 dated 27/09/18.
52. The Tribunal finds the Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (4608 AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 to be a 'minor variation' to the plans submitted with the Building Application CAR 21/0187 previously considered by the Assessment Manager.

The Decision Making Process

53. The Tribunal formed the opinion that the proposed parts of the covered BBQ area and proposed high masonry boundary wall within the 4500mm set back from the rear (canal) boundary of the subject property will contravene the Sunshine Coast Planning Scheme 2014 Dwelling Housing Code (DHC) **Setbacks to Canals and Artificial Waterways 'Performance Outcome' PO6** *“Buildings and structures are adequately setback from canals and other artificial waterways or water bodies”*.
54. The Tribunal formed the opinion that the proposed parts of the covered BBQ area and proposed high masonry boundary wall within the 4500mm set back from the rear (canal) boundary of the subject property will contravene the Queensland Development Code

(QDC) '**Performance Criteria' P2 (c)** (summarised here as) structures "*Do not adversely impact on the amenity and privacy of residents on adjoining lots.*"

55. The Tribunal found that the previously existing (now demolished) gazebo, with sides of 2360mm and a pyramid roof with a maximum height of approximately 3100mm, set back 700mm from the side property boundary was retrospectively approved by the Maroochy Shire Council on the 22 June 2004 (BA 02/0676).
56. The Tribunal finds that a covered BBQ area with a low pitched skillion roof that is of a similar size to the previously approved gazebo (that has now been demolished), located within 4500mm of the rear (canal) property boundary, will have less impact than the previously approved gazebo given the considerations set out in:
 - The Sunshine Coast Planning Scheme 2014 Dwelling Housing Code (DHC) *Setbacks to Canals and Artificial Waterways 'Performance Outcome' PO6*
 - The Queensland Development Code (QDC) '**Performance Criteria' P2 (c)**
57. The Tribunal formed the opinion that a covered BBQ area encroaching into the 4500mm setback area by not more than 2630mm (east/west) in length and 3330mm in width (north/south) is acceptable. (This north south dimension being equivalent to the dimension of the previously approved gazebo plus that previously approved gazebo's side boundary setback of 700mm).
58. The Tribunal formed the opinion that the maximum height for the skillion roof over the BBQ area (within the 4500mm set back from the rear (canal) property boundary) should be no more than 2800mm (equivalent to that shown in the elevations accompanying Plan TE 120).
59. The Tribunal formed the opinion that a maximum height of 1500mm (above the RL of the new concrete deck) is acceptable for the masonry wall to be built along the side property boundary.
60. The Tribunal considered such changes would be a 'minor change' that it could consider under Section 254(3) of the Planning Act 2016.

The *Planning Act 2016* schedule 2 defines a minor change for a development approval as follows (The basis for the Tribunal's consideration that the proposed change is a minor change is shown in italics):

minor change means a change that—

- (b) for a development application—
 - (i) would not result in substantially different development (*complies*); and
 - (ii) if a development application for the development, including the change, were made when the change application is made would not cause—
 - (A) the inclusion of prohibited development in the application (*complies*); or
 - (B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application (*not applicable*); or
 - (C) referral to extra referral agencies, other than to the chief executive (*not applicable*); or
 - (D) a referral agency, in assessing the application under section 55(2), to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application was made (*not applicable*); or
 - (E) public notification if public notification was not required for the development application.
(*not applicable*).

Reasons for the Decision

61. The Tribunal considered the covered BBQ area and masonry wall conforming to the revised drawings Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (4608 AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 will have less impact than the previously approved gazebo, and will meet the relevant 'performance criteria' given the considerations set out in:
- The Sunshine Coast Planning Scheme 2014 Dwelling Housing Code (DHC) *Setbacks to Canals and Artificial Waterways 'Performance Outcome' PO6*
 - The Queensland Development Code (QDC) '*Performance Criteria' P2 (c)*.
62. The Tribunal considers the Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (4608 AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 to be a 'minor variation' to the plans submitted with the CAR 21/0187 application previously considered by the Assessment Manager.
63. Having regard to the relevant 'performance outcomes' of the Dwelling Housing Code (DHC) ***Setbacks to Canals and Artificial Waterways PO6*** the Tribunal considers that no unreasonable loss of amenity to adjacent land and dwellings will occur having regard to:
- privacy and overlooking
 - views and vistas
 - building character and appearance: and
 - building massing and scale as seen from neighbouring premises.
64. Having regard to the relevant 'performance criteria' of the Queensland Development Code (QDC) ***P2 (c)*** the Tribunal considers the proposed development of a covered BBQ area and masonry wall conforming to the revised drawings Blackburn and Jackson Design '*Roof Plan/Elevations/Section - BBQ*' (4608 AO2_04_B) Issue B "BBQ Area Updated" dated 14-12-21 will not adversely impact on the amenity and privacy of residents on adjoining lots.
65. The Tribunal formed these views with regard to each of the respective 'performance criteria' above because of:
- i. The minimum impact that the narrow low pitched skillion roof and its supports will have on the views, vistas, building character, massing and scale as seen from the adjoining property.
 - ii. The distance of the proposed structures from the pool and recreational areas of the adjoining property to the south (created in part by the concrete boat ramp/slipway on the adjoining property adjacent to the common property boundary).

Derek Craven Kemp
Development Tribunal Chair
Date: 18 January 2022

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:

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