



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	19-026
<b>Appellant:</b>	Oskar Booth c/-Project BA
<b>Respondent (Assessment Manager):</b>	Stewart Magill c/-Pure Building Approvals
<b>Co-respondent (Concurrence Agency):</b>	Noosa Shire Council
<b>Site Address:</b>	2 Compass Place, SUNRISE BEACH Qld 4567 and described as Lot 44 on RP 906244 – the subject site

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### Appeal

Appeal under section 229 and Schedule 1, Section 1, Table 1, Item 1 of the *Planning Act 2016* against the refusal of a development application for a roof terrace.

Noosa Shire Council (**Council**) as the concurrence agency directed the assessment manager to refuse the application on the basis that the development proposed did not comply with the Specific outcomes O16, acceptable solutions and probable solutions O16.2 of the Detached House Code (**DHC**) from the Noosa Plan (**NP**).

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<b>Date and time of hearing:</b>	Thursday 7 November 2019 at 11:30am
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Henk Mulder - Chair Andrew Montgomery-Hribar – Member
<b>Present:</b>	Oskar Booth – Appellant, Architect Luke Neller – for the Appellant, Certifier Jack Lewis – for the Appellant, Planner Billy Glover – Council Representative Shane Adamson – for Council, Planner Stewart Magill – Assessment Manager Sean Hallett – Owner and applicant Dorian Hallett – Owner and applicant Dayne Lawrie – for the Owner, Builder

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## Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) replaces the decision of the Assessment Manager as directed by Council as a concurrence agency to refuse the development application for building works to utilise a roof terrace, with a decision to allow the development application in accordance with the revised Plans listed hereunder, and subject to the following conditions:

- a) The proposed roof terrace be completed in accordance with the revised Plans from Tim Ditchfield Architects dated 11 November 2019, numbered:
  1. RT1.01 A Roof Context Plan
  2. RT1.02 A Roof Terrace Detail Plan
  3. RT1.03 A Sections Roof Terrace
  4. RT1.04 A Sections Roof Terrace
  5. RT1.05 A Roof Terrace Images.
- b) No additional roof, shade device, structure or element whether temporary or permanent is to be supplied or installed to the terrace or surrounding roof area other than as shown on the revised Plans (above).
- c) The barrier shown providing separation to the northern side of the roof terrace is to be a permanent structure. The planting as shown is to be undertaken prior to occupancy and maintained.
- d) The screening is to be integrated in its finished colouring with the roof and wall at this part of the residence and is not to distinguish itself through colour variation.
- e) The Appellant shall, prior to any building work commencing onsite, apply for and gain, a Development Approval for the Building Works, for which these conditions are to be referred to and checked prior to the issue of the final inspection certification at the completion of the building works.

## Background:

1. The Owner, with the Appellant sought a 'Minor Change' to an existing Approval for a Detached House at 2 Compass Place, Sunrise Beach (Site). The change proposed was for the inclusion of a roof top terrace to the Detached House.
2. The Site is at a corner of two streets and has a similar sized neighbour to the north, also on a corner site. The topography rises in height behind the properties.
3. The assessment manager lodged a concurrence agency referral with Noosa Council on 1 April 2019.
4. An accompanying Planning Report (**Report**) prepared by Pivotal Perspective described a roof top terrace with an area of 18.0m<sup>2</sup>, built into a low pitched roof above a bedroom, and intended for personal use.
5. The Report sets out Roof form as the key compliance issue, with height and setback modelled for the nearest neighbour to the north, at 26 Resolute St..
6. The DHC sets out that a roof terrace is not an acceptable Solution per S16.2, and that the specific Outcomes at O16 are used to establish any compliance.
7. It is understood from the hearing that Council sought and received a number of requests for information, prior to completing its response.

8. Council completed its referral agency response on 27 May 2019 with the decision to require the Assessment Manager to refuse the application for the change (**Refusal Letter**), based on the following reasons:
1. The proposed roof top terrace is contrary to the specific outcomes of the Detached House Code as it will create opportunities for residents to overlook the private open space areas of neighbouring properties.
  2. The proposal is contrary to the overall outcomes of the Detached House Code as the roof top terrace will adversely impact on the amenity of neighbouring properties.
9. The Appellants lodged an appeal with the Tribunal, received on 27 June 2019.

### **The Hearing**

10. The new residence is well under construction, and allowed the hearing on site to also inspect the roof terrace, and the lines of sight available.
11. Those for the appellant confirmed the roof terrace proposed is not an acceptable Solution, as set out in the DHC S16.2. The capacity to assess the performance of the proposal against the specific Outcomes in O16 is available in any determination.

<p><b>Roof form</b>  <b>O16</b> Roof forms—</p> <ol style="list-style-type: none"> <li>a) contribute positively to the local skyline;</li> <li>b) complement the low density character of the locality;</li> <li>c) do not present an appearance of excessive bulk to side neighbours (eg. avoid low pitched roofs or box profiles/parapets);</li> <li>d) use simple traditional roof designs;</li> <li>e) offer shading to the walls and windows of the <i>dwelling unit</i>;</li> <li>f) do not create opportunities for residents to overlook the private open space areas of neighbouring properties.</li> </ol>	<p><b>S16.1</b> With the exception of removal houses, the roof of the <b>Detached house</b> (including any <i>secondary dwelling</i>) or, <b>Ancillary dwelling unit</b> has—</p> <ol style="list-style-type: none"> <li>a) a <i>roof pitch</i> no less than—             <ol style="list-style-type: none"> <li>i. if in Kin Kin village or Boreen Point village - 12 degrees;</li> <li>ii. otherwise - 5 degrees for at least 75% of the roof; and</li> </ol> </li> <li>b) if not in Precinct C or D of Noosa Springs— minimum 600mm eaves to at least 75% of the perimeter of the <i>dwelling unit</i>.</li> </ol> <p><b>Editor's note:</b>  <i>Note that 450mm eaves will achieve this solution provided there is a 150mm wide gutter that brings the total width to 600mm.</i></p> <p>AND</p> <p><b>S16.2</b> <i>Buildings and structures</i> do not include roof top terrace areas.</p>
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12. The appellant supplied a short written summary (**Hearing Notes**) of issues. The notes set out methods for using the specific Outcomes sought as performance based and able to be evaluated by comparison with detailed responses elsewhere in the DHC. Council noted these were inapplicable to the Site zoning.
13. Different examples of roof terrace use were discussed, albeit wherein different zones and planning schemes, and that the building code allowed structures above height constraints, such as tv antennae and solar panels. Council affirmed the detached housing zone of the site revokes the use of a roof terrace under the DHC as an acceptable Solution.
14. Council have described their refusal of the application in the terms contained in the specific Outcomes of Roof form O16.

15. Of the six criteria, item (f) was of the greatest bearing. The roof terrace, as a part of the 'Roof forms' criteria, must:

f) not create opportunities for residents to overlook the private open space areas of neighbouring properties.

16. The appellant sought to establish that private open spaces to the front yard of the property to the north would be protected and acceptable in the scheme as proposed.

17. Council identified the property to the north-west at 3 Courageous Place as also being directly affected by overlooking to private open space. It can be considered that the overlooking to this site represents the back yard and private open space from 30 - 40 metres away approximately. Beyond this range is the rear glass wall of the ground floor, and it is speculated that at night it may be visible to the interior.

18. The appellant noted that the criteria for O16 (f) had not been described in earlier discussions as being applicable to the site, including the information requests and responses to date.

19. The application of the term 'neighbouring' was raised, as the north west property was not an adjacent neighbour, being separated by another property from a direct link at the boundaries of the Site. There was no ready determination for what a neighbouring property could be, whether it represented properties at adjacent boundaries, or in a general vicinity. No measure for distance is used in the DHC and a proximate effect that can be demonstrated appeared as an underlying basis for Council assessment.

20. It was also presented to the Tribunal that neighbours' opinions were used in contributing to Council views, despite the application only being a concurrence referral without neighbour's input, rather than an impact assessable development, with neighbouring input required.

21. The appellant noted the rising topography of this and residential areas generally, where the likelihood for overlooking at distance can be unavoidable. The distinction for overlooking between a roof terrace and any other accessible area such as decks, verandahs and floor level terraces is made more likely with such topography, to many residential properties. Council considers that these types of external floor areas are at a lower level than a roof generally and that a roof type terrace area, as a part of the Roof form is delineated in the DHC as not acceptable.

22. The parties were asked if there were any objection to the new submission of drawings by the appellant to demonstrate screening for the north and north-west properties that would seek to comply with the height, building bulk and materials constraints of the DHC. Council would have the opportunity for review and comment.

### **Submissions**

23. The appellant provided new plans (**Plans**) to the Registrar on 14 November 2019. The Plans demonstrate a redacted floor area with restricted access to the northern side of the roof terrace, as well as screening to the maximum allowable height above ground to the north and western sides.

24. Council sought to supply to the Tribunal a summary (**Summary**) of Council assessment of the original proposal from Shane Adamson, of Adamson Town Planning, which the appellant

agreed to. The Review was dated 13 September 2019, and received by the Tribunal on 14 November 2019.

25. The Summary describes a number of residences as being affected by the proposal "... The ... dwellings at 24 and 26 Resolute Street and 3, 5 & 7 Courageous Place are single storey. The outdoor entertainment areas for the dwellings at 24 Resolute Street and 3, 5 & 7 Courageous Place are more elevated and directly face the proposed dwelling and the roof top terrace area.

26. The Summary sets out a specific response to the first five issues for an assessment of the specific outcomes sought from the roof form:

The proposed development does not comply with the specific outcome O16 for the following reasons:

- a) the proposed roof terrace does not contribute positively to the local skyline, with the balustrading protruding above the roof line, which will be clearly visible from neighbouring properties, in particular to the north west, west and south west and is not consistent with the preferred roof form (refer Elevations - Attachment 2);
- b) the addition of a roof terrace at this location and balustrading protruding above the proposed roof line adds to building bulk and presents as a box profile to surrounding properties and the street (refer Figure 2D & Attachment 1);
- c) the incorporation of a roof terrace does not provide for simple traditional roof design and is not consistent with the existing built form in the locality;

27. The Summary then establishes Council assessment against the specific Outcome O16(f)

- d) the proposed roof terrace being located towards the northern property boundary creates opportunities for residents to overlook into private open space and outdoor entertainment areas of neighbouring properties to the north, north west and west as shown in the photographs provided in Attachment 1.

being the overlooking issue:

Under part 14.51.2(c) the proposed roof terrace is not an attractive feature and is not consistent with the developed character of the particular neighbourhood.

28. Council submitted two additional emailed responses based on the Plans dated 19 November 2019. The first requested that any support of the application be required and conditioned accordingly. The second email noted that the western side was accessible to users overlooking the screening, toward private open areas to north west properties. Council added that the screening is inconsistent with preferred character of a two storey Detached House.

### **Jurisdiction:**

29. The Appellant lodged the Appeal with the Tribunal under section 229 of the PA2016, against the Decision Notice of the Assessment Manager for refusal of the application, based on the concurrence agency response.

30. The Tribunal is of the opinion that a refusal of a development application is:

- (a) a matter under the PA2016 that relates to the Building Act, and
- (b) cannot be decided by the QBCC pursuant to the Building Act.

31. As such the requirement of section 1(2)(g) of Schedule 1 of the PA is satisfied and accordingly, table 1 can apply for a tribunal. As the matter falls within item 2 of table 1, the tribunal has jurisdiction in this instance.

#### **Decision Framework:**

32. Noosa Council undertook a concurrence agency referral for the proposed use as Schedule 6 Part 2 excludes the proposal from being Code or Impact Assessable. Council directed the Assessment Manager to refuse the application in the Refusal Letter. At that time, the **PA2016** and the **NP** was in force.

33. The onus rests on the Appellants to establish that the appeal should be upheld (see section 253(2) of the PA2016. 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 and was appealed against (see section 253(4) of the PA2016).

#### **Material Considered:**

34. The material considered in arriving at this decision comprises:

- i. IDAS Form 2 - Building work requiring assessment against the *Building Act 1975*;
- ii. Request for Referral Agency response to Council from the Assessment Manager, Stewart Magill from Pure Building Approvals.
- iii. Supporting documentation for Referral Agency response including a Planning Report (**Report**) from Pivotal Perspective as planning consultant and twelve drawings of plans, elevations and sections.
- iv. Concurrence Agency Response from Noosa Council dated 27 May 2019 instructing Assessment Manager to refuse Development Application for Building Work (**Refusal Letter**).
- v. Assessment Manager Decision notice to the Applicant dated 31 May 2019.
- vi. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 27 June 2019.
- vii. Project BA Letter regarding Grounds for Appeal (**Grounds**) dated 26 June 2019.
- viii. Verbal submissions at the hearing from the attendant parties to the appeal; Observations from Site Inspection, as mentioned in this decision.
- ix. Submission supplied at the Hearing by Project BA titled Hearing Notes dated 7 November 2019. (**Hearing Notes**)
- x. Submissions provided after the Hearing:
  - a) From Project BA for the Applicant comprising revised plans (**Plans**) dated 12 November 2019

- b) From Adamson Town Planning for Council as a summary (**Summary**) of Council assessment, dated 13 September 2019.
- c) Two emails from Council in response to the revised Plans of the Applicant.
- xi. The Planning Act 2016 (**PA2016**).
- xii. The Planning Regulation 2017 (**PR2017**)
- xiii. The Noosa Plan (**NP**)
- xiv. NP Part 14 - Assessment Benchmarks and Requirements For Development For A Stated Purpose Of A Stated Type (**Part14**)
- xiv. The Detached House Code (**DHC**)

### **Findings of Fact:**

- 35. The Committee makes the following findings of fact:
- 36. The Site is a rectangular corner allotment of 808m<sup>2</sup> with a long East frontage of approximately 35 metres to Mariners Place and short South frontage of 23 metres approximately to Compass Place.
- 37. The short property boundary to the North is with 26 Resolute St, a mirror of the Site, with a long East frontage to Mariners Place and short North frontage to Resolute Place. Both of these properties establish a larger front yard to Mariners Place at the long boundary. Boundary setbacks on this shaped corner lot ensure minimal rear yard area. The private open space at 26 Resolute St is to the front yard. Currently there is no screening from the street to this front yard.
- 38. The topography shared by the neighbours in the vicinity is rising east to west. The site topography rises from Mariners Place to the West with a slope of 1:14 metres or 7.5% approximately. This establishes that houses 40 metres away to the west of the site are in the order of a storey higher than the subject Site.
- 39. The roof terrace at the time of the Hearing is generally constructed as shown in the application drawings, with floor and seal to surrounding roofing. The facility to view the lines of sight to the properties nominated in the Summary from Adamson Town Planning is available.
- 40. The roof terrace needs to be considered against the Overall outcomes for the DHC, which give the House Code its purpose. Overall Outcome DHC 14.51.2(c) is highlighted by Council.
- 41. The roof terrace is to be assessed against specific Outcomes sought from O16 'Roof form' of the DHC on the basis that it is not an outright acceptable Solution, and in particular specific Outcome O16 f).
- 42. With regard to the use of 'neighbouring' in the refusal by the Assessment Manager for an assessment against O16 Roof form in the DHC, the Tribunal has not been able to agree about the definition and thus the application of the term. Two definitions are considered by the Tribunal.
  - 1) 'Neighbouring' refers to those properties that share a common boundary with the Site.

- 2) 'Neighbouring' refers to those properties that are nearby and potentially affected by the proposal.
45. This has significant implication for whether any consideration of overlooking should be undertaken to the properties to the north-west, such as 3 Courageous Place, which are not directly connected with a common boundary.
46. No definition for neighbouring is found under Part 2 - Interpretation or 2.1 Definitions, in the NP. Multiple uses of the term are contained in Part 14 of the NP, wherein the DHC is contained, and these relate to an adjacent property with a boundary in common. The PR2017 also has various applications of the term, including 'relevant neighbouring premises', which again generally relates to an adjacent property with a boundary in common. A definition was not found to be set out in PR2017 or PA2016.
47. The use of common dictionaries also describe a meaning of neighbouring' as 'next to or very near another place'. The Shorter Oxford Dictionary 5th Ed 2002 sets out a neighbour as:
- A person who lives near or next to another; a person who occupies a near or adjoining house, each of a number of people living close to each other esp in the same street or village.
48. Butterworths Concise Australian Legal Dictionary establishes that a duty of care exists for a neighbour:
- Neighbour. In tort law, a person so closely and directly affected by the acts or omissions of another, that the other person ought reasonably to contemplate the first person being so affected when directing his or her mind to the acts or omissions called into question: *Donoghue v Stevenson* [1932] AC 562.
49. In considering 'neighbouring' as meaning an adjacent property with a common boundary, the assessment against the criteria Council have set out in their direction for the Assessment manager is only in regard to those properties that share a common boundary.
50. In considering a 'neighbouring' property as being other than directly adjacent or sharing a common boundary, any effect of the amenity of a neighbouring property should also be considered with regard to what an adjacent property could build as an acceptable, two storey neighbour. That is, would a two storey residence built to boundary setbacks next door to the western properties set out in the Summary be allowed an equivalent extent of overlooking from any rear terrace, deck, or living area.
51. The specific Outcomes O16 a) to e) require the scope of the visible element proposed - the screening, be considered as from the neighbouring properties in regard to the roof line, size and bulk of the existing residence, with its relatively recent development approval from Council.
52. Private open space (POS) as referred to in the specific Outcome O16 f) is more readily understood as capable of receiving unobstructed sunlight for a number of hours in mid winter, and should allow multiple uses such as clothes drying, children's play, outdoor living, rubbish bin storage, and garden. This is derived from 'Subdivisional Design Guidelines Toward A More Sustainable Subdivision' (Incorporating the principles of ecologically sustainable development). This document was endorsed by the Built Environment Research Unit, Building Division Department of Public Works.
53. POS may be considered as comprising an area of 20m<sup>2</sup> though with regard to the issue for the roof terrace and the neighbouring properties, it is clear that the POS is the back yards to all of the surrounding properties described in the Summary, apart from the



adjacent neighbour to the north at 26 Resolute Street. The POS at 26 Resolute Street is the front yard, due to the site and building constraints.

### **Reasons for the Decision:**

54. The Plans establish an area available as a roof terrace is reduced from 18m<sup>2</sup> to 10.6m<sup>2</sup>, including the access hatch. The utility of the space is restricted to fewer people than considered in the Refusal Letter.
55. With the establishment of an unusable area to the north side of the roof terrace, and in combination with screen height described in the revised Plans, the proposal is considered effective against overlooking to the private open space of the adjacent and neighbouring properties at 24 and 26 Resolute Street.
56. In considering the application of the term 'neighbouring', both definitions described above serve to be satisfied by the proposal, as mentioned below.
57. Where 'neighbouring' refers to an adjacent property with a common boundary, the setback and screening serves to ensure that the overlooking is not a diminishment of the POS to the properties at 24 and 26 Resolute St. There is no further consideration required to the western properties such as 3, 5 and 7 Courageous Place, as they are not considered as neighbouring the Site.
58. Where neighbouring refers to a nearby property potentially affected by the proposal, then the properties further west at 3, 5 and 7 Courageous Place are also considered in regard to specific Outcome O16 f).
59. The extent for overlooking to the properties of 3, 5 & 7 Courageous Place is contained to a tight circulation space at the top of the ladder access to the roof terrace. In combination with the distance from the roof terrace to these properties, and with regard to an equivalent assessment of an as-of-right two storey residence adjacent to each site in the residential zone, the proposal is not considered to compromise the POS of the residences.
60. Screening as proposed, and as conditioned for an integrative finish with the residence as a whole, is not of a significant scale to amend the building bulk. The screening is a small and simple visible element with the surrounding roof, and contributes with some minor variety to the local skyline, complementing a local, contemporary character. The proposed change to the development application is a 'minor change' as defined in schedule 2 of the PA2016
61. In regard to the purpose and overall Outcome 14.51.2(c), the proposal is a part of a neighbourhood made up of contemporary residential dwellings with a variety of roof forms, for which the proposal is considered consistent, additional and no less attractive.

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**Henk Mulder**

**Development Tribunal Chair**

**Date: 19 December 2019**

## **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:**

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