



## Development Tribunal – Decision Notice

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### **Planning Act 2016, section 255**

<b>Appeal number:</b>	23-020
<b>Appellant:</b>	Jamie and Helen Hay
<b>Respondent: (Assessment manager)</b>	Rob Wibrow
<b>Co-respondent: (Concurrence agency)</b>	Noosa Shire Council
<b>Site address:</b>	71 Goodwin Street, Tewantin, Queensland 4565 and described as Lot 4 RP129062 – the subject site

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### **Appeal**

This is an appeal under section 229(1)(a)(i) and schedule 1 section 1 table 1 item 1(a) of the *Planning Act 2016* (PA) against the assessment manager's decision to refuse an application for a building development permit, given by a decision notice dated 13 April 2023, as directed by Noosa Shire Council (**Co-respondent**) as the referral agency.

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<b>Date and time of hearing:</b>	Friday 23 June 2023 at 10:30 am
<b>Place of hearing:</b>	On site, 71 Goodwin Street, Tewantin
<b>Present:</b>	Kate Isles - Tribunal Chair Henk Mulder - Tribunal Member  Jaime and Helen Hay - Appellants Marcus Brennan - for the Appellant (via phone)  Jarrad Postle - Co- Respondent, Noosa Shire Council

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### **Decision:**

The Development Tribunal, in accordance with section 254(2)(c) of the *Planning Act 2016* replaces the decision of the assessment manager to refuse the development application for building work for a carport within the front boundary setback with a decision to approve the carport as it has been constructed in situ, with the following conditions:

- a. complete painting of the carport including all elements above the top of the fence including posts and beams to match the dark colouring comprising the timber finish contained in the fence;
- b. selection of a roof finish for the carport other than white, complementary to the darker structure.
- c. provision of a set of as-constructed drawings to the Co-respondent.

## **Background**

1. The allotment contains a single storey residence with a front entry and tandem off-street parking available on the driveway off Goodwin Street.
2. On 30 June 2022, a Request for referral agency response was lodged with the Co-respondent for a building development application for a carport within the front boundary setback. The application included a double carport built to the front and southern boundaries, a widened driveway and fence along the front boundary with a pedestrian access gate and sliding gate for the carport.
3. In June 2022, the adjoining neighbours at 73 Goodwin Street and 36 Gympie Street, Tewantin, signed statements advising that they had no objections or concerns with the proposal prior to lodgement of the application.
4. On 5 July 2022, the Co-respondent issued a request for additional information (RFI), seeking a 'near compliant road boundary setback' for the carport as the proposal 'is not consistent with the predominant character of the streetscape'.
5. On 18 July 2022, the appellant provided a response to the referral agency information request including revised plans.
6. On 20 July 2022, the Co-respondent issued the Referral Agency Response which directed refusal of the application due to non-compliance with PO9(f) of the low density residential zone code as 'the design and location of the proposed carport provides an insufficient road boundary setback and is not consistent with the predominant character of the streetscape'.
7. On 13 April 2023, the Respondent issued a decision notice refusing the application as 'the assessment manager was directed to refuse the application by Brad Geaney of Noosa Shire Council in accordance with their referral agency role'. The refusal was stated to be 'solely because of the direction of the referral agency'.
8. Since approximately September 2022, construction of the double carport, widened driveway and front boundary fence has occurred.

## **Jurisdiction and decision framework**

9. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.
10. Table 1 of schedule 1 of the PA states the matters that may be appealed to the Planning and Environment Court or the tribunal subject to (in the case of the tribunal) the pre-conditions stated in section 1(2) of schedule 1.
11. The Tribunal has jurisdiction to determine this appeal under section 229, schedule 1, section 1(2)(g) and schedule 1, section 1(1)(b), table 1, item 1(a) of the PA.

12. In circumstances where the decision notice was dated 13 April 2023 and received on 19 April 2023, this appeal was to be filed on or before 19 May 2023, which has been undertaken.
13. Accordingly, the Tribunal is satisfied that it has jurisdiction to hear this appeal.
14. The Appellant must establish that the appeal should be upheld, pursuant to section 253(2) of the PA.
15. Under section 253(4) of the PA, 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 the subject of this appeal.
16. Section 249 of the PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and the Tribunal may seek the views of any person.
17. The Tribunal is required to decide the appeal in one of the following relevant ways set out in section 254(2) of the PA:
  - (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*

(...)

#### **Material considered**

18. The material considered in arriving at this decision comprises:
  - (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 10 May 2023.
  - (b) Planning Act 2016 (PA).
  - (c) Planning Regulation 2017 (PR).
  - (d) Building Act 1975 (BA).
  - (e) Building Code of Australia (BCA).
  - (f) Noosa Plan 2020 (NP)
  - (g) Queensland Development Code Part MP1.2 (QDC).
  - (h) Aerial imagery from QImagery and Near Map.
  - (i) Council request for additional information dated 5 July 2022 (RFI)
  - (j) Council referral agency response dated 20 July 2022 (RAR)
  - (k) Decision notice by the Respondent, dated 13 April 2023 (DN)
  - (l) The verbal submissions made by the parties at the hearing and during the site inspection 23 June 2023 as referred to in the body of the decision.

## Findings of fact

The Tribunal makes the following findings of fact:

19. Application for a carport was initially made by the Appellants with a different private certifier, from the assessment manager who made the decision the subject of this appeal.
20. That private certifier referred the proposed development to the Co-Respondent as a referral agency under the *Planning Regulation 2017* for the building setbacks, which Council confirms is stipulated in the NP as an alternative provision to QDC.
21. As the referral agency, the Co-respondent directed the refusal of the development application, no RAB22/1032. Details of Council's reasons for refusal are outlined in their referral agency response dated 20 July 2022 as follows:

*The application is refused as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:*

*Noosa Plan 2020 – Low Density Residential Zone Code*

*PO9 Buildings and structures are designed and sited to;*

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

*It has been considered that the design and location of the proposed carport provides an insufficient road boundary setback and is not consistent with the predominant character of the streetscape.*

*It is Council's view that the predominant character of the streetscape consists of buildings and structures providing a considerably greater road boundary setback than that of the proposed carport.*

22. The Respondent refused the development application on 13 April 2023 because:

*The assessment manager was directed to refuse the application by Brad Geaney of Noosa Council in accordance with their referral agency role. The refusal is solely because of the direction of the referral agency*

23. An appeal was lodged with the Development Tribunals Registrar on 15 May 2023.

## The hearing

24. A hearing took place on site on 23 June 2023 with the Tribunal, the Appellants and a representative of the Co-Respondent in attendance. Marcus Brennan, agent for the Appellants, attended via phone.
25. At the hearing the Appellants advised that:
  - (a) The original certifier engaged by the Appellants had retired in around July/August 2022, and that is why no decision notice was issued post the receipt of the referral agency response from the Co-respondent, until the assessment manager/ Respondent's decision dated 13 April 2023.
  - (b) The Appellants proceeded with the work as a part of the wider building programme being undertaken.
  - (c) The Appellants were aware that the Co-respondent was unlikely to approve the carport in the location, and were of the view that many other neighbouring

structures nearby were lawful, and decided to accept the risk of starting work before seeking an approval for the work.

- (d) During the construction of the carport in and around February 2023 the Co-respondent issued a stop-work notice alleging that the works were unlawful.
  - (e) After receiving the notice, the Appellants engaged with Marcus Brennan who advised them to engage another certifier to issue a formal decision notice which would enable them to then commence an appeal against the refusal.
  - (f) The Appellants acknowledged that the carport as constructed was not consistent with the plans that were subject to the building application.
  - (g) In around April 2023 the Appellants engaged the assessment manager/ respondent who issued the decision notice dated 13 April 2023 refusing the carport based on the direction issued by the Co-Respondent.
26. The Co-respondent acknowledged that it did not have an issue with the fence that had been constructed and the concern was limited to the carport.
27. The Co-respondent did further acknowledge that the current planning scheme does require new houses to have two parking spaces available on site and that given the location of the existing house the opportunities for the car accommodation are limited.
28. The Co-respondent cited other decisions where matters of consistent and predominant character had been established and stated that it maintained the view that there was non-compliance with PO9(f) given that a predominant character was already established in the street.
29. The Co-respondent acknowledged that it had formed the view that the proposal met all of the other performance outcomes in PO9 being (a) - (e) and (g).
30. The parties agreed that Goodwin Street contained significant verges of both sides.

### **Reasons for the decision**

31. The Tribunal is satisfied that the proposal is consistent with the predominant character of the streetscape, which does contain several structures that have been established within the road boundary setback in Goodwin Street and Gympie Street.
32. The subject site contains a dwelling which is setback 6m from the property line. The property line is then set back approximately 8.84m to the kerb. This represents a wider street verge than commonly seen in the area by approximately 2.5m. The effect of the verge in Goodwin Street establishes a high value landscaping character in addition to any landscaping, fencing and structural changes to private property.
33. The character of the streetscape is enforced by the primary route of travel required to enter and exit the surrounding area. All residents of this section of Goodwin Street, Gympie Street and Flame Tree Drive travel past multiple structures established within the road boundary setbacks, including carports, which contributes to their perception of the predominant streetscape character.
34. The visible character of the proposed carport, in tandem with the front boundary fence located in-line with the existing side fence of 36 Gympie Street, further ensures that the proposal integrates and forms a part of the existing character of the streetscape.
35. Notwithstanding that the structure as built is not consistent with the plans as presented for decision, it is the Tribunal's view that the carport as constructed still satisfies PO9(f).

36. The adjoining neighbours have stated that they have no objection to the proposal.
37. For the reasons stated above, the Tribunal is satisfied the proposal complies with the Low density residential zone code, including PO9(f), as it is consistent with the predominant character of the streetscape.

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**Kate Isles**

**Development Tribunal Chair**

**Date: 9 August 2023**

## **Appeal rights**

Schedule 1, table 2(1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Development Tribunals  
Department of Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

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