



## Development Tribunal – Decision Notice

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### Planning Act 2016, section 255

<b>Appeal number:</b>	22-064
<b>Appellant:</b>	Fiona June McMahon
<b>Respondent/ Assessment manager:</b>	Craig Bates
<b>Co-respondent/ Concurrence agency:</b>	Brisbane City Council
<b>Site address:</b>	138 Kent Rd, Kalinga Qld 4030 and described as Lots 31 and 32 on RP 19480 – the subject site

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### Appeal

Appeal under section 229(1)(a)(i) and schedule 1, section 1, table 1, item 1(a), against the assessment manager's decision to refuse the application. The refusal was made at the direction of the concurrence agency, Brisbane City Council (**Council**), which refused its concurrence to the variation of the building setbacks to extensions to an existing dwelling house.

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<b>Date and time of hearing:</b>	Not applicable (Appeal decided on the written submissions)
<b>Place of hearing:</b>	Not applicable (Tribunal Chair and Member conducted site inspection on 23 March 2023.)
<b>Tribunal:</b>	Markus Pye – Chair Andrew Veres – Member

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### Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(c) of the PA **replaces** the decision of the Respondent with a decision that the development application be approved in accordance with the amended drawings supplied by Council to the Tribunals Registrar on 20 March 2023.

### Background

1. The subject site is located in Kent Rd, Kalinga, an access road connecting Rose Street and Lodge Road. The neighbourhood is characterised by renovated and un-renovated high set traditional timber 'Queenslander' dwellings and workers cottages. The area also contains modern dwellings of varying vintages including those on small lots. Because of the varied building stock and lot sizes there are considerable variations to front and side boundary setbacks.
2. The subject site is currently improved by a Class 1a single detached dwelling house, a traditional timber character dwelling set back approximately 7m from the road reserve. The subject site is an 810m<sup>2</sup> level allotment that is rectangular in shape, consisting of two 405m<sup>2</sup> lots. The subject dwelling straddles the internal lot boundary.
3. The subject site is zoned character Residential 1 within the Brisbane City Plan 2014 as well as being located within the Clayfield-Woolloowin district neighbourhood plan. With regard to siting

and boundary clearances, the Tribunal noted that the siting provisions of the Queensland Development Code (QDC) have been applied in the application.

4. Brisbane City Council was the applicable concurrency agency as the proposal did not comply with Acceptable Outcomes for siting of the Queensland Development Code Part MP1.2 (QDC MP1.2). The QDC MP1.2 defines where and how single dwelling houses and associated structures are located on a property for lots 450 square metres and over.
5. The adjoining renovated dwelling to the south has zero frontage setback, due to an open gated carport located along the front boundary. The adjoining traditional dwelling to the north, the lot subject to the considered impacts, has a more traditional 6m setback and appears largely undeveloped.
6. The history of the application was as follows:
  - 16 November 2021: Lodgement of a Code Assessable Application for extensions and partial demolition of a dwelling house. Council application reference:- A005881780
  - 25 March 2022: Early concurrence agency response under section 57 of the Planning Act 2016, i.e. no objection noted and Development Application Decision Notice issued. Council application reference:- A005881780.
  - 20 October 2022: Lodgement of Minor change application.
  - 22 November 2022: Council refusal for Siting Variation Request for Referral Agency Advice.
  - 23 November 2022: Subsequent refusal of building approval application, issued by Craig Bates.
  - 13 December 2022: Lodgement by Appellant of Notice of Appeal with the Tribunals Registrar.

### **Jurisdiction**

7. The tribunal has jurisdiction for this appeal under the PA section 229(1)(a)(i) and schedule 1, sections 1(1), 1(2)(g) and table 1, item 1(a), which is an appeal by the appellant against the refusal of the development application by the assessment manager.

### **Decision framework**

8. The onus rests on the appellant to establish that the appeal should be upheld (section 253(2) of the Planning Act (PA)).
9. 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 (section 253(4) of the PA); however, the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings).
10. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA and the tribunal's decision takes the place of the decision appealed against (section 254(4) of the PA).
11. On 23 March 2023, the Tribunal conducted a site inspection.

### **Material considered**

12. 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 Tribunals Registrar on 13 December 2022.
- b. Written submissions made by Hubert Toś of Council provided on 17 and 23 February 2023, 9 March 2023 and 20 March 2023, 11 and 18 May 2023, 1 June 2023 and 7 July 2023.
- c. Written submissions made by the Appellant on 9 March 2023, 2 and 3 May 2023, and 7 and 14 July 2023.
- d. Queensland Development Code Part MP1.2 (QDC MP1.2) for lots 450 square metres and over.

## Findings of fact

The Tribunal makes the following findings of fact:

13. The BCC assessed the proposal and on 22 November 2022 directed the Assessment Manager to refuse the application on the basis that it was not compliant with the QDC. The proposed side boundary setback on the northern boundary of the subject site was not considered by Council to create an acceptable amenity for the neighbouring residents due to its imposing built form, including as to how it related to QDC:

*P2 – Buildings and Structures:*

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

14. On 17 February 2023, Council advised the Tribunals Registrar that Council and the Appellant had reached agreement about a resolution to the issues in dispute in the appeal, subject to the Appellant providing a final set of plans to reflect what was agreed.
15. On 20 February 2023, the Tribunal directed Council to provide an update by 24 February 2023.
16. On 23 February 2023, Council provided the Tribunals Registrar with finalised plans which Council advised, had been agreed to between the parties.
17. On 27 February 2023, the Tribunal made directions requiring:
  - a. Council to provide by 9 March 2023 an explanation of the differences between the revised plans and provided to the Tribunals Registrar on 23 February 2023 and the plans referred to in the decision under appeal.
  - b. The Appellant to confirm to the Tribunals Registrar by 13 March 2023, that the appellant accepts the Council's proposal as outlined in the drawings submitted by Council on 23 February 2023 and as explained in Council's explanation in response to the direction above.
18. On 9 March 2023, Council advised the Tribunal that Council and the Appellant had agreed to modifications to the drawings and a rationale as to how the modified proposal now satisfied the QDC. Council advised that the modified plans agreed between the parties introduced the following amendments to the design:
  - *Reduction of the roof height over the two-storey rear extension by 300mm*
  - *Changes to the roof profile over the two-storey rear extension (introduction of a gable facing the street frontage)*
  - *Corrections to 'Ground Floor Plan', BA03 rev. F to show the extent of terrace/ gable (front) and a new awning (rear) above.*
19. Later on 9 March 2023, the Appellant advised the Tribunals Registrar as follows:

*...I accept and agree the Council's proposal as outlined in the drawings attached to Hubert's email dated 23 February 2023 and as explained further in his email below.*

*Please let me know if there's anything else you need from me.*

*I look forward to hearing from the Tribunal as to their decision.*

20. On 13 March 2023, the Tribunals Registrar issued the following further directions to the parties:

*The Tribunal has reviewed the parties' responses to the previous directions.*

*The Tribunal requires further information to assist it to make its determination and makes the following direction:*

*That the Co-respondent (Council) provide to the Registrar on or before 4pm on Friday 17 March 2023:*

1. *two (2) sets of drawings—restricted to drawings relevant to the issues in the appeal—that comprise:*
  - *the original refused drawings*
  - *the new agreed drawings with the differences highlighted, such as by clouding.*
2. *an explanation (no more than two pages in length) of the differences between the original and the revised drawings and how these changes address the design impacts identified in the Referral Agency Response.*

21. On 20 March 2023, Mr Hubert Toś of Council provided the Tribunals Registrar with two sets of plans and made the following relevant statement:

*I have attached the drawings showing the proposal as refused by council and the amended set of drawings agreed between the parties. I have added annotations to clarify the extent of changes on the amended plans.*

*In relation to assessment of P2(c) of MP 1.2 of QDC the following comments are made to assist the Tribunal.*

*The amended proposal includes changes to the roof form of the rear extension resulting in a reduction of the overall building height by 300mm, and provides for a dwelling house compatible with its residential surrounding and the overall level of amenity that can be expected in the immediate vicinity of the site. Although the proposed development as amended does not achieve compliance with the prescribed side setbacks in accordance with A2 of MP 1.2 of QDC, the resulting structure with reduced height, does not result in undue impact on the amenity of residents on adjoining lots, and occupiers of the property sharing the northern boundary with the site in particular. Considering the local context of the site and the existing side setbacks of residential properties on Kent Road in the immediate proximity of the site, the amended proposal is overall considered to satisfy P2(c) of MP 1.2 of QDC.*

22. On 28 April 2023, the Tribunal made a decision under s254(2)(c) of the Act, replacing the decision of the assessment manager with an approval based on the amended plans subject to a condition that the plans be amended again to reduce the overall roof pitching height by 300mm.

23. Subsequently the appellant and the Council corresponded with the Registrar about the Tribunal's decision. After considering that correspondence, the Tribunal formed the view that the decision notice dated 28 April 2023 contained an error in relation to what had been agreed by the Appellant and Council.

24. On 8 May 2023, the Tribunal revoked its decision dated 28 April 2023.

25. Subsequently the Tribunal invited the parties to make submissions to clarify the substance of the agreement and in particular, in relation to an apparent discrepancy between Council's reference to a 300mm reduction in overall building height, and the amended plans, which indicated a different roof height reduction.

26. On 7 June 2023 the Appellant and the Council confirmed that the agreement reached was in accordance with the plans submitted by Council to the Tribunals Registrar on 20 March 2023 and that both of those parties accepted that the overall roof height reduction was 248mm and not 300mm as previously described.

### **Reasons for the decision**

27. The Tribunal comes to the understanding of how the Council relaxed its view on the impacts of the proposal and satisfied its assessment through three key changes outlined in Item 18 above. The Tribunal deliberated on these three items and makes the following observations about the following two items:
- a. Regarding the second item in Council's list reproduced in paragraph 18 above—*Changes to the roof profile over the two-storey rear extension (introduction of a gable facing the street frontage)*—the Tribunal is of the opinion that this modification would have negligible impact on the amenity and privacy of the residents on adjoining lots. The Tribunal therefore makes no comment on its implementation and therefore accepts it as a condition.
  - b. Regarding the third item in Council's list reproduced in paragraph 18 above—*Corrections to 'Ground Floor Plan', BA03 rev. F to show the extent of terrace/ gable (front) and a new awning (rear) above*—the Tribunal notes that this was a clarification on elements that were not considered to be impacting on the adjacent northern property and accepts it as a binding condition of approval.
28. Regarding the first item in Council's list reproduced in paragraph 18 above—*Reduction of the roof height over the two-storey rear extension by 300mm*—the Tribunal accepts the Council's reasoning in its submission dated 20 March 2023 and extracted at paragraph 21 above, about requiring a roof height reduction of 300mm, subject only to the Tribunal's finding that the roof ridge height reduction is in fact 248mm, as acknowledged by the Appellant and the Council.

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**Markus Pye**

**Development Tribunal Chair**  
**Date: 28 July 2023**

## Appeal rights

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

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

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

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

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

## Enquiries

All correspondence should be addressed to:

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

Telephone 1800 804 833

Email: [registrar@epw.qld.gov.au](mailto:registrar@epw.qld.gov.au)