



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-040
Appellant:	Gemma Rivers
Respondent (Assessment Manager):	Luke Owen-Jones
Co-respondent (Concurrence Agency):	Noosa Shire Council
Site Address:	54 Mahogany Drive Marcus Beach and described as Lot 202 on M111117 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the refusal of a Development Application for approval of Building Work for a Class 10a structure, being a carport, on a residential site. The decision followed a referral agency response by the Noosa Shire Council, directing refusal of the application on the grounds that a carport does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2006, Low Density Residential Zone Code 9.3.1, PO9 (a) *provide a high level of amenity to the users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight*; and PO9 (f) *be consistent with the predominant character of the streetscape*;

Date and time of hearing:	10.30am 23 April 2021
Place of hearing:	The subject site
Tribunal:	Debbie Johnson – Chair John O’Dwyer – Member
Present:	Gemma Rivers and Sean Rivers – Appellants Luke Owen Jones Earthcert Pty Ltd – Assessment Manager Matthew Adamson and Bradley Geaney – Council representatives Mitch Collins – Building Designer

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 on 16 November 2020 with another decision, namely to approve the siting of the proposed *open carport* on the subject land as shown on Dwg No A103 prepared by Collins Building Designs dated 24 September 2020 and the design of the *open carport* as shown on Dwg No A201 and A202 prepared by Collins Building Designs dated 24 September 2020, subject to:

- the maximum height of the structure not exceeding 4.0m, measured from the natural ground level; and
- the development is subject to any additional conditions attached to the building approval by the building certifier to address the requirements of the *Building Act 1975*.

Background

1. The subject site is irregular in shape, having a truncated frontage of approximately 26m tapering each side over 40M to a rear boundary width of 14m. This 820sq/m site falls 3m from the rear to the road boundary however the majority of the fall is in the rear third of the allotment.
2. The property faces north and fronts a broad curve in the road as it corners the subject lot and neighbouring residential properties either side. Directly opposite is a wide bush pathway which appears to be an emergency vehicles access to the national park. This roadway is fairly well concealed due to the significant vegetation along each side of the tracks. Neighbouring residential sites either side of this pathway are also well shaded by extensive native trees and shrubs.
3. The original single storey brick veneer home and those surrounding it was built in or around the early 1980's. Given the demand for property in recent times and that values increasing many homes in this area have been significantly renovated and or extended.
4. The appellants purchased this property approximately twelve months ago with this in mind. They engaged Collins Building Designs to prepare drawings that included renovations and extensions to the rear of the home. Building design drawings were issued to the appellants on 24 July 2020.
5. The appellants subsequently approached Luke Owen-Jones of Earthcert to seek an approval for the proposed building works some weeks later, although it appears he wasn't engaged as the assessment manager until the 8 October 2020, this information is derived from the Form 2 Building Application.
6. As the proposed works required assessment against the relevant performance criteria of the Noosa Plan 2020 due to the siting of the double carport and other structures within the 6m road setback area, Earthcert referred the application to Noosa Council on 24 August 2020.
7. Council issued an information request on 9 September 2020 requesting that the applicant reconsider the location of the proposed carport and gatehouse structure as the design was not considered to be consistent with the predominate character of the street and unlikely to be supported.
8. Council advised the applicant to reconsider the location of the proposed building works in consideration of the specific outcomes of PO9 of the Low Density Residential Zone Code; and upon achievement of a more compliant design, provide a copy of amended plans for further consideration.
9. After receiving the information request the applicants subsequently discussed their options with council officers, their building designer and the building certifier. Revised drawings were prepared on 24 September 2020 and lodged to Council for further consideration.
10. On 2 October 2020, the assessment manager issued a Decision Notice approving all proposed works with the exception of the pool, carport and the gatehouse. These works included the conversion and therefore removal of the existing garage to provide an additional bedroom.
11. On 29 October 2020, Council issued the Referral Agency Response directing the assessment manager to refuse the application stating that the proposed development cannot be conditioned to comply with the following performance criteria:

Noosa Plan 2020 – Low Density Residential Zone Code:

PO9 (a) *provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight;*

Council added-

It has been considered that a reduced road boundary setback is not required to provide a high level of amenity to users of the site, in that the alterations and additions being carried out to the existing building is removing the existing covered car parking space and the new design has not taken advantage of the option to incorporated covered car parking spaces in a location that meets the accepted outcomes of the Noosa Plan.

Further, the new building work has been designed in a manner that prevents access to the rear of the property to enable full utilisation of the site.

PO9 (f) *be consistent with the predominant character of the streetscape;*

Council added-

It has been considered that the amended design of the Carport provides for a location and building form that is not consistent with the predominant character of the street.

On 16 November 2020, the assessment manager issued a Decision Notice refusing the building application for a carport citing the referral agencies direction to refuse.

Jurisdiction

12. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
13. 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”.
14. The tribunal is satisfied 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.
15. That application was subsequently refused by the assessment manager as directed by Council as the concurrence 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 or all or part of the development application.
16. At the hearing the Council raised the issue of jurisdiction stating that there hadn't been a building application lodged. In the findings of fact below, the Tribunal found there was no evidence submitted or any argument made about the existence of any Confirmation Notice or Action Notice by the Assessment Manager or Council as the Referral Agency, Therefore the Tribunal has considered this appeal on the basis of the direction to refuse by Council as the Referral Agency and the refusal issued by the Assessment Manager.
17. The refusal directed by Council and the refusal made by the Assessment Manager have enlivened the jurisdiction of the Tribunal.

Decision framework

18. Section 246 of the PA provides as follows (omitting the examples contained in the section):

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.

19. 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 building works plans prepared by Collins Building Designs identified as Sheets A101, A102, A103, A105, A106, A201 and A202 issued 21 July 2020 and revised 24 September 2020.
2. Referral Agency Information Request dated 9 September 2020;
3. DA Form 2 building work application dated 8 October 2020 for works stated as being for a new building or structure and repairs alterations or additions to the value of \$106,870.00. Contact name for the application was Sean Rivers, the assessment manager being Luke Owen-Jones ;
4. DA Form 2 building work application dated 28 April 2021 for works stated as Carport being a new building or structure to the value of \$106,870.00. No contact name was provided, the assessment manager being Luke Owen-Jones.
5. Email correspondence dated 23 September 2020, from Sean Rivers to the building designer and the assessment manager copied to the council. The email outlined changes to be made to the proposed design and included pictures of nearby properties with carport structures within the road boundary setback;
6. Email correspondence dated 24 September 2020 from the building designer responding to the previous request and attaching revised building design drawings;

7. Email correspondence dated 26 October 2020 from the building designer to the building certifier, being a forward of the previous email sent to the assessment manager on the 24 September 2020;
8. Noosa Council Referral Agency Response - 29 October 2020;
9. Email correspondence from Noosa Council to the certifier dated 30 October 2020, being the Referral Agency Response, being a direction to refuse the proposed carport;
10. Email correspondence dated 30 October 2020 from the assessment manager to Sean Rivers and the building designer referring to the attached council approval and stating that the file would be amended to include the carport and the pool as discussed. Note this appears to have been an administration error as the proposed carport had been refused not approved by council;
11. EarthCert Decision Notice refusing the application - dated 16 November 2020;
12. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 10 December 2020;
13. Detail survey plan and an identification survey plan of the subject site, prepared by Geo Surveying and dated 22 June 2020;
14. Building approval package received from the assessment manager on 30 April 2020. Approved plans are stamped to clarify that the approval does not include works for the carport, swimming pool or gatehouse structure. All other alterations and extensions were approved 2 October 2020.
15. Noosa eProperty information for 3 Mahogany Drive Peregian Beach and 2 Cherrywood Close Marcus Beach
16. Google maps and street view images;
17. Planning and Development Online information for the subject site;
18. Queensland Building and Construction Commission Licence Search;
19. The Planning Act 2016 (PA);
20. The Planning Regulation 2017 (PR);
21. The Development Application Rules 2017;
22. The Building Act 1975 (BA);
23. The Building Regulation 2006 (BR);
24. The Queensland Development Code (QDC) Part MP 1.2;
25. The Noosa Plan 2020;
26. The National Construction Code 2019 (NCC); and the
27. The verbal submissions made by the parties at the hearing and during the site inspection.

The Tribunal in reaching his decision has considered all the above material but only identifies in this decision the material on which it has specifically relied upon to reach its decision.

Findings of Fact

20. The hearing for the appeal was held at the appellant's home and therefore at the subject site, on 23 April 2021. It was evident that all of the proposed works that had been approved by the assessment manager on 2 October 2020 had been completed.
21. The works included an extension to the rear of the home which required some excavation and retaining wall to accommodate the additional floor area. Within the existing dwelling an extra bedroom was achieved by the conversion of the original single car garage. Along the eastern side boundary there is a new in ground pool and a covered patio area was constructed between the pool and the newly extended living area. Between the original garage and the eastern boundary, there is a large free standing shed, having been erected on the neighbouring fence line.
22. The front yard was bare, cleared of vegetation, to allow for the proposed carport, fencing and landscaping that had been proposed. The original driveway is still evident and it is either there or in the street that the homeowners are able to leave their vehicles.
23. It should be noted that properties either side of the subject lot have erected new fencing between their respective properties. The side boundary fencing on both sides is relatively high, estimated to be at least 1.8m and runs all the way to the front boundary. It is the appellant's intention to fence their own property across the road frontage boundary, and landscape the front yard, just as soon as the matter of the proposed carport is resolved.
24. Neither of the adjoining residential properties can readily be seen from the front yard of the subject site. This is in part due to the fencing described, but mostly due to the curve in the road that corners and wraps around the three properties.
25. At the hearing the appellants explained that they'd purchased the home the previous year. It was always their intention to extend and renovate the original home as quickly as possible given their young family's needs. They were particularly concerned about the parking arrangements as neither of their cars could be parked inside due to height and the width of the original garage. While they were aware that the siting of a carport within the 6m setback required council's approval, they didn't appreciate that council may reject their proposal. This was in part due to the examples of other carports they had observed in their area.
26. The Noosa Plan 2020 Low Density Housing Code sets out the Design Criteria for low density residential development within Part 9.3.1.3. Acceptable Outcome AO7 states that car parking is to be provided in accordance with Table 9.4.1.4 of the Driveways and Parking Code. Under the provisions of Table 9.4.1.4, a dwelling house should be provided with two covered car parking spaces. The assessment manager approved works which permitted the appellants to convert their existing car accommodation, and build a shed alongside the existing dwelling. There is now no other opportunity to provide covered car parking except between the dwelling and the road frontage boundary.
27. At the hearing, the Council's representatives reiterated the reasons for their decision as being outlined in the Referral Agency Response Advice. However, they also raised the matter of whether or not the tribunal had jurisdiction to hear the appeal, pointing out that their Referral Agency Response had included the following, believing that a development application for building works hadn't yet been properly made:

Time Limit for Making Further Application

Pursuant to section 54(4) of the *Planning Act 2016*, you will not be required to refer your building works application to Council for a further Referral Agency Response if:

- (a) you submit this Referral Agency Response in its entirety, including all referenced plans and documents, when making the application to the Assessment Manager; and

(b) there are no changes to the proposal that was presented to Council with this referral; and

(c) the development application to the assessment manager is made within 6 months of the date of this referral agency response.

28. Council officers queried whether or not a building application had been properly made as they had a record of only one building application on file, being that which covered works other than the carport. Council had not sighted a Form 2 for the carport.

29. Under the DA rules:

Part 1 1.1 states for section 51(5) of the Act, an application is taken to be a properly made application on the day the application is received by the assessment manager, unless an action notice is given.

Part 1 2.2.1 states a Confirmation Notice can only be given for a properly made application.

Part 2 2.2.2 (b) states the assessment manager must give the applicant a Confirmation Notice when an application requires referral under the act, as was the case in this instance. The tribunal has not sighted a Confirmation Notice pertaining to the application for the proposed carport.

Part 2 9.1 states the referral agency assessment period starts the day after the earlier of the following occurs—

(a) the referral confirmation notice has been given; or

(b) if no action notice has been given, the referral confirmation period has ended.

30. Part 2 9.2 states the referral agency must give a referral agency response to the assessment manager, and a copy to the applicant, before the end of the referral agency assessment period. In this instance council sent an information request to Earthcert on 9 September 2020.

31. On the 29 October 2020, after receiving and considering the applicant's response to the information request, council issued the referral agency advice directing the assessment manager to refuse the application.

32. On 16 November 2020, Earthcert issued a Decision Notice of refusal for the proposed development being a Class 10a carport which is the subject of this appeal.

The Queensland Development Code (QDC)

The Low Density Residential Zone code Table 6.3.1.3, contains some alternate provisions to the QDC. The QDC Part MP1.2 is the standard for the Design and Siting requirements applicable to Class 1 Dwellings and Class 10 structures on residential sites over 450 m² in area. The provisions of the QDC apply to the extent that a local planning scheme does not opt to provide alternative provisions. In this instance the Low Density Residential Zone code Table 6.3.1.3 PO9 provides some alternative siting provisions to the QDC A1 (a), therefore the 6m setback provisions (for a garage or a carport) of the Low Density Residential Zone code apply to the proposed development.

The Noosa Plan 2020

The Low Density Residential Zone Code Table 6.3.1.3, contains some alternate provisions to the QDC.

Acceptable outcome AO9.1 states

Buildings and structures have a setback of 6m from the road frontage, provided that the setback may be reduced to 4.5m where the lot:

- (a) has frontage to more than one road;
- (b) is less than 600sq/m in area; or
- (c) is less than 15m in width.

The proposed double carport is 5.6m deep and 6.2m wide with a setback 1.45m to the road frontage. The site has a single road frontage, is 820sq/m with a frontage width which is approximately 26m wide.

As the proposal does not meet the acceptable outcomes of AO9.1 assessment is made against the performance outcomes stated at PO9 which states:

Buildings and structures are designed and sited to:

- (d) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual privacy and acoustic privacy and access to sunlight;
- (e) not unreasonably obstruct views or cause overlooking of private open space or habitable areas of adjoining premises;
- (f) provide adequate distance from adjoining land uses;
- (g) preserve existing vegetation that will help buffer development;
- (h) allow for space and landscaping to be provided between buildings including adequate area at ground level for landscaping with trees, shrubs and outdoor living;
- (i) be consistent with the predominate character of the streetscape; and
- (j) protect the natural character and avoid adverse impacts on ecologically important areas such as national parks, waterways and wetlands.

Council's referral agency response directed the assessment manager to refuse the building application stating the proposal didn't comply and couldn't be conditioned to comply with Noosa Plan 2020 – Low Density Residential Zone Code:

PO9 (a) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight; and PO9 (f) be consistent with the predominant character of the streetscape;

Reasons for the Decision

- 33. The tribunal found that the subject site does not currently provide any covered car parking opportunity as the recently approved and now completed works have repurposed the single garage that had previously been available. Similarly, these works have included a large storage steel shed alongside the southern end of the home where compliant car parking may have been achieved. While this situation has arisen at the home owners own instigation, there is no doubt now, that the proposed carport would offer significant amenity to the users of the subject site.
- 34. The tribunal also found that the amenity on adjoining properties would not be adversely affected as neither property can see into the subject site due to their respective orientations and the new fencing between the three properties.
- 35. The original single storey brick veneer home and those surrounding it was built in or around the early 1980's. Given the demand for property in recent times and that values are increasing, many homes in this area have been significantly renovated and or extended as is the case in this instance.
- 36. The tribunal found that visual streetscape on the opposite side of the road was shaded and very natural, being heavily vegetated around the bush pathway. However, the character and streetscape of the subject site and other properties on their side of the road was entirely different.

Further to this, the cornering of the roadway around the subject site meant that you cannot view both the subject site and one or other of their neighbours at the same time.

37. The tribunal is satisfied that the proposed development meets all of the relevant performance criteria stipulated in the Noosa Plan 2020, Low Density Residential Zone Code Table 6.3.1.3I at PO9.

Debbie Johnson

Development Tribunal Chair

Date: 21 June 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:

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