



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20 – 021
Appellant:	Darren Horton
Respondent (Assessment Manager):	Phillip Parkes, Private Certifier A20933
Co-respondent (Concurrence Agency):	Redland City Council
Site Address:	11 Reserve Esplanade, Wellington Point and described as Lot 1 on RP 53836 – the subject site

Appeal

Appeal under s. 229 and Schedule 1, Table 1, Item 1 of the *Planning Act 2016* against the refusal of a Development Application for Building Work for a Class 10b structure, being a swimming pool, on residential premises. The decision followed a response by the Redland City Council pursuant to section 57 of the *Planning Act 2016* that the application be refused on the basis that it did not comply with Performance Criteria P1 of *Queensland Development Code MP 1.1 – Design and Siting Standard for Single Detached Housing – on lots under 450 m²* (QDC MP 1.1) as it would create an unacceptable building bulk forward of the road boundary setback of neighbouring buildings and structures, and result in an unacceptable streetscape.

Date and time of hearing:	Friday, 13 November 2020 at 11.00 am.
Place of hearing:	9 Reserve Esplanade, Wellington Point.
Tribunal:	Ain Kuru – Chair Catherine Baudet - Member
Present:	Darren Horton – Appellant Phillip (Phil) Parkes – Agent for the Appellant (Building Code Approval Group) who is also the Assessment Manager, private certifier and Respondent for the application Vadim Ribinsky – Agent for the Appellant (Building Code Approval Group) Charlotte Hughes – Co-respondent (Redland City Council as the Referral Agency) Michael Anderson – Co-respondent (Redland City Council as the Referral Agency) Desley Horton Rachael Lucas

Decision:

The Development Tribunal (Tribunal):

1. In accordance with section 254(3) of the *Planning Act 2016* (Planning Act) accepts amended drawings submitted by the Appellant as a minor change to a development application;
2. in accordance with section 254(2)(d) of the Planning Act, **sets aside** the decision of the Assessment Manager to refuse the application; and
3. in accordance with section 254(2)(c) of the Planning Act **approves** the application in accordance with the conditions set out in the schedule of this Decision Notice.

Background

The Proposal

1. The subject site is rectangular with a bevelled frontage to Reserve Esplanade. It has a width of 15.09 m with a southern boundary depth of 36.23 m and northern boundary depth of 22.93 m. The area of the lot is 445 m². The lot traverses a coastal escarpment with a maximum fall from the rear to the frontage of the lot of 5.25 m. At the time of the hearing a new three level house was being constructed on the lot.
2. The constructed road stops about 25 m short of the subject site, and a long driveway has been constructed from the cul-de-sac to the subject site. The road reserve at the frontage of the site is open space that adjoins open parkland along the foreshore, which has been developed for public recreation and conservation purposes.
3. The adjoining lot to the north contains an older house built on the Reserve Esplanade frontage below the escarpment, and further to the north, a large retaining wall has been constructed to level the site with access from Main Road at the rear. Lots to the south have been developed for detached housing. These houses are built on top of the escarpment and have access from Main Road. They are only partly visible from Reserve Esplanade as they are screened by vegetation along the escarpment.
4. The streetscape is therefore characterised by a mixture of elements comprising:
 - parkland with both open and forested areas;
 - associated public amenities;
 - public car parking;
 - the existing house and adjoining retaining wall built to the road frontage; and
 - the subject site on which a three storey house is under construction.

The Development Application

5. As the proposed swimming pool structure did not comply with the prescribed road frontage setback of 6 m under Queensland Development Code (QDC) MP 1.1 A1 (d), the Private Certifier referred the application to Redland City Council on 12 February 2020 (though the need to refer the application to Council is also a ground for appeal). The application was referred to Council pursuant to Schedule 9, Part 3, Division 2, Table 3 – Design and Siting of the *Planning Regulation 2017*. The referral jurisdiction under section 4 of Table 3 was whether the proposed structure complies with the performance criteria stated in the paragraph. The relevant Performance Criteria is QDC MP 1.1 P1.
6. On 18 August 2020 Council issued a notice directing the Private Certifier to refuse the application. However, a building development application for the swimming pool structure had not yet been made. As the referral agency response from Council was received prior to a

building development application being made, the notice from Council is considered as a response prior to an application pursuant to section 57 of the Planning Act.

7. The Council's response to refuse the application was on the grounds that the proposed structure would create unacceptable building bulk forward of the road boundary setbacks of neighbouring buildings and that this would be exacerbated by the elevated ground level. Further that the proposed articulation, design elements and landscaping is considered insufficient to soften or screen the building bulk. The location and bulk of the structure was therefore considered to result in an unacceptable impact of the streetscape and was not in compliance with Performance Criteria P1.
8. The Appellant subsequently lodged an application for a Development Permit for Building Work for the proposed swimming pool structure with the Building Code Approval Group on 18 August 2020. Phil Parkes from the Building Code Approval Group was engaged as the Private Certifier and Assessment Manager. A Decision Notice refusing the application was issued the same day advising that the Council, as a referral agency, had directed the Private Certifier as the Assessment Manager to refuse the application.

Background to the Referral Application

9. The initial proposal lodged with the Council comprised of a 6.88 m long and 3.17 m high pool wall sited 95 mm from the boundary. The pool wall comprised a 1.14 m high footing and a 2.03 m high pool. There was no fence on the pool wall as the wall itself was to act as the barrier.
10. The Council issued an Information Request dated 02 March 2020:
 - noting that the pool wall had no articulation and presents a large blank façade when viewed from Reserve Esplanade;
 - advising that in its view, the pool wall did not result in an acceptable streetscape pursuant to Performance Criteria P1; and
 - requesting the Appellant to submit amended plans that demonstrate compliance with Performance Criteria P1.
11. Further information was also sought in relation to the side boundary, which is not subject to the appeal.
12. The Appellant responded on 6 March 2020, outlining reasons why the pool satisfied Performance Criteria P1 including the unique circumstances of the street, the topography and noting other examples of buildings and structures built to the frontage of nearby lots.
13. The Appellant submitted amended plans on 03 April 2020. These plans recessed the footings of the pool by 500 mm to provide a landscaped area under the pool. A decorative feature was also added to the pool wall. The Council subsequently advised the amended design did not address its concerns.
14. The Appellant submitted further amended drawings on 01 May 2020. The setback of the pool was increased to 195 mm, and the pool wall was broken into two 2.4 metre long sections, separated by a 2.19 m long section which was recessed 395 mm. This area would allow space for landscaping and would break up the bulk of the pool wall. The Council advised that it was still concerned by the height of the pool wall and the inability for it to be adequately screened.
15. The Appellant submitted further amended drawings on 08 June 2020. The height of the pool was reduced from 3.17 m to 2.5 m and now comprises a 1.3 m high footing wall and a 1.2 m high pool wall. However, the footing is no longer recessed and is in line with the pool wall. A glass fence is now shown on top of the wall, making a total height of 3.5 m.

Grounds for Appeal

16. The grounds for appeal can be summarised as follows:

1. There is no requirement for a front boundary setback and referral of the application to the Council. The wall of the swimming pool complies with the prescribed road frontage setback in QDC MP 1.1 A1 (d) (i) (B) as it provides a solid wall at least 1.8 metres high between the water and the road frontage;
2. The house on the adjoining lot is built to the road frontage, as are buildings or structures on two other nearby lots;
3. The slope and fall of the site limit how a pool can be built on the site; and
4. The Appellant modified the design by reducing the height from 3.1 to 2.5 m, articulating the pool wall with a recess and adding landscaping.

Matters raised at the hearing

17. *Phil Parkes and Vadim Ribinsky (Agents for the Appellant), Darren Horton (Appellant), Rachael Horton and Desley Horton*

- There are no height restrictions for swimming pools in QDC MP 1.1, where a wall is located between the pool and the adjoining lot to prevent water splashing into this lot, so referral of the proposal was not necessary. The application was lodged with Council as there was uncertainty as to whether the Council agreed with this interpretation of the QDC MP 1.1;
- The proposal was amended to address the Council's concerns about the bulk of the swimming pool structure wall by reducing the height of the solid wall and articulating it with a vertical break;
- Council advised that the swimming pool structure was to be no higher than 2 m; however, this was not practical as it would mean adding steps down from the house for which there was no room. This would also result in poor surveillance of the pool area from the house and concerns about security as the pool could more easily be accessed from the adjoining parkland;
- The neighbours had advised in writing that they did not object to the height of the swimming pool structure;
- Consideration of the bulk of the swimming pool structure must take into account the adjoining house at 9 Reserve Esplanade, which is built to the road frontage, and a very large retaining wall located further along the road;
- The swimming pool structure will be "lost in the landscape", and there is sufficient space for planting to screen it;
- There is no discernible streetscape as the street is parkland and elevated; and
- A copy of another appeal was tendered at the hearing (Tribunal Decision 52 – 2018), where the Tribunal had examined the meaning of "acceptable" and "bulk". The Tribunal was encouraged to review the findings of this appeal in determining whether the bulk of the swimming pool structure would facilitate an acceptable streetscape.

18. *Michael Anderson (Co-respondent, Redland City Council)*

- QDC MP 1.1 needs to be interpreted in its entirety. Within subsection (d) of the Acceptable Solution A1, the various provisions for structures are separated with an "and" and therefore subsection (i) swimming pools must be read in conjunction with sub subsection (ii) screens, fences, and retaining walls, the latter not to exceed 2 m in height. Vadim Ribinsky responded that a swimming pool could not be considered to be a retaining wall. Council advised that the pool is a retaining wall as it retains water.
- The Council assessed the application under Performance Provision P1 and in particular subsections (a) and (b). The bulk and height of the swimming pool structure were considered to result in an unacceptable streetscape, and Council did already agree to a

2.7 m frontage setback for the house. The swimming pool structure will interrupt the open streetscape.

- Council did take into account the existing hedge in front of the swimming pool structure, which is on Council land.

Post Hearing Submission

19. Material tendered at the hearing was distributed by the Appellant's Agent after the hearing (Tribunal Decision 52 – 2018,) which examined the meaning of “acceptable” and “bulk” along with a further written submission. The material was provided to the Council for a response.

20. *Phil Parkes (Agent for the Appellant)*

- Council determined the proposal was “unacceptable” and the bulk of such magnitude that it cannot be deemed acceptable. The definitions examined in the decision were:

Considering the current densification in the area, the Tribunal then sought to better understand and define the words ‘acceptable’ and ‘bulk’. A review of Merriam-Webster 2019 (MW) dictionary, Dictionary.Com 2019 (D.com) dictionary, Oxford Dictionary 2019 and The Free Dictionary 2019 (FD) generated definitions which finds several options the building might satisfy:

Some definitions for acceptable were defined as:

- 1. capable or worthy of being accepted – MW and D.Com*
- 2. barely satisfactory or adequate – MW and D.Com.*
- 3. capable of being endured; tolerable; bearable – D.Com*
- 4. able to be agreed on; suitable- Oxford*
- 5. able to be tolerated or allowed- Oxford*

Similarly, several definitions for bulk were defined as:

- 6. an organised structure especially when viewed primarily as a mass- MW*
- 7. magnitude in 3 dimensions – MW and D.Com.*
- 8. the mass or size of something large – Oxford and D.Com.*
- 9. size, mass or volume especially when very large – FD;*

- The proposed swimming pool structure will be dwarfed by a large three storey dwelling on the lot currently under construction. The proposed pool will “blend seamlessly” into the background, and the fencing on top of the structure will have glass balustrading;
- The frontage is parkland. There is no road, verge or footpath to form an unacceptable streetscape;
- Subsection QDC MP A1 1.1 A1 (d) deals with frontage setbacks for alternative siting requirements for structures, being separated into the following elements: Swimming Pools; Screens, fences, retaining walls; and Gatehouses. These are all separate types of structures and therefore need to be read independently. They are joined with an “and” as they are all different types of structures under subsection A1 (d); and
- The swimming pool structure is not a retaining wall as it is a free-standing structure. Section 75 of the Building Act refers to retaining walls being necessary to protect land, buildings or structures to prevent soil movement. The pool fence is not a fence but a 1 m balustrade as it is required to ensure people do not fall off the pool structure. Therefore the pool structure is only assessable against the Acceptable Solutions for swimming pools contained in QDC MP 1.1 A1 (d) (i) (B).

21. *Michael Anderson (Co- respondent, Redland City Council)*

- Council is not familiar with Tribunal Decision 52 – 2018 referred to by Phil Parkes however notes it deals with the addition of walls and a garage door to a carport and understands how in these circumstances, the definition of what is an ‘acceptable’ streetscape and consideration of ‘bulk’ is relevant. However, this appeal deals with a different circumstance and has no relevance;
- Council undertook an assessment of the swimming pool structure and whether its location facilitated an acceptable streetscape appropriate for the bulk of the building in accordance with Performance Criteria P1 (a). Council also undertook an assessment as to whether the location of the swimming pool structure facilitates an acceptable streetscape appropriate for the road boundary setbacks of neighbouring buildings in accordance with Performance Criteria P1 (b);
- As set out in the reason for refusal, having had regard to the existing streetscape Council determined that the bulk of the swimming pool structure, located forward of the property under construction and forward of neighbouring road boundary setbacks would not facilitate an acceptable streetscape;
- The Appeal should be determined on its own merits when assessed against the relevant performance criteria, and therefore the appeal decision provided is considered to have little or no relevance;
- The swimming pool structure will be built out of the ground and extends forward of the property almost to the front boundary. Due to its prominence in the foreground, it is not agreed that the swimming pool will blend seamlessly into the existing dwelling under construction or those dwellings located to the rear;
- It is agreed that whilst there is no constructed road, the public still has access to this land. Limiting consideration of the term ‘streetscape’ to simply a made road or street only is not considered accurate when assessing impacts on the streetscape. Council is of the opinion that streetscape is a broader collective term given to the appearance of buildings, footpaths, gardens and landscaping that contribute to the community identity and sense of place from all public vantage points. This is determined on a case by case basis relative to the immediate context;
- Council maintains that the swimming pool does not meet Acceptable Solution QDC MP1.1 A1 (d) (i) (A) or (B). The intent of this part is clear when read together, and compliance for swimming pools is achieved when the coping to the swimming pool is not more than 1.2m above finished ground in subsection (A). Subsection (B) contemplates a boundary fence or solid wall of 1.8m between the water and the road frontage, ensuring that the wall or fence is at least 1.0m above the pool coping;
- Council remains of the opinion that this part does not intend that the solid wall or fence is part of the same swimming pool structure. In any event, the proposal fails to meet A1 (d) (ii) as the structure has a combined height of 3.5m within the road setback. The intent is clear in such circumstances, and it is necessary to address the performance outcomes.

Tribunal Direction

22. The Tribunal was of the view that the proposed swimming pool structure presented a blank concrete wall of some bulk to the streetscape and therefore did not satisfy Performance Criteria P1 of the QDC MP 1.1.
23. The Tribunal can approve minor changes to a development application in accordance with section 254(3) of the Planning Act. The Tribunal believed that appropriate treatment of the external walls visible from the street through different finishes, colours and textures would be a minor change to the development application, and these changes could result in an acceptable streetscape.
24. Pursuant to section 250 of the Planning Act, a Tribunal may, at any time during proceedings, make any direction or order that the Tribunal considers appropriate.

25. On 16 December 2020, the Tribunal subsequently ordered the Appellant to reconsider the design of the external walls of the proposed swimming pool structure as shown in drawings referenced as 11-RES-N, and within 20 days:
 1. Request the Tribunal to decide the appeal without any changes; or
 2. Submit to the Tribunal for consideration changes to the finishes, colours and textures of the external walls (ensuring that these changes comprise low maintenance materials).
26. On 19 December 2020, the Appellant submitted revised options to the Tribunal for consideration. These included treating the concrete wall with timber substitute (Modwood), wire trellis or decorative screens. The design of the pool had also been altered to add an infinity edge and tiled waterfall.
27. On 5 January 2021, the Tribunal advised the Appellant that the purpose of the order dated 16 December 2020 was to provide the Appellant with an opportunity to submit an alternative proposal which the Tribunal could approve pursuant to section 254(3) of the Planning Act. Further, the Tribunal advised that it was not its role to recommend design changes to the swimming pool structure. The Tribunal did, however, advise that in its view, the amended proposal still did not result in an acceptable streetscape as it relied on landscaping in the road reserve to screen the concrete wall and that the proposed render and colour of the wall do not consider the textures and colours in the immediate surrounds.
28. On 6 January 2021, the Appellant advised that they would seek the advice of an Architect and therefore required more time, which the Tribunal subsequently agreed to.
29. On 19 January 2021, an amended proposal was received from the Appellant. The setback of the pool wall was increased to 600 mm by reducing the width of the pool, and stone cladding was applied to the pool wall. As a result, the amended design provided a landscaped edge to the pool and created an acceptable streetscape. On 20th January 2021 the Appellant also submitted proposed colours for the stone cladding and other surfaces.
30. However, as the design now relied on landscaping, on 4 February 2021, the Tribunal ordered the Appellant to provide further details about proposed landscaping detailing plant layout, species, sizes and proposed maintenance; and demonstrating how the plan complies with any relevant Council landscaping policies. The Appellant was provided within 14 days or longer as required to submit such plans, and the Council was directed to provide comments on the plan to the Appellant and Tribunal within a further seven days.
31. The Appellant provided a landscaping plan on 12 February 2021, which proposed 11 shrubs being *Elaeocarpus reticulatus* 'Prima Donna' along with planting details and maintenance details, including maintaining the height of the shrub to 2.5 m. The Appellant also advised the proposed plant selection complies with the Council's Vegetation Enhancement Strategy, is indigenous to the area, forms a good screening hedge and is salt tolerant.
32. On 17 February 2021, the Council advised that the shrub be changed to the *Syzygium* species due to the garden bed being only 600 mm wide as this species would adapt better in a smaller space. On 18 February 2021, the Appellant responded, stating the *Elaeocarpus reticulatus* was also suitable enclosing information in an extract from an unknown publication. The Tribunal consulted a landscape Architect and reviewed information available from www.australianplantsonline.com and agrees that the Syzygium provides better screening and requires less maintenance.
33. On 4 March 2021 the Tribunal advised that subject to the following conditions the amended plans would satisfy Performance Criteria P1 of QDC MP 1.1:

- a. The colour of stone cladding and other surfaces must closely match the earth tones provided in the email from the Appellant to the Tribunal dated 20 January 2021;
 - b. Landscaping must comprise psyllid resistant Syzgiums (Lilly Pillys) instead of Eleocarpus reticulartis; and
 - c. Landscaping must be otherwise completed and maintained in accordance with Landscape Plan Job 113-2021 Document A Revision A, and the accompanying written report (Balance Garden Design) dated 12 February 2021.
34. The Tribunal subsequently directed the Assessment Manager to assess the amended plans for the swimming pool in accordance with relevant legislation and advise what conditions, certificates and inspections should be required.
35. Instead on 23 March 2021 the Assessment Manager issued a Decision Notice. The Tribunal advised the Assessment Manager that they did not have the power under section 254 of the Planning Act to approve the application and requested the Assessment Manager revoke the Decision Notice and provide the information requested. The Assessment Manager subsequently provided the required information.

Jurisdiction

36. 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, Item 1 of Schedule 1 of the Act.

Decision framework

37. Pursuant to section 253(2) of the Planning Act, the onus rests on the Appellant to establish that the appeal should be upheld.
38. 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.
39. Pursuant to section 246 of the Planning Act, the Tribunal, through the Registrar, may request any information it reasonably requires to decide the appeal.
40. 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:

1. 'Form 10 – Notice of Appeal' attaching Grounds for Appeal and the documents listed at 3, 4 and 5 below lodged with the Tribunals Registrar on 31 August 2020.
2. 'DA Form 2 – Building Work Details' building work application form submitted by Darren Horton for a swimming pool;
3. 'Information Request – Referral Agency' from Redland City Council dated 02 March 2020;
4. 'Information Request Response' from Phil Parkes, Building Code Approval Group Pty Ltd dated 16 March 2020;
5. 'Referral Agency Response' from Redland City Council dated 18 August 2020;
6. Drawings:

- a. Site Plan - Drawing Number 11-RES-J dated 26 January 2020;
- b. Site Plan - Drawing Number 11-RES-I dated 02 February 2020;
- c. Elevations 1 - Drawing Number 11-RES-I dated 02 February 2020;
- d. Elevations 2 - Drawing Number 11-RES-I dated 02 February 2020;
- e. 3D Plan - Drawing Number 11-RES-I dated 02 February 2020;
- f. Pool Layout - Drawing Number 11-RES-I dated 02 February 2020;
- g. Pool Layout – Drawing Number 11-RES-K dated 29 April 2020;
- h. Pool Layout – Drawing Number 11-RES-N dated 06 June 2020;
- i. Pool Details - Drawing Number 11-RES-I dated 02 February 2020;
- j. Pool Details - Drawing Number 11-RES-K dated 29 April 2020
- k. Pool Details - Drawing Number 11-RES-N dated 06 June 2020;
- l. 3D Render - Drawing Number 11-RES-I dated 02 February 2020;
- m. 3D Render - Drawing Number 11-RES-K dated 29 April 2020;
- n. 3D Render - Drawing Number 11-RES-N dated 06 June 2020;
- o. Schematic Design Drawings SD-000 to SD-009 Revision A undated (Clements Clarke Architects) accompanied by a covering letter dated 19 January 2021;
- p. E mail dated 20 January providing details of stone cladding and other surface colours to be used with Design Drawings SD-000 to SD-009 Revision A; and
- q. Landscape Plan Job 113-2021 Document A Revision A and accompanying written report (Balance Garden Design) dated 12 February 2021.

7. Email correspondence between the Appellant and Redlands City Council:

- a. 12 March 2020 - Daniel Manathunga (Redlands City Council) to Phil Parkes advising that after reviewing additional information received on 06 March that Council was not able to support the proposal due to the height of the solid wall and the inability to screen the wall;
- b. 03 April 2020 - Phil Parkes to Daniel Manathunga attaching amended drawings proposing articulation of the pool wall and a recess (version 11-RES-I dated 02 February 2020);
- c. 23 April 2020 - Daniel Manathunga to Phil Parkes expressing concerns that proposed landscaping would not soften bulk forward of the building line established by neighbouring buildings and structures;
- d. 01 May 2020 – Phil Parkes to Daniel Manathunga attaching amended drawings breaking up the bulk of the pool with landscaping (version 11-RES-K dated 29 April 2020);
- e. 13 May 2020 - Daniel Manathunga to Phil Parkes advising Council still has concerns with the height and bulk of the wall and that landscaping would be

- unable to grow to a height which would soften or screen it and therefore an unacceptable streetscape in accordance with the QDC;
- f. 13 May 2020 - Phil Parkes to Daniel Manathunga suggesting that QDC provisions in relation to the height, setback and streetscape of structures may not be applicable; and that the design changes proposed by the owners had reduced the bulk from 22.2 m² to 7.68 m²;
 - g. 20 May 2020 - Daniel Manathunga to Phil Parkes advising that the bulk and setback of the pool wall structure is applicable; and that Council was still concerned by the height of the pool wall, the inability to screen it and the visual impact from the street;
 - h. 20 May 2020 - Phil Parkes to Daniel Manathunga disagreeing with Council's interpretation of the QDC;
 - i. 02 April 2020 - Phil Parkes to Daniel Manathunga advising that the owners are reconsidering the design of the pool;
 - j. 02 April 2020 - Phil Parkes to Daniel Manathunga attaching a proposed 3D image of pool with artwork;
 - k. 08 June 2020 - Darren to Phil Parkes forwarding email from neighbour advising they have no objection to the original proposed plans;
 - l. 08 June 2020 - Robert and Desley Horton to Phil Parkes advising they had no objection to the proposal;
 - m. 08 June 2020 – Phil Parkes to Daniel Manathunga attached amended plans which have lowered the height of the pool (version 11-RES-N dated 06 June 2020).
8. 'Approved Decision Notice' from Building Code Approval Group stating that the application was refused as directed by the Referral Agency – Redland City Council.
 9. Further written submission from Phil Parkes dated 13 November 2020;
 10. Further information sought by the Tribunal:
 - a. 23 November 2020 – Phil Parkes providing a copy of Form 56 - Notice to the local government that a private certifier has been engaged (this was requested as the Decision Notice was not signed by Phil Parkes);
 - b. 1 December 2020 – Redland City Council confirming the site has frontage to a road reserve;
 - c. 14 December 2020 – Redland City Council regarding referral agency response in respect of the house;
 - d. 21 December 2030 – Darren Horton and Rachel Lucas providing alternative design options;

- e. 19 January 2021 - Darren Horton and Rachel Lucas providing amended design (Schematic Design Drawings SD-000 to SD-009);
- f. 20 January 2021 - Darren Horton and Rachel Lucas providing colours of materials in addition to stone cladding;
- g. 12 February 2021 - Darren Horton and Rachel Lucas providing landscaping plan;
- h. 17 February 2021 – Redland City Council providing comments on the proposed landscaping plan; and
- i. 18 February 2021 - Darren Horton and Rachel Lucas responding to Council's comments about the proposed landscaping plan.
- j. 26 March 2021 – Phil Parkes advising that the amended plans comply with relevant legislation and advising what conditions, certificates and inspections should be required.

Findings of Fact

The site has frontage to a road reserve

41. The open space at the frontage to the site is shown in Council planning scheme zoning maps as Conservation. QDC MP 1.1 defines a road as:

Road means –

(a) an area of land dedicated to public use as a road; or

(b) an area open to, or used by, the public and developed for, or has, as 1 of its main uses, the driving or riding of motor vehicles; and

(c) does not include a pedestrian or bicycle path.

42. Following the hearing, the Tribunal requested the Council to confirm that the open space was a dedicated road for the purposes of QDC MP 1.1. Michael Anderson provided the Tribunal with extracts from Council maps showing this land as a road reserve.

Referral agency response in respect of the existing house

43. The building development application for the house was referred to Council as the frontage setback of the proposed dwelling was 2.7 m instead of 3.0 m as required by QDC MP 1.1. The application was approved on grounds including the design of the house, slope of the site, shape of the site and facilitating an acceptable streetscape.

Interpretation of QDC MP 1.1 A1 (d)

44. The proposed pool structure is 3.5 m high, comprising a 2.5 m high concrete wall with a 1 m high glass fence on top of the wall. The structure is located 195 mm from the boundary with a 490 mm recess.

45. The Appellant's Agent questioned whether a minimum road setback for a pool was required by QDC MP1.1 A1 (d) (i) (B), where a solid wall higher than 1.8 m in height is between the water and the road frontage. Subsection (d) states:

(d) For structures the minimum road setbacks are as for A1(a), (b), and (c) except for –

(i) swimming pools, where the minimum distance from the water to the road frontage is

(A) where the vertical distance to the coping above the finished ground level is not more than 1.2m – 1.5m;

or

(B) where a solid wall or fence at least 1.8m high above finished ground level is constructed between the water and the road frontage and the top of the wall or fence is at least 1.0m above the top of the coping of the pool – no requirement; and

46. Under (A), the coping of a swimming pool not more than 1.2 m above ground level must be sited 1.5 m from the road frontage, while in (B), there is no minimum setback provided a solid wall is located between the coping of the pool and the road frontage.

47. The Tribunal notes the Appellant Agent's submission that there are no other Acceptable Solutions relating to swimming pool structures and that the other sub-sections deal with structures that are not swimming pools.

48. The Tribunal also notes Council's interpretation that subsection of QDC A1 (d) (ii) must also be considered as it is separated from sub subsection (i) with an "and". Subsection (ii) states:

(ii) screens, fences, retaining walls or a combination of screens fences or retaining walls not more than 2m in height;

49. Council is of the view that subsection of QDC MP 1.1 A1 (d) (i) does not intend that the solid wall or fence is part of the same swimming pool structure, and the proposal fails to meet subsection (ii) as the structure has a combined height of 3.5m within the road setback.

50. The Tribunal also notes the Appellant Agent's argument that the swimming pool structure is not a retaining wall as anticipated under the Building Act, even though it was argued by Council that it does retain water.

51. A literal interpretation of (B) would conclude that an out of ground pool of any height over 1.8 m can be built on the road frontage provided the top of the wall is at least 1 m above the coping. However, this is not consistent with other Acceptable Solutions in the QDC, which seek to limit the height and bulk of buildings and structures.

52. A literal interpretation of (B) relies solely on the plain meaning of words. However, where there is uncertainty, consideration must be given to the context and purpose of the QDC as well.

53. Firstly, the purpose of the QDC is to provide for '*good residential design that promotes the efficient use of a lot, an acceptable amenity to residents, and to facilitate off-street parking.*' The provisions establish minimum boundary setbacks for buildings and structures. One would expect this to apply to all structures irrespective of whether they contained a swimming pool.

54. Secondly, the Tribunal researched the legislation relating to swimming pool structures and found that prior to QDC MP 1.1, the siting provisions were contained in the repealed *Standard Building Regulation 1993* in which section 42 (b) stated that:

a structure that is not part of a building and which is not more than 1 m above the level of the natural ground surface

55. Advice about section 42 contained within a Building Newsflash dated 28 March 2002 issued by the Department of Local Government and Planning states:

The purpose of the provision is to limit the impact of structures constructed close to a boundary, on the amenity of the neighbouring property. Subclause (b) provides that the concessions apply to a structure which is not more than 1 m above natural ground level. This would include a swimming pool that is not more than 1 m high.

56. Thirdly these provisions were removed from the Standard Building Regulation and transferred into QDC MP at some later date, and the provisions were amended to require a solid barrier to be placed between the road frontage and the water in the pool. The purpose of these provisions was to provide concessions for fencing used to prevent water splashing onto adjoining properties. There is no indication that these provisions provide any additional concessions for swimming pool structures.

57. The Tribunal finds that the Acceptable Solutions as written are unclear where a swimming pool structure is to be built out of the ground within the frontage setback and is higher than 2 m, being the maximum allowable height for fencing and retaining walls under subsection (ii). Section 22 of the Planning Regulation states that Schedule 9 lists matters for which referral agencies assess development applications. Schedule 9, Part 3, Division 2, Table 3 – Design and Siting of the Planning Regulation, Column 2 states that the local government is the referral agency where:

Development application for building work that is assessable development under section 1, if—

(a) the Queensland Development Code, part 1.1, 1.2 or 1.3 applies to the building work and, under the part, the proposed building or structure does not include an acceptable solution for a relevant performance criteria under the part;

58. The Tribunal finds that in this circumstance, the application must be referred to the Council as the concurrence agency pursuant to there is no Acceptable Solution.

Assessment of QDC MP 1.1 Performance Criteria P1

59. The relevant Performance Criteria against which the application must be assessed are:

P1 The location of a building or structure facilitates an acceptable streetscape, appropriate for –

(a) the bulk of the building or structure; and

(b) the road boundary setbacks of neighbouring buildings or structure; and

(c) the outlook and views of neighbouring residents; and

(d) nuisance and safety to the public.

60. The Tribunal agrees with the Council that subsections (a) and (b) are relevant.

61. In evaluating the application against MP1.1 P1, the Tribunal looked at the definition of “streetscape” and determined that streetscape was a collection of visual elements making up the surrounds of a street. In this case, it comprises buildings, large retaining walls, various closed and open structures, open parkland, irregular trees and vegetation and an open car park as well as both elevated and flat landmass. There is no discernible pattern to the streetscape, and as such, it cannot be argued that the location of the structure in question is unacceptable in this context.

62. Performance Criteria P1 specifically refers to how the location of the structure in the setback area impacts bulk. The proposed structure consists of a 3.5 m high wall rather than the allowable wall height of 2 m. However, the upper 1 m of this wall is glass, so the additional

perceived height is 0.5 m more than allowable. When viewed in context with the surrounding streetscape, it is a minor addition to the permitted bulk and would be barely discernible. Nevertheless, the swimming pool wall will add “bulk “close to the boundary, and this will be accentuated due to it being a blank concrete wall. Therefore, it does not meet the Performance Criteria P1.

Reasons for the Decision

63. Minimising the impact of this blank structure so that it blends seamlessly with its immediate surroundings is an achievable solution to the perception of bulk. A design solution lies in the visual treatment of the wall through its finishes, colours and textures.
64. Following orders issued by the Tribunal, an amended proposal which provides stone cladding to the wall of the pool structure; a 600 mm landscaping area on the subject site; and a suitable landscaping plan provides a landscaped edge to the pool structure. In the Tribunal’s view, this treatment creates an acceptable streetscape that satisfies Performance Criteria P1.

Ain Kuru

Development Tribunal Chair

Date: 6 April 2021

Schedule: Conditions

1. The development must be constructed in accordance with the following approved drawings and specifications. A copy of the approved documents are to be kept on site during construction.

Reference No	Version	Issue Date	Drawing/Report Title	Purpose of Issue
PLANS – ARCHITECTURAL – Prepared by-- Working Drawing (as amended by conditions)				
Job Revision A	SD-000	24/08/2020	Cover Page	Construction Drawings
	SD-001		Site Plan	
	SD-002		Level 1 Floor Plan	
	SD-003		Pool Area Plan	
	SD-004		North Elevation	
	SD-005		East Elevation	
	SD-006		Sections	
	SD-007		Front 3D	
	SD-008		Top 3D	
PLANS – ENGINEER – Swimming Pool – Prepared by-- Structerre Consulting Engineers - Working Drawing				
3.19.291	S-000	22/03/2021	Cover Sheet & Drawing List	Construction Drawings
	S-00		General Notes	
	S-200		Pool Plan	
	S-201		Pool Details - 01	
	S-202		Pool Details – 02	
	S-203		Pool Details – 03	
	S-204		Pool Details - 04	
PLANS – LANDSCAPING – Prepared by-- Balance Garden Design - Working Drawing (as amended by conditions)				
113-2021 -A	A	12 Feb 2021	Landscaping Plan	Construction Drawings
			Landscaping Document B	

2. Prior to the commencement of work, the location of any nearby underground services should be confirmed on site. If underground services are not located where anticipated, the Applicant must inform the Certifier so that a further assessment can be undertaken to ensure the location of the proposed swimming pool is in accordance with QDC MP 1.4.
3. Work must comply with the Building Code of Australia (BCA) and Queensland Development Code (QDC) in force at the time when this application was approved irrespective of any errors or omissions on the approved drawings.
4. Ensure an inspection of the swimming pool is carried out within 6 months of the date of this approval in accordance with sections 35A, 35B and 35C the Building Regulations 2006.
5. All building work must be satisfactorily completed within 12 months of the date of this approval.
6. Where the works are not set out by a registered cadastral surveyor, the builder shall set up a string line between survey pegs so that the certifier can establish the location of building work. Where this is not done satisfactorily, or the survey pegs are not available onsite, the certifier will request a certificate from a registered cadastral surveyor to ensure all building work is contained within the property boundaries.
7. The colour of stone cladding and other surfaces on the pool structure must closely match the earth tones provided in the email from the Appellant to the Tribunal dated 20 January 2021.
8. Landscaping must comprise psyllid resistant Syzgiums (Lilly Pillys) instead of Eleocarpusreticulartis. Landscaping must be otherwise completed and maintained in accordance with the approved documents.

9. Part of the swimming pool barrier also forms a balustrade as it is on stairs and a deck higher than 1 metre above ground level. The BCA requires the balustrade be designed and certified by an RPEQ engineer in accordance with AS1170.1 and AS1170.2. Provide an engineer's design drawings, Form 15 design certificate and Form 16 from an appropriately QBCC licensed installer that the barrier has been installed as per the engineer's design.
10. Prior to construction a warning sign must be displayed on the site in accordance with Part 4 Section 14 of the Building Regulation 2006. The sign can be removed once the pool fencing is inspected, approved and a Form 17 issued by the building certifier.
11. Swimming pool fencing must be installed to comply with Part 4 of the Building Regulation 2006 and QDC MP 3.4. Prior to the pool being filled to a depth of 300 mm, the pool fencing must be inspected, approved and a Form 17 issued by the building certifier.
12. A resuscitation sign must be displayed near the pool in accordance with Guideline 8 – Cardiopulmonary Resuscitation published by the Australian Resuscitation Council in January 2017.
13. All excavation and fill associated with the work is to be constructed in accordance with the BCA Part 3.1.1 Earthworks.
14. Retaining walls associated with the swimming pool retaining cut or fill greater than 1 metre in height above ground level must be approved by the certifier. Retaining walls of any height associated with the swimming pool within 1.5 metres of another building or structure must be approved by the certifier.
15. All siteworks are to be fully contained within the property boundaries. During construction, all sediment must be retained on site.
16. A temporary pool fence may be approved for a maximum period of 3 months at a time, provided the temporary fence includes at least 1 gate. The temporary pool fence must otherwise comply with Part 4 of the Building Regulation 2006 and QDC MP 3.4 and must be securely fixed to resist all reasonably foreseeable actions to which it may be subjected. Prior to the pool being filled to a depth of 300 mm, the temporary pool fencing must be inspected, approved and a Form 16 issued by the building certifier.
17. Where any portion of the pool is more than 1 metre out of the ground, or not fully supported by natural ground, an additional inspection of the reinforcement steel must be undertaken by the building certifier or other approved competent person.
18. Buildings and associated siteworks are to be constructed to ensure that people and other property are protected from the adverse effects of redirected surface water in accordance with BCA Part 3.1.2.
19. Swimming pool backwash must be connected to a legal point of discharge nominated by the Council. Where no legal point of discharge is available, backwash must be dispersed in an approved manner such as not to cause nuisance to adjoining properties.
20. The following certificates are required in accordance with Part 6 of the Building Regulation 2006 to the satisfaction of the certifier:
 - Form 15 pool steel reinforcement design certificate demonstrating compliance with AS/NZS 1170.0-1 and AS 2783 or AS 3600 (RPEQ Engineer);
 - Form 16 pool steel reinforcement inspection certificate demonstrating compliance with AS/NZS 1170.0-1 and AS 2783 or AS 3600 (RPEQ Engineer); and

- Form 15 glass fencing design certificate demonstrating compliance with AS1288 (Manufacturer);
- Form 15 balustrade design certificate and design drawings demonstrating compliance with AS 1170.1 and AS 1170.2 (RPEQ Engineer); and
- Form 16 balustrade installation inspection certificate confirming balustrade has been installed in accordance with engineer's design (QBCC licensed installer).

21. The following certificates may be required in accordance with Part 6 of the Building Regulation 2006 to the satisfaction of the certifier:

- Form 16 survey certificate (registered cadastral surveyor) demonstrating that the location of the swimming pool is in accordance with the approved drawings.

22. The following inspections must be carried out and a certificate of inspection issued in accordance with Part 6 of the Building Regulation:

- Inspection of steel reinforcing by RPEQ Engineer or the certifier; and
- Final inspection by the certifier.

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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Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833

Email: registrar@hpw.qld.gov.au