



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	24-049
Appellants:	Darren Love and Rebecca Davis-Love
Respondent/Assessment manager:	Trevor Gerhardt, Sunshine Coast Building Approvals
Co-respondent (Concurrence agency):	Sunshine Coast Regional Council ('Council')
Site address:	18 Reliance Place, Pelican Waters Qld 4551 – formally described as Lot 13 on SP138679 ('the subject site').

Appeal

Appeal under section 229(2) and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1(a), of the *Planning Act 2016* ('the PA') against the assessment manager's decision to refuse the appellants' application for a building works development permit for a proposed swimming pool pavilion ('the application').

Date and time of hearing:	Tuesday, 10 December 2024, at 10.00am
Place of hearing:	The subject site
Tribunal:	Neil de Bruyn – Chairperson Elisa Knowlman – Member
Present	Darren Love – Appellant Rebecca Davis-Love – Appellant Marcus Brennan – Appellants' representative Trevor Gerhardt – Assessment manager Stephen Whitby – Council representative Jeffrey Dodd – Council representative

Decision

1. The Development Tribunal ('the Tribunal'), in accordance with section 254(2)(d) of the *Planning Act 2016* (PA) **sets aside** the decision of the assessment manager to refuse the application, and orders the assessment manager:
 - a) to remake the decision within 25 business days of the date of receipt of this decision notice, as if the concurrence agency had no requirements; and
 - b) in the event that the assessment manager then decides to approve the application, to include the following conditions in the resultant building works development permit:

- i. Except as modified by condition (ii) below, the approved development is to be in accordance with the Graham Green Design Drafting plans (Project No. 224-062 Revision C, Sheets 1 to 8 and dated 13.08.24). In particular, the maximum height of the pavilion roof at its outermost northern projection should not be greater than 2,244mm.
- ii. The proposed pavilion is to be sited to a minimum side boundary setback of 500mm measured from its northern outermost projection to the northern side boundary of the subject site.

Background

2. The subject site consists of a residential canal estate lot with an area of 1,034m² and described as Lot 13 on SP138679. The subject site has direct frontage to Reliance Place, forming its western boundary and to Lamerough Canal, forming its eastern boundary. The subject site is located within the Sunshine Coast Regional Council local government area. The immediate vicinity of the subject site is characterised by low density residential land uses.
3. Based on the material before the tribunal, the subject site is included within the Low Density Residential Zone under the Sunshine Coast Planning Scheme 2014, being the current and applicable planning scheme for the subject site ('the planning scheme').
4. The subject site contains a substantial dwelling house and associated swimming pool area. The latter is located adjacent to the eastern (canal) boundary of the subject site.
5. It is proposed to construct a roofed pavilion structure ('pavilion') on the northern side of the swimming pool area, such that the roof of this pavilion will provide shade over the relevant part of the tiled pool surround, the northern section of the swimming pool itself and over the integrated spa. The proposed structure will be open sided to the east, west and south.
6. The proposed pavilion will consist of a solid, fire-rated wall on its northern side, with a skillion-style roof supported by two new pillars situated on each side of the northern pool edge. The fire-rated wall will be 7.6 metres wide, 2.244 metres high (including the attached section of the proposed roof) and set back 230 millimetres from the northern boundary of the subject site. The maximum height of the proposed pavilion will be 2.54 metres at the southern end of the roof. The pavilion will also be set back 2.5 metres from the subject site's eastern (canal) boundary.
7. At the site inspection, the tribunal noted the existence of a Colorbond panel fence extending along that part of the northern lot boundary associated with the pool area. This fence was observed to have a height of approximately 1.8 metres above the level of the tiled pool surround, and to be set back approximately 2.5 metres from the canal boundary. At the hearing, the tribunal was informed by the Council representatives that the relevant part of this fence, being higher than 1 metre, non-transparent and sited within 4.5m from the canal boundary:
 - a) is inconsistent with Acceptable Outcome ("AO") 6 of the applicable Dwelling House Code under the planning scheme, which requires a minimum boundary setback of 4.5 metres in such cases; and
 - b) does not have the necessary development approval.
8. Also at the site inspection, the tribunal observed the existence of a tall and somewhat dense hedge located within the adjoining premises at 17 Reliance Place and extending along the northern side of the common boundary with the subject site and almost to the easternmost part of the fence mentioned in paragraph 7 above. The top of this hedge

was clearly visible from within the subject site and extending to just above the height of the aforementioned fence.

9. Building works involving a dwelling house on the subject site are subject to the design and siting provisions of the Dwelling House Code ('the code'), identified for section 33 of the *Building Act 1975* ('section 33') and in section 1.6 of the planning scheme as being alternative design and siting provisions to those provided under the Queensland Development Code ("QDC"). As mentioned above, AO6 of the code provides that, in the case of the subject site, buildings and structures higher than one metre (other than semi-transparent pool fencing) are to be set back by a minimum of 4.5 metres from a lot boundary with a canal. Clearly, the proposed setback to the canal boundary of 2.5m does not achieve this AO.
10. Furthermore, as the code does not contain any provisions for side boundary setbacks, Part MP1.2 of the QDC applies in relation to this aspect. Acceptable solution A2 of this part of the QDC ('the relevant QDC part') requires that the minimum side boundary clearance (setback) for a building or structure on a lot with a frontage exceeding 15 metres (the case here) and with a height of 4.5 metres or less, is to be 1.5 metres. Again, the proposed side boundary setback of 230mm does not comply with this acceptable solution.
11. For section 54 of the PA, schedule 9, part 3, division 2, table 3 of the *Planning Regulation 2017* ('the PR') specifies that a development application for building work that is subject to Part MP1.2 of the QDC or subject to alternative design and siting provisions under section 33, and that does not comply with an acceptable solution under the QDC or a quantifiable standard under the alternative provisions, requires referral to the applicable local government as a concurrence agency.
12. The application was duly referred to Council on 19 August 2024.
13. As the proposed pavilion does not achieve the 4.5 metre canal boundary setback required by AO6 of the code, or the 1.5 metre side boundary setback required by A2 of the relevant QDC part, the assessment of the application was to be against the requirements of Performance Outcomes ('PO') 6 of the code and P2 of the relevant QDC part.
14. PO6 of the code provides as follows:

Buildings and structures are adequately setback from canals and other artificial waterways or waterbodies (e.g. lakes) to:

- a) *protect the structural integrity of the canal/waterway/waterbody profile and revetment wall;*
- b) *ensure no unreasonable loss of amenity to adjacent land and dwellings occur having regard to:*
 - (i) privacy and overlooking;*
 - (ii) views and vistas;*
 - (iii) building character and appearance; and*
- c) *building massing and scale as seen from neighbouring premises.*

15. P2 of the QDC part provides as follows:

Buildings and structures –

- a) *provide adequate daylight and ventilation to habitable rooms; and*

- b) *allow adequate light and ventilation to habitable rooms of buildings on adjoining lots*
- c) *do not adversely impact on the amenity and privacy of residents on adjoining lots.*

16. Council issued an information request dated 22 August 2024, stating as follows:

Key Issues

Based on the application material submitted, the key issues arising from your application relate to:

- *Patio Canal and Side Setbacks*

Information Required

1. *The proposed patio addition would be located 2.5m to the rear canal boundary, in lieu of the required 4.5 metre setback, as per Acceptable Outcome AO6 of the Dwelling House Code. Moreover, the proposed patio would be located 230mm to the northern side boundary, in lieu of the required 1.5 metre side setback, as per Acceptable Solution A2 of the Queensland Development Code.*

The proposed patio addition is considered to likely result in an unreasonable loss of amenity to the northern neighbouring lot, thereby conflicting with Performance Outcome PO6 of the Dwelling House Code and Performance Criteria P2 (b) of the Queensland Development Code. This is due to the patio's proximity to the canal boundary and neighbour's dwelling; the solid north facing wall and roofing would impact the views to the canal from the northern neighbour's backyard and ground floor windows.

Amend the proposal plans or provide additional information to demonstrate compliance with Performance Outcome PO6 of the Dwelling House Code and Performance Criteria P2 of the Queensland Development Code. This may include the following:

- a) *Increase the distance between the proposed patio addition and the northern side boundary and rear canal boundary;*

OR

- b) *Evidence that this building will not affect the amenity of the neighbouring residents is required. Your consultation with the affected neighbours at 17 Reliance Place may assist in providing the necessary information**

**Council advice:*

The provision of neighbour's consent is not a requirement under the Planning Act 2016 or Sunshine Coast Planning Scheme 2014, but can assist in Council's assessment of the application, particularly regarding potential amenity and privacy impacts on neighbours. Council will consider the neighbour's statement in conjunction with the requirements of the planning scheme prior to making a final decision.

17. On 9 September 2024, the appellants' response to the information request was submitted. The response did not include amended proposal plans showing the increased setbacks suggested in the information request, or evidence of any consultation with the adjoining neighbours at No.17. The response instead reiterated the reasons why the proposed pavilion is considered necessary and for the siting as

proposed. Regarding the amenity impacts suggested by the information request, the response drew attention to the neighbour's tall, dense hedge located along their side of the common boundary, suggesting that the neighbours had "*voluntarily impacted their own canal views.*"

18. Council issued a referral agency response dated 18 September 2024, directing refusal of the application. The grounds for this decision were stated to be that the siting of the proposed pavilion would not achieve PO6(b) or (c) of the code, or P2 of the relevant QDC part, essentially in that the proposed pavilion would:
 - a) obscure the canal views enjoyed by the northern side neighbour (number 17) and would thus result in an unreasonable loss of amenity to that neighbour.
 - b) impose an unreasonable degree of building mass and scale when viewed from the northern neighbours' premises.
 - c) impact on the northern neighbour's amenity due to view loss and proximity to habitable rooms, windows and outdoor living areas of their dwelling.
19. On 24 September 2024, the assessment manager decided to refuse the application and issued a decision notice in this regard. The reason for this refusal is stated to be the concurrence agency direction by Council. No other reasons for this refusal were given.
20. The appellants duly lodged this appeal with the tribunal registrar on 1 October 2024.
21. A site inspection and hearing were held on the subject site on Tuesday, 10 December 2024, at 10.00am.
22. Following the inspection and hearing, the tribunal issued the following directions on 11 December 2024:

Following the site inspection and hearing of the appeal referenced above, and a preliminary review of the appeal material, the tribunal directs the parties to provide the following additional information:

1. **The appellants** are to provide electronic copies of all photographs (over and above those already included in the appeal material before the tribunal) of local premises containing buildings and/or structures that are considered not to comply with Acceptable Outcome AO6 of the Dwelling House Code under the Sunshine Coast Planning Scheme 2014 (canal boundary setback), and/or not to comply with Acceptable Solution A2(a) of Part MP 1.2 of the Queensland Development Code (side boundary setback). The material to be provided is to include a key plan showing the location of these sites relative to the subject site, and their respective addresses. The appellant may include any written descriptions of, or comments on, the identified examples.
2. **Council** is to review the above-mentioned material to be provided by the appellant, and to provide any comments as well as written advice as to whether the identified buildings and/or structures have been lawfully approved, or not (or whether no records have been found to exist).
3. **Council** is to provide a copy of the letter of objection received from the owner(s) of the neighbouring premises, as referred to at the hearing.
4. **Council** is to provide a complete copy of the planning assessment report upon which its referral agency decision was based.
5. **The appellants** may provide further written material in response to the council's submissions under 2 to 4 above.

The above-mentioned material is to be provided by email to the Tribunal Registrar, with copies to the other party to this appeal, by no later than 4pm on Friday, 20 December 2024.

23. On 18 December 2024, the appellants provided a response to the tribunal's directions. This response included photographs of 20 sites within Pelican Waters considered to contain buildings or structures sited within the 4.5 metre setback required by AO6 of the code. This response also noted the appellants' objections to the tribunal receiving the material requested in Items 3 and 4 of the directions.
24. On 11 and 19 December 2024, Council provided its response to the tribunal's directions, in the form of two emails. These included the material requested under Items 3 and 4 of the directions, and a summary of its response to the material provided by the appellants in response to Item 1 of the directions.

Jurisdiction

25. Section 229(1) of the PA provides that schedule 1 ('the schedule') of the PA states the matters that may be appealed to a tribunal.
26. Section 1(1)(b) of the schedule provides that the matters stated in table 1 of the schedule ('table 1') are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that table 1 only applies to a tribunal if the matter involves one of the matters set out in section 1(2).
27. Section 1(2)(g) provides that table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the BA, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
28. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision framework

29. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
30. The tribunal is required to hear and decide an appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA).
31. 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 PA.
32. The tribunal is required to decide an 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)).
33. The tribunal must not make a change, other than a minor change, to a development application (section 254(3)).

Material considered

34. The material considered in arriving at this decision was:
 - a) Emails and attachments dated 11 and 19 December 2024, submitted by Council in response to the tribunal's directions of 11 December 2024.
 - b) An email and attachment dated 18 December 2024, submitted on behalf of the appellants in response to the tribunal's directions of 11 December 2024.

- c) Form 10 Notice of Appeal lodged with the tribunal registrar on 1 October 2024, including a Document A stating the appellants' reasons for the appeal.
- d) A copy of the decision notice issued by a tribunal in relation to Appeal 18-053, dated 19 July 2019
- e) The assessment manager's decision notice reflecting his decision of 24 September 2024.
- f) A copy of DA Form 2, partially completed and presumably accepted by the assessment manager pursuant to section 51(4)(c) of the PA.
- g) Council's referral agency response dated 18 September 2024.
- h) Council's information request dated 22 August 2024 and the appellants' response, dated 9 September 2024.
- i) The appellants' referral material, including a Concurrence Agency Report prepared by Sunshine Coast Building Approvals and dated August 2024, completed Council Request for Concurrence Agency Response (Building Work) form and Referral Checklist for Building Work form.
- j) The design plans being Graham Green Design Drafting plans (Project No. 224-062 Revision C, Sheets 1 to 8 and dated 13.08.24).
- k) The *Planning Act 2016* and the *Planning Regulation 2017*.
- l) The *Building Act 1975*.
- m) *Sunshine Coast Planning Scheme 2014*, including the Dwelling House Code.
- n) Queensland Development Code Part MP1.2 – *Design and Siting Standard for Single Detached Housing – on Lots 450m² and over*.

Findings of fact

- 35. In relation to the stated grounds for Council's direction of refusal of the application, the tribunal finds that the proposed pavilion would not result in any unreasonable loss of amenity to any adjacent land or dwellings due to:
 - a) A loss of privacy or overlooking, as the only potentially affected neighbour's acoustic and visual privacy would be somewhat enhanced by the proposed pavilion.
 - b) A significant loss of canal views, as the only affected neighbour would still benefit from very extensive canal views, and as the southerly and south-easterly view line from the only neighbouring lot that could be affected is already significantly obscured by that neighbour's own approximately 1.8 metre high hedge located just inside the common boundary with the subject site.
- 36. The tribunal finds further that the proposed pavilion would result in a degree of visual amenity impact upon the neighbouring lot through the construction of a 7.6 metre wide and 2.2 metre high solid, blank wall sited only some 230mm from the common boundary between the two lots. However, the tribunal finds that this impact will be significantly mitigated by:
 - a) the 1.8m high common fence extending (lawfully) across approx. 5.6m of the wall's 7.6 metre width and apparently unlawfully across its full width; and by
 - b) the neighbour's own hedge that slightly exceeds the height of the fence and extends even further across the width of the proposed solid wall.

37. In relation to the degree of visual impact referred to in paragraph 36, the tribunal finds that this impact could be further mitigated by an increase in the proposed northern side boundary setback, from 230mm to 500mm. This increase would also facilitate access to the northern face of this wall, facing the neighbour's premises, for cleaning and maintenance purposes, which would be heavily restricted if not impossible with a setback of only 230mm.
38. Based upon the above, the tribunal finds that the proposed development would achieve, or can be conditioned to achieve, PO6 of the code and P2 of the relevant QDC part, and therefore that Council's grounds for directing refusal of the application were unfounded.
39. In relation to the objections raised on the appellants' behalf regarding Items 3 and 4 of the tribunal's directions of 11 December 2024, the tribunal finds that section 253(5) of the PA entitles it to consider any evidence presented to it with the leave of the tribunal and any information provided under section 246 of the PA.

Reasons for the decision

40. The tribunal, in accordance with section 254(2)(d) of the PA, has decided this appeal as set out in paragraph 1 above.
41. The tribunal's reasons for this decision are that the design and siting of the subject development, as shown on the plans listed under paragraph 1, will either comply with the code and the relevant QDC part, or can be conditioned to comply as set out in paragraph 1.

Neil de Bruyn
Development Tribunal Chair
Date: 14 January 2025

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 and Public Works
GPO Box 2457
Brisbane Qld 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au