



Development Tribunal – Decision Notice

Planning Act 2016 Section 255

Appeal number: 23-024

Appellant: Mr Glenn Rowen

Respondent: Sunshine Coast Council
(Assessment manager)

Site Address: 3 Cypress Court, Minyama and described as Lot 328 on RP202425

Appeal

Appeal under section 229 and schedule 1, table 1, item 2 of the *Planning Act 2016* (Qld) (**PA**) against the decision by Council as assessment manager to refuse a change application for a minor change to existing development permit for building works assessable against the planning scheme for works associated with a dwelling house.

Date and time of hearing: 17 August 2023 at 10am

Place of hearing: The subject site

Tribunal: Amelia Prokuda – Chair
Elizabeth Anderson – Member

Present: Glenn Rowen – Appellant
Sharon Rowen – Appellant’s wife
Andrew Stevens, Project Urban – Appellant’s representative
Daniel Rundle – Council representative
Jessica McKauge – Council representative
Tracey Douglas – Council representative

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(c) of the PA, replaces the decision of the Assessment manager as set out in the decision notice dated 15 May 2023 with a decision to approve the change application for a minor change the existing development approval to make the following changes to the conditions:

Condition 8

~~The building is to remain as an open carport at all times.~~ **DELETED**

Condition 9

~~No doors/gates/screens or the like are to be constructed.~~ **DELETED**

Condition 10

~~No side or rear screening/fencing/lattice/battens or the like are to be constructed.~~ **DELETED**

Background

1. On or about 9 January 2019, Council approved a development application for a development permit for building work assessable against the planning scheme for works associated with a dwelling house over land located at 3 Cypress Court, Minyama (**Land (Existing Approval)**). The Existing Approval is for the construction of a two bay 36 square metre open carport in the front setback of the Land.
2. On or about 9 November 2022, the Appellant (together with his wife) made an application to change the Existing Approval.
3. The change application was made in response to a show cause notice issued by the Assessment manager, as there is an existing carport on the Land which does not comply with the conditions of the Existing Approval. In particular, the carport has the following features:
 - (a) an opaque perspex electric 'roller door' at the front; and
 - (b) powder coated metal screening on the sides.
4. The application was accompanied by an eDevelopment application form and Form 5 – Change application form.
5. The letter from Project Urban to Council dated 9 November 2022 sets out the proposed changes to the Existing Approval. The following changes are proposed:
 - (a) Deletion of condition 8, which states:
'The building is to remain as an open carpet at all times.'
 - (b) Deletion of condition 9, which states:
'No doors/gates/screens or the like are to be provided across the front of the carport.'
 - (c) Deletion of condition 10, which states:
'No side or rear screening/fencing/lattice/battens or the like are to be constructed.'
6. On 15 May 2023, Council issued a decision notice refusing the change application. The decision notice did not contain reasons for Council's decision.
7. In response to a direction given by the Tribunal on 24 July 2023 made under section 246(1) of the PA in which Council was requested to provide its reasons for the decision

to refuse the change application, Council provided a copy of the assessment report for the change application.

8. The Council assessment report identifies the following reasons for refusal (summarised from the report):
 - (a) the change application fails to comply with the following provisions of the Strategic Policy – Assessment of amenity and aesthetic considerations for particular building work – carports (**Strategic Policy**), which was in effect when the development application was lodged:
 1. the “Policy outcome”;
 2. the “Guiding principles”
 3. PO3 (and AO3);
 - (b) the change application fails to comply with PO2 of the Dwelling house code; and
 - (c) the proposed changes cannot be conditioned to comply with the requirements of the planning scheme.
9. In the letter from Project Urban to the Assessment manager dated 14 March 2023 in response to further issues raised by the Assessment manager, the following submissions were made in support of the change application:
 - (a) the carport complies with PO3 of the Strategic Policy as the roller door and side walls do not affect the current opportunities for casual surveillance of the street. The existence of the solid fence along the boundary already limits surveillance from the ground floor of the dwelling house but surveillance opportunities from the first floor are maintained;
 - (b) the carport materials reflect the character of the dwelling house; and
 - (c) the quality design and finish of the carport limits the appearance of bulk from the street and minimises any adverse amenity and aesthetic impacts that may ordinarily occur.
10. At the hearing, the Appellant also raised concerns about the lack of security associated with an open carport.

Jurisdiction

11. Under section 229(1)(a) of the PA, the matters that may be appealed to either a Tribunal or the Planning and Environment Court, or only a Tribunal, or only the Planning and Environment Court are set out in schedule 1.
12. Table 1 of schedule 1 sets out the matters that may be appealed to the Planning and Environment Court or the Tribunal. There are limitations as to when matters in table 1 may be appealed to the Tribunal. Under section 1(2) of schedule 1 of the PA, table 1 only applies to a Tribunal only if one of the circumstances set out in paragraphs (a) to (l) apply.
13. 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 that Act that may or must be decided by the Queensland Building and Construction Commission.’*
14. The types of matters that may or must be decided by the Queensland Building and Construction Commission are different from those that the Planning and Environment Court or Tribunal would ordinarily decide. They go to matters such as licensing and the conduct of building certifiers (see section 133 of the *Building Act 1975* (Qld) (**Building Act**)).

15. The appeal is against the decision of the responsible entity (in this case, Council) on a change application (item 2 of table 1 in schedule 1 of the PA). The change application relates to an existing development permit for building work, which has been refused on grounds relating to compliance with the local government planning scheme. The change application is a building development application under section 6(1)(b) of the Building Act.
16. Section 8(5) of the PA confirms that a local planning instrument must not include a provision about building work, to the extent it is regulated under the building assessment provisions (set out in section 30 of the Building Act) unless allowed under the Building Act.
17. At the time the development application for the Existing Approval was lodged, the Sunshine Coast Planning Scheme 2014 (**SC Planning Scheme**) (version 17 effective 7 December 2018) was in effect. At the time the change application was lodged, the SC Planning Scheme (version 24 effective 16 May 2022) was in effect.
18. Under section 1.6 of both versions of the SC Planning Scheme, the Dwelling house code specifies alternative design solutions for boundary clearance and site cover provisions MP 1.1, 1.2 and 1.3 of the Queensland Development Code.
19. The Tribunal is satisfied that the Tribunal has jurisdiction to hear and decide the appeal, as the appeal relates to a matter in table 1 of schedule 1 of the PA and relates to the Building Act.
20. An appellant must start an appeal within the appeal period, which in this case is 20 business days after the day the notice of the decision is given to the person (section 229(3)(g) of the PA). The Appellant filed the Notice of Appeal on or about 25 May 2023, only eight business days after they received the decision notice so there is no dispute that the appeal was started in time.

Decision framework

21. The Appellant carries the onus to establish that the appeal should be upheld (section 253(2) of the PA).
22. 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 the appeal (section 253(4) of the PA).
23. 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.
24. The Tribunal gave leave pursuant to section 253(5)(a) of the PA to the Appellants to present the other evidence identified in the list of "material considered" below.
25. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Material considered

26. The material considered by the Tribunal pursuant to section 253(4) and (5) of the PA in arriving at this decision comprises the Form 10 Notice of appeal, grounds for appeal and documents accompanying the appeal lodged with the Tribunals Registrar on or about 25 May 2023 including:
 - (a) the letter from Project Urban to the Assessment Manager dated 9 November 2023 making the change application;

- (b) the letter from Project Urban to the Assessment Manager dated 14 March 2023 responding to further issues raised by the Assessment Manager;
 - (c) the decision notice issued by the Assessment Manager dated 15 May 2023; and
 - (d) letters from nearby residents to the Assessment Manager expressing support for the change application.
27. Prior to the hearing in response to a direction made by the Tribunal under section 246(1) of the PA on 24 July 2023, the Assessment Manager provided a copy of the assessment report for the change application. The Tribunal has also considered the assessment report.

Findings of fact

28. The Tribunal makes the findings of fact below.

The Land and immediate streetscape

29. The Land has an area of 840 square metres and is located on the Mooloolah River canal area.
30. There is an existing dwelling set back from the road boundary. The carport is located in front of the dwelling in the south-western corner of the Land. The carport is 4.5 metres high and setback 1.65 metres from the south-western (side) boundary. There is a solid white fence along the road boundary and an opening of 2.65 metres between the carport and fence, leading to the entry gate.
31. Cypress Court is characterised by large contemporary single dwellings, with solid brick or masonry fences and electric sliding gates on the road boundary. Carports are either setback from the road or open carports on or close to the road boundary. There is one dwelling house with an enclosed carport (at 9 Townsend Court). The Assessment Manager submitted that the carport was constructed at the time the superseded Planning Scheme was in effect.
32. Several of the carports are of a large scale. This is unsurprising given the dwellings are located on or across the road from a canal and the residents often own boats, jet skis and other watercraft that need to be stored.

Assessment of the change application

33. The change application seeks to change the Existing Approval so as to delete the conditions that require the carport to be enclosed.
34. The Tribunal is satisfied that the proposed change to the Existing Approval constitutes a 'minor change' as defined in schedule 2 of the PA. The proposed change would not result in substantially different development as the change does not:
- (a) involve a new use; or
 - (b) result in the application applying to a parcel of new land; or
 - (c) dramatically change the built form in terms of scale, bulk and appearance (discussed in further detail below); or
 - (d) change the ability of the proposed development to operate as intended; or
 - (e) remove a component that is integral to the operation of the development; or
 - (f) significantly impact on traffic flow and the transport network, such as increasing traffic to the site; or

- (g) introduce new impacts or increase the severity of known impacts; or
 - (h) remove an incentive or offset component that would have balanced a negative impact of the development; or
 - (i) impact on infrastructure provisions.
35. Further, the proposed change would not:
- (a) cause the approval to include prohibited development; or
 - (b) require the application to be referred to extra referral agencies; or
 - (c) require a referral agency to assess the application; or
 - (d) cause the application for the changed approval to be subject to public notification.
36. In assessing the change application, the responsible entity (in this case, the Tribunal standing in the shoes of the assessment manager) must consider:
- (a) the information the applicant included with the application;
 - (b) if the responsible entity is the assessment manager – any properly made submission about the development application or another change application that was approved;
 - (c) any pre-request response notice or response notice given in relation to the change application;
 - (d) all matters the responsible entity would or may assess against or have regard to, if the change application were a development application; and
 - (e) another matter that the assessment manager considers relevant (section 81(2) of the PA).
37. The responsible entity must consider the statutory instrument, or any other document applied, adopted to incorporated in a statutory instrument, as in effect when the development application for the existing approval was properly made (section 81(4) of the PA). However, the responsible entity may give the weight it considers appropriate to statutory instruments or other documents in effect when the change application was made (section 81(5)(a) of the PA). The Strategic Policy is no longer in effect but it still must be considered in assessing the change application.
38. The parts of the Strategic Policy referred to in the assessment manager’s decision notice attached and marked “Attachment A”.
39. The assessment benchmark in the Dwelling house code of the SC Planning Scheme that is referred to in the assessment manager’s decision notice is extracted below.
40. The Guiding Principles in the Strategic Policy refer to providing *‘building forms in nominated localities which are considered to be consistent with either the existing or desired character’* and ensuring *‘carports located within the frontage setback do not proliferate and negatively impact upon the streetscape character of the Sunshine Coast’*.

Reasons for the decision

41. The parties agree that the change application does not comply with AO3 of the Strategic Policy and AO2 of the Dwelling house code. It is therefore necessary to demonstrate compliance with PO3 of the Strategic Policy and PO2 of the Dwelling house code.
42. With respect to PO3(a) of the Strategic Policy, the Tribunal is satisfied that the carport in its existing condition maintains opportunities for casual surveillance to the street. It is true that the carport does limit the view to the street to a minor extent but the opportunities for surveillance from the ground floor are already limited by the solid fence on the road boundary. As a result of the carport, opportunities for casual surveillance from the first floor of the dwelling are not impacted and are maintained.
43. With respect to PO3(b) of the Strategic Policy, the colour and materials used to construct the carport ensure it does not dominate the appearance of the dwelling. In the context of the existing solid fences and large carports in the street, the carport does not have the appearance of dominating the streetscape. The Tribunal is therefore satisfied that the change application complies with PO3 of the Strategic Policy. It is also satisfied that the change application complies with PO2(b) of the Dwelling house code which requires carports not to dominate the streetscape.
44. There is no evidence that the carport in its existing form adversely impacts the amenity of the adjacent land and dwelling houses. The Tribunal is satisfied that there is compliance with PO2(a) of the Dwelling house code.
45. The carport maintains an adequate area adjacent to the road frontage suitable for landscaping. The deletion of conditions 8 to 10 will not affect the areas available for landscaping. For that reason, the Tribunal is satisfied that there is compliance with PO2(c) of the Dwelling house code.
46. Having regard to the existing streetscape which has an appearance of block fences along the road boundaries and substantial carport structures (albeit that most of them are open), the Tribunal is satisfied that the carport the subject of the appeal maintains the visual continuity and pattern of buildings and landscape elements within the street and therefore complies with PO2(d) of the Dwelling house code.
47. In summary, the change application should be approved as the changed development complies with the applicable assessment benchmarks in the Strategic Policy and Dwelling house code.

Amelia Prokuda
Development Tribunal Chair

Date: 9 October 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

Attachment A – Extracts of Strategic Policy and Dwelling house code

Strategic Policy

Policy outcome

This policy seeks to protect the character and amenity of the Sunshine Coast from incompatible building work whilst providing for particular built forms in specific localities and under certain circumstances. The provision of particular built forms in certain localities and circumstances recognises the characteristics of individual places and the community’s level of acceptance of different built form outcomes in those places.

Mooloolah River Canal Area

Lots in the Mooloolah River Canal Area have specific characteristics which tend to create a particular type of residential amenity.

The attributes that contribute to this amenity are as follows:-

- lots that are generally larger and wider than average;
- lots that have both street and water frontages;
- living areas are generally orientated to take advantage of water views meaning that street frontages can sometimes become secondary frontages whilst water frontages become primary frontages;
- larger and more densely landscaped areas due to the size and width of lots and orientation of living areas;
- lots that are flat, with minimal elevation, resulting in limited viewlines along streets; and
- a cul-de-sac dominated street network resulting in local traffic movement only.

Whilst the provision of carports within specified road boundary setback distances has the potential to adversely affect amenity and aesthetics, there may be circumstances where open carports in the Mooloolah River Canal Area can be sited within the specified road boundary setback without detrimentally impacting on the amenity and aesthetics of the locality, provided that the scale of such structures is limited and a high standard of design and finish is achieved.

The restriction of this policy to the Mooloolah River Canal Area will ensure that carports within the road boundary setback do not proliferate within the Sunshine Coast Local Government Area more generally, which would have a negative impact upon the amenity and aesthetics of the Sunshine Coast. The Mooloolah River Canal Area is a discrete area which, due to finger-like land projections bounded by canals, is not generally experienced by visitors travelling through the region or by residents from other areas on the Sunshine Coast.

Guiding principles

- This policy will ensure the continued effective operation of the SCPS 2014 through the regulation of certain types of building work.
- This policy will provide for building forms in nominated localities which are considered to be consistent with either the existing or desired character, whilst ensuring outcomes sought by the SCPS 2014 in regard to the wider Sunshine Coast community are still achieved (i.e. ensure that carports located within the *frontage setback* do not proliferate and negatively impact upon the streetscape character of the Sunshine Coast).

PO3	Carports:- (a) maintain opportunities for casual surveillance to the street; and (b) do not dominate the <i>streetscape</i> or appearance of the dwelling.	AO3	Carports:- (a) are open on all sides (excluding any side adjoining the <i>dwelling house</i>) to a minimum height of 2.1 metres; and (b) do not include a door (roller, panel, tilt or the like) facing the <i>frontage</i> (whether transparent or not).
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