



## Development Tribunal – Decision Notice

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*Planning Act 2016*, section 255

<b>Appeal number:</b>	<b>23-050</b>
<b>Appellant:</b>	Jason Noble and Melanie Nixon-Smith
<b>Respondent (assessment manager):</b>	Gus Schultz
<b>Co-respondent (Concurrence agency):</b>	Noosa Shire Council
<b>Site address:</b>	33 Woolumba Street, Tewantin Qld 4565 and described as Lot 207 on RP810153 – the subject site

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### Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* against the refusal of a development application for building work for a class 10a structure, being a carport within the road boundary setback on a residential site. The decision followed a referral agency response by the Noosa Shire Council directing refusal of the application on the grounds that the proposed carport does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2020, Low Density Residential Zone Code PO9 (a) *provide a high level of amenity to users of the subject site and adjoining premises including provision of visual and acoustic privacy and access to sunlight; (e) allow for space and landscaping between buildings; and, (f) be consistent with the predominant character of the streetscape.*

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<b>Date and time of hearing:</b>	15 December 2023 at 11.30 am
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Anthony Roberts - Chair Lisa Lambie – Member
<b>Present:</b>	Jason Noble and Melanie Nixon-Smith - Appellants Gus Schulz - Building certifier (Core Building Certification) John Demetriou – Core Building Certification Paul Schultz – Builder (Builder Direct) Jarrad Postle - Council representative

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### Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* replaces the decision of the Assessment Manager with another decision, namely, to approve the design and siting of the proposed carport on the subject land as shown on Drawings No. A001; A002; A003 prepared by Builder Direct and dated 9 August 2023, subject to the following conditions:

1. The carport is to remain open to the road frontage and not enclosed with a carport gate or door;
2. The area immediately adjacent to the southern side of the carport (to a minimum width of 1m) to be landscaped with appropriate vegetation to provide effective screening to the full height of the carport roof.

## Background

1. The subject site is:
  - a. a gently sloping, irregular-shaped allotment located on a sweeping bend in Woolumba Street, Tewantin;
  - b. 663m<sup>2</sup> in area containing a single storey dwelling house set in well landscaped grounds;
  - c. zoned Low Density Residential under the Noosa Plan 2020.
2. The proposed carport is:
  - a. attached to the front fascia of the existing dwelling house and located 1.70m minimum from the Woolumba Street boundary;
  - b. intended to accommodate two vehicles being 5.5m long and 6.1 m wide with an area of 33.5m<sup>2</sup>;
  - c. 2.8m in height to the Woolumba Street frontage;
  - d. lightweight in design (with posts set back 0.6m from roof edge), a skillion Colorbond roof sloping towards the street and would not incorporate an enclosing door or gate.
3. As the proposed structure triggers assessment against the relevant performance criteria of the Noosa Plan 2020 due to the proposed siting within the required 6m road boundary setback, the Assessment Manager on 14 August 2023 lodged with the Noosa Shire Council a Request for a Concurrence Agency Response for the design and siting of a carport within the front setback (under Schedule 9, Division 2, Table 3 of the Planning Regulation 2017).
4. Council issued an Information Request on 23 August 2023 seeking re-consideration of the siting and design of the carport to achieve a more compliant outcome. No response was provided by the Assessment Manager.
5. On 6 September 2023, Council issued a Referral Agency Response directing the Assessment Manager to refuse the application for the reasons stated 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:

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

*It has been considered that alternative locations are available for which the carport may be located that provide for the same level of amenity to the users of the subject site while also complying with other relevant performance outcomes.*

- e) allow for space and landscaping to be provided between buildings including adequate area at ground level for landscaping with trees, shrubs and outdoor living;

*It has been considered that the current proposal does not allow for space and landscaping to be provided between buildings.*

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

*It has been considered that the design and location of the proposed carport 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 greater road boundary setback than that of the current proposal.*

6. The Assessment Manager subsequently issued a decision notice on 20 September 2023 refusing the proposed development based exclusively on the referral agency response from Council directing refusal.
7. The hearing for the appeal was held at the subject site on 15 December 2023 at 11.30 am. The Tribunal had the opportunity to view the positioning of the proposed structure from the subject site and the streetscape more generally.

### **Material considered**

8. The Tribunal considered the following material:
  - a. 'Form 10 – Appeal Notice', grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar on 25 September 2023;
  - b. The *Planning Act 2016* (PA);
  - c. The Planning Regulation 2017 (PR);
  - d. The Queensland Development Code MP 1.2 2020 (QDC);
  - e. The *Building Act 1975* (BA);
  - f. The Building Regulation 2021 (BR);
  - g. The Noosa Plan 2020 (Noosa Plan);
  - h. Noosa Plan 2020 – Low Density Residential Zone Code (the Code);
  - i. Post-hearing submissions made by the Appellant's agent on 17 November 2023 and by Council on 20 November 2023;
  - j. The verbal submissions made by the parties at the hearing and site inspection;
  - k. A 3D image of the design provided by the Appellant at the hearing.

### **Jurisdiction**

9. The Tribunal has jurisdiction to hear the appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(1)(b), 1(2)(g) and Table 1, item 1(a) being an appeal by the Appellants against the refusal of the development application by the assessment manager at the direction of the referral agency.

### **Decision framework**

10. Section 253 of the PA sets out matters relevant to the conduct of this appeal. Subsections (2), (4) and (5) of that section are as follows:
  - (2) Generally, the appellant must establish the appeal should be upheld.
  - (4) The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.

- (5) However, the tribunal may, but need not, consider— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.

11. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and is not relevant here) are as follows:

- (1) This section applies to an appeal to a tribunal against a decision.
- (2) The tribunal must decide the appeal by-
  - (a) confirming the decision; or
  - (b) changing the decision; or
  - (c) replacing the decision with another decision; or
  - (d) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time; or
  - (e) [not relevant].
- (3) However, the tribunal must not make a change, other than a minor change, to a development application.

12. Section 33 of the BA (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) allows a planning scheme to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover.
13. The Low Density Residential Zone Code Table 6.3.1.3, contains alternate provisions to the QDC. As the proposal does not meet the acceptable outcomes set out in Acceptable Outcome AO 9.1, which as applied to the subject site requires buildings and structures have a setback of 6m from the road frontage, assessment is made against the list of Performance Outcomes stated at PO9 of the Code.
14. For the purposes of this appeal only PO9(a) 'provide a high level of amenity to users of the subject site and adjoining premises including provision of visual and acoustic privacy and access to sunlight'; (e) 'allow for space and landscaping between buildings'; and, (f) 'be consistent with the predominant character of the streetscape' are applicable.

### **Matters in dispute**

15. PO9 of the Code specifically applies to the design and siting of building and structures. PO9(a), which deals with amenity considerations has a focus both on the amenity of the 'users' and 'adjoining premises'. At the hearing, it was established that, due to the separation of the proposed carport siting from adjoining neighbours, only the amenity impacts of the development on the users of the site were in contention. However, amenity considerations relating to adjoining properties did come into play in relation to the siting alternative proposed by Council.

### **Findings of fact**

16. The Tribunal makes the following findings of fact:
  - a. In relation to the grounds for appeal, the Appellants contend that:
    - i. The proposed carport will provide enhanced amenity to the users of the premises as no covered carparking currently exists and the proposed positioning will maximise convenience of access and weather protection;

- ii. The carport is needed as the existing garage space had been converted to a utility room to accommodate a growing family;
- iii. The proposed siting will have no impact on neighbouring properties due to ample separation;
- iv. The proposed carport is of lightweight design with features such as posts set back 0.6m from roof edge and a Colorbond roof to match the visual appearance of the premises;
- v. Substantial existing landscaping will be retained to screen the structure and there is space for extra landscaping to soften the overall look if required;
- vi. The curved alignment of Woolumba Street will make the carport inconspicuous;
- vii. Locating the carport in the side yard of the property would result in inconvenient access to the dwelling and would be unlikely to accommodate a double carport and result in amenity impacts on the adjoining premises;
- viii. There are examples in the vicinity of the site where carports and other structures are situated within the required 6m front setback.

b. In relation to the grounds for refusal, Council contends that:

- i. The design and location of the proposed carport is not consistent with the predominant character of the streetscape which consists of buildings and structures 'providing greater road boundary setback than that of the current proposal';
- ii. There is an alternative siting option available (i.e. the side yard) to locate the carport so as to provide an equivalent level of amenity whilst achieving better compliance with relevant performance outcomes;
- iii. The alternative location would allow for a more compliant setback with less impact on the streetscape;
- iv. The proposed siting does not allow for space and landscaping to be provided between buildings and landscaping conditions attached to development permits are difficult to enforce;
- v. Council considers the term 'streetscape', although undefined in the Noosa Plan, to be 'what can be seen standing in front of the property and looking up and down the street'.
- vi. Examples of other properties in the vicinity of the site where buildings and structures are within the required setback are not a valid precedent as they are variously: approved under the previous planning scheme; not Council approved structure, or not within the streetscape considered by Council to be applicable to the subject site;
- vii. The previous removal of the existing garage within the dwelling house has necessitated the provision of external covered carparking creating potential amenity impacts.

PO9(a) amenity and PO9(e) space/landscaping between buildings

- 17. Based upon the site inspection conducted at the hearing, the Tribunal finds that the proposed design of the carport is appropriate and the intended location is logical and practical. The carport, as proposed, would likely enhance the amenity of the users of the dwelling (particularly in terms of vehicle protection and convenience of dwelling access) and have no detrimental impact on neighbouring properties.
- 18. The Tribunal considers that the alternative side-yard siting proposed by Council is unacceptable as it would: not allow for a two-vehicle structure; be less convenient for

the users of the subject site, and potentially impact the amenity of the neighbouring property. It would still likely require a Council relaxation of the front setback requirement.

19. Further, the alternative location of the carport would necessitate a new crossover and driveway together with the removal of the existing crossover and driveway which in the Tribunal's view would be both impractical and cost prohibitive.
20. In respect of open space and landscaping considerations, the Tribunal understands that existing landscape buffer (including mature trees) adjoining the footprint of the carport structure is to be substantially retained and will provide effective screening of the structure for the north elevation. There also exists potential on the site for supplementary landscaping to provide a visual buffering of the structure for the south elevation.

#### PO9(f) streetscape

21. Based upon the site inspection conducted at the hearing, the Tribunal finds that Woolumba Street presents as a variable streetscape, due principally to the meandering nature of the road alignment and comprises mixed architectural styles and landscape elements. The substantial curvature of the road in front of the subject site means that there are restricted sightlines to the property. This is particularly the case for passing vehicles. The subject site also sits opposite a substantial open space in the road reserve for Monk Place which breaks up the immediate streetscape setting for the subject site.
22. The Tribunal acknowledges that there is disagreement between the parties as to what working definition should be used to determine the applicable 'streetscape' for the purposes of the appeal. Council put forward that the appropriate definition was 'what can be seen standing in front of the property and looking up and down the street' whilst the Appellants contend that the streetscape within a reasonable proximity of the site on the same or interconnecting streets should be the frame of reference.
23. It is predominantly the case, utilising Council's preferred definition of streetscape, that the streetscape framing the subject site exhibits a pattern of buildings and structures 'providing greater road boundary setback than that of the current proposal'. However, the Tribunal noted that there was at least one example (i.e. 79 Hooper Crescent) of a double carport with minimal front setback within immediate view from the subject site.
24. The Tribunal further noted that when the delineation of streetscape recommended by the Appellants was preferred there are several examples (including 1 Carter Court and 1 Woolumba Street) where structures intrude into the required 6m front setback.
25. With respect to these examples, Council contends that any unapproved structure should be disregarded for the purposes of consideration of the subject site and any structures approved under the previous Noosa Plan should also be disregarded because the previous Noosa Plan had different requirements.
26. In relation to existing examples of allegedly unlawful development, the Tribunal's view is that they should not be considered as a component of the streetscape if Council is actively attempting to have them removed as part of a concerted compliance and enforcement effort. As no evidence of compliance and enforcement action was presented by Council to demonstrate that Council's intent is to remove unlawful structures, the Tribunal considers they do form an element in the existing streetscape.
27. In relation to existing examples of development approved under the previous Noosa Plan, the Tribunal concurs with the Appellant's view that the relevant provisions of the

previous Noosa Plan are substantially the same as the current plan and therefore these examples are also relevant. Irrespective of the technical definition of streetscape applied, the presence of these structures (approved or otherwise) do form an integral component of the established streetscape from a lay person's perspective.

### **Reasons for the decision**

28. In this Appeal, the Tribunal considers the Appellants have satisfied the onus to demonstrate the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision of the Assessment Manager for the reasons identified below.
29. In relation to amenity considerations, the Tribunal finds that, unlike the alternative preferred by Council, the proposed design and siting of the carport is appropriate and practical. The intended development would likely enhance the amenity of the users with no detrimental impact on neighbouring properties.
30. In relation to streetscape considerations, the Tribunal considers the proposed development to be consistent with the character of the streetscape.
31. The Tribunal found that Woolumba Street presents as a variable streetscape due principally to the meandering nature of the road alignment and comprises mixed architectural styles and landscape elements. The substantial curvature of the road in front of the subject site means that there are restricted sightlines to the property which would, together with enhanced landscape buffering, make the proposed structure unobtrusive. There is adequate opportunity on site to bolster existing landscape screening elements to further soften the development from a streetscape perspective.
32. The Tribunal further considers that there are several examples both in the immediate vicinity of the subject site and in the neighbouring area where buildings and structures intrude into the front setback.
33. The Tribunal therefore considers Performance Outcomes PO9(a), (e) and (f) have been satisfied. However, to ensure that the structure does not, through alteration, become more visually dominant in future and to enhance the existing vegetative buffers, a condition preventing enclosure of the front of the structure and a condition requiring supplementary landscaping are considered appropriate by the Tribunal.

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**Anthony Roberts**  
**Development Tribunal Chair**

Date: 12 February 2024

## **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 Housing, Local Government, Planning 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)**