



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-005
Appellant:	Gavin Raymond Deane and Catherine Jane Deane
Assessment manager:	Noosa Shire Council
Site Address:	66 Seaview Terrace, Sunshine Beach Qld 4567 and described as Lot 69 on RP 81810 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(c) of the Planning Act 2016 against Noosa Shire Council's refusal of representations to delete condition 4 of a Development Approval (MCU 21/0212) requiring the removal of the rooftop terrace component of a proposed dwelling house on the grounds that the proposed rooftop terrace is contrary to the Noosa Plan 2020 Low Density Residential Zone Code.

Date and time of hearing:	17 April 2023 at 1.30 pm
Place of hearing:	The subject site
Tribunal:	Anthony Roberts – Chair Markus Pye – Member
Present:	Jack Lewis, Pivotal Perspective Pty Ltd – representing the Appellants Shaun Lockyer, Lockyer Architects – representing the Appellants Shane Adamson, Adamson Town Planning Pty Ltd – representing Noosa Shire Council

Decision

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the Planning Act 2016 replaces the decision of the Assessment Manager on 19 January 2023 with another decision, namely to delete condition 4 of MCU 21/0212 and approve the proposed rooftop terrace as shown on amended plans (prepared by Shaun Lockyer Architects) appended to the Tribunal submission by Jack Lewis, Pivotal Perspective Pty Ltd (dated 7 June 2023).

Background

1. The subject site is:
 - a. a steep-sloping, substantially vegetated and vacant 576m² allotment on the eastern side of Seaview Terrace
 - b. located just off the cul-de-sac head of Seaview Terrace with a frontage of 22m
 - c. zoned Low Density Residential under the Noosa Plan 2020.

2. The proposed dwelling house is:
 - a. contemporary, high-specification in design comprising 450m² internal floor area with 40% site cover
 - b. setback an approved 2.45m at ground-level from the front boundary
 - c. contained within the 8m height limitation
 - d. intended to include a landscaped and screened rooftop terrace (first level) incorporating roofed structures (covering an access stairwell and plant rooms) with a front setback of 6m to the main building line and 5.5 m to the eaves.
3. This appeal stems from condition 4 contained in a Development Approval for the dwelling house on the subject site ((MCU21/0212) 15 September 2022, which states:

Prior to the issue of any further development approvals amended plans must be submitted to Council. The plans must remove the rooftop terrace. The plans must be to the satisfaction of the Manager, Development Assessment.

4. The Appellants made subsequent representations to Council on 24 October 2022 seeking deletion of condition 4 and providing amended plans aimed at addressing Council's concerns by reducing the size of the rooftop terrace and enhancing the proposed screening and landscaping treatment on the terrace level.
5. In response to the representations, Council decided on 19 January 2023 to refuse to delete condition 4 for the following reasons:

The proposed rooftop terrace is contrary to Purpose and Overall Outcomes 6.3.1.2 (2)(c) and Performance Outcomes PO7, PO9 and PO16 of the Low Density Residential Zone Code as it:

- a. Does not make a positive contribution to the streetscape or maintain low scale character of the eastern side of Seaview Terrace;*
- b. Is not consistent with the predominant character of the streetscape;*
- c. Results in a three-storey building which will visually dominate the street and the surrounding area; and*
- d. Will obstruct the views of dwellings within proximity of the site.*

6. The Appellants subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 3 February 2023.
7. The grounds for appeal provided by the Appellant include:

(...)

- 1. ...The rooftop terrace is designed to maximise the views from the split-level house, while not overlooking any neighbours and is accessible via an internal stairwell.*
- 2. The building is considered low rise and below the 8m height limit – complementing the landform changes which falls away from Seaview Terrace. The design does not obscure views, or lead to unreasonable overshadowing of neighbouring properties.*
- 3. The built form includes landscaping and large trees within the Seaview Terrace frontage to maintain a vegetated skyline. The architecturally designed building from one of Queensland's pre-eminent and award-winning coastal architects is consistent with the high end finishes of surrounding buildings.*
- 4. The design makes a positive contribution to the character of the streetscape.*

8. The hearing was held at the subject site on 17 April 2023 at 1.30 p.m. The Tribunal had the opportunity to view the positioning of the proposed dwelling house (incorporating the

rooftop terrace) from the subject site, neighbouring properties, and the streetscape more generally.

9. As a result of discussions between the Appellants' and Council's representatives at the hearing, the Tribunal invited further submission/s (by 7 June 2023) resulting from intended further discussions between the parties in respect of minor amendments to the proposed development, requesting that any such submission/s should, in particular, specifically address how the proposed development is to comply with PO7 (f) which states that developments 'not to exceed two storeys'.

Material Considered

10. 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 3 February 2023;
 - b. The Planning Act 2016 (PA);
 - c. The Planning Regulation 2017 (PR);
 - d. The Queensland Development Code 2020 (QDC);
 - e. The Building Act 1975 (BA);
 - f. The Building Regulation 2006 (BR);
 - g. The Noosa Plan 2020 (Noosa Plan);
 - h. Noosa Plan 2020 – Low Density Residential Zone Code (the Code);
 - i. Pre-hearing submission made by Council on 16 April 2023;
 - j. Post-hearing submissions made by the Appellant's agent on 7 and 19 June 2023 and by Council on 16 and 19 June 2023;
 - k. The verbal submissions made by the parties at the hearing and site inspection.

Jurisdiction

11. 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(c) being an appeal by the Appellants against a provision of a development approval.

Decision framework

12. 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.*
13. 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.*

14. 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. The Noosa Plan - Low Density Residential Zone Code contains alternate provisions to the QDC.

15. As the proposal does not meet the outcomes set out in Acceptable Outcome AO 7.1, AO 9.1 and AO 16.3 of the Code it must be assessed against the respective Performance Outcomes stated in the Code namely: PO7 (building height), PO9 (setback) and PO16 (roof design) together with the Code's Purpose and Overall Outcomes.

Findings of Fact

16. The Tribunal makes the following findings of fact:

Setback of rooftop terrace

17. The substantive issue related to this appeal is the compliance of the proposed rooftop terrace with the intent and letter of the Noosa Plan with respect to setbacks from front property boundaries.

18. Council maintains that condition 4 of the Development Approval requiring removal of the rooftop terrace was imposed primarily because the bulk, scale and form of the dwelling would dominate the streetscape as a result of the rooftop terrace being located 3.5m from the front boundary rather than the expected 6m setback as required by Acceptable Outcome AO9.1 under the Code.

19. Council contends that the proposed development already enjoys a substantial relaxation for the ground level building setback of 2.45m - which it considers reasonable given the allotment slope - but not reasonable to allow a rooftop terrace also within the 6m building setback area.

20. In support of this position, Council considers that the rooftop terrace will be visually dominant and inconsistent with, and fail to make a positive contribution to, the streetscape character of Seaview Terrace. This is given that the several dwellings on the eastern side of Seaview Terrace within the 6m building setback area are all single storey and that dwellings on the western side of Seaview Terrace on the upper slope are mostly set back 5m or more.

21. However, Council's oral representations at the hearing confirm the position expressed in Council's pre-hearing written submission, that:

....there is no dispute with the design of the dwelling other than the increased building bulk at the first level within the 6m building setback area in circumstances where a relaxation has already been agreed for the ground level having a reduced setback of 2.450m

(...) In summary, the proposed inclusion of a roof terrace is supported where not located within the 6m building setback area. This is provided the design ensures there is no overlooking and no adverse amenity impacts will be caused to neighbouring properties, the development does not exceed 8m in height and does not have a bulky appearance when viewed from adjoining properties and the street.

In the circumstances, amended plans should be provided with the structures at the first level within the 6m building setback area (sic) removed from this location, and a roof terrace otherwise complying with the planning scheme.

22. In response to this positioning, the Appellants submitted amended plans that show that the (first level) rooftop terrace has been pushed back so that the main building line meets the 6m setback with only the eaves intruding 0.5m into the setback area.
23. The Appellants contend that the streetscape of Seaview Terrace is characterised by architecturally-designed and 'high-end' finished two storey houses overlooking Sunshine Beach and that there are several instances where buildings intrude into the 6m street setback and not necessarily restricted to ground floor level.
24. The Appellants claim that the built form of the proposed rooftop terrace incorporates architectural treatments, screening and vertical landscape elements that soften the visual impact of the structure and provide a high-level building aesthetic that would be complementary to the existing streetscape. Further, the Appellants suggest that the architectural design and treatment detail emulates that of neighbouring buildings and makes a positive contribution to the character of the streetscape.
25. Based upon the site inspection conducted at the hearing and the various written and oral submissions and amended plans made in relation to this aspect of the appeal, the Tribunal finds that the proposed design and associated screening and landscape treatment of the rooftop terrace mean that it is unlikely to have a detrimental impact on the visual amenity and predominant character of Seaview Terrace. The 0.5m intrusion of the eave of the terrace roofed structures is considered reasonable as this feature enhances the façade of the building by countering the bulk by the effect of chiaroscuro.
26. Further, in the light of the successive plan amendments made by the Appellants in relation to this issue – including the effective removal of the rooftop terrace from the 6m setback area – the Tribunal considers that the rooftop terrace will not present a bulk, scale and form that detracts from the character of the streetscape but rather could potentially make a positive contribution by making evident the immediacy of ocean views from the streetscape.

Building height in storeys

27. Both parties are in agreement that the proposed rooftop structure is within the 8m height limitation set under the Code. However, there is a question as to whether the roofed structures proposed for the rooftop terrace constitute a storey by definition under the Noosa Plan, therefore making the building three storeys in part, which is contrary to Acceptable Outcome AO7.1 and does not satisfy Performance Outcome PO7 (f) of the Code. Performance Outcome PO7(f) is drafted definitively to state that buildings and structures 'do not exceed two storeys.'
28. The Tribunal held concerns that the plans under consideration at the hearing represented a three-storey building in part by definition under the Noosa Plan. This was agreed by both parties at the hearing.

29. However, in their post-hearing submission the Appellants contend that the amended plans submitted (which delete roofed structures other than those covering the stairwell, associated landing area and plant rooms) demonstrate a two-storey building.
30. The Tribunal concurs with the Appellants that the proposed roofed structures on the rooftop terrace in their amended form do not constitute a storey by definition, therefore satisfying PO7(f) of the Code.

Obstruction of neighbours' views/overlooking neighbours

31. A consideration that has received considerable attention throughout the assessment and appeal process associated with this proposed development is the potential for the rooftop terrace to obstruct the views from neighbouring premises and introduce overlooking impacts on adjoining properties.
32. In relation to the potential for obstruction of views, the Tribunal notes the statement in Council's pre-hearing submission as follows:

If the first level of the dwelling is located outside of the 6m building setback, then the views of the dwellings on the western side of Seaview Terrace would not be affected and even if they are, this would not be unreasonable.

33. The Tribunal is satisfied that the proposed (first level) rooftop terrace, as amended post-hearing, would not result in an unreasonable loss of views from neighbouring properties and therefore complies with PO9(b) of the Code.
34. In relation to the potential for overlooking neighbouring properties, the post-hearing submission provided by Council raises in particular continuing concerns regarding the privacy of the neighbouring property to the north being potentially impacted by the rooftop terrace due to inadequacies in the proposed screening and landscaping treatment of the rooftop terrace.
35. In this regard, the Tribunal concurs with the Appellants that the matter of overlooking is not a material consideration as it was not included as matter of concern as conveyed through the Council's reasons for refusal of the representations to delete condition 4 of the Development Approval, noting that the Council's assessment report dated 16 January 2023 concludes that:

The plans provided by the applicant have addressed the overlooking/privacy concerns around the rooftop terrace for neighbouring properties.

Reasons for the decision

36. In this Appeal, the Tribunal considers the Appellants have satisfied the onus to demonstrate that the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision of the Assessment Manager with another decision namely to delete condition 4 of MCU 21/0212 and approve the proposed rooftop terrace as shown on amended plans appended to the Tribunal submission by Jack Lewis, Pivotal Perspective Pty Ltd (dated 7 June 2023) for the reasons identified below.
37. The Tribunal considers the amended design, siting and associated screening and landscape treatment of the proposed rooftop terrace ensures that it does not:
- have a detrimental impact on the visual amenity and predominant character of Seaview Terrace
 - constitute a storey by definition under the Noosa Plan
 - result in an unreasonable loss of views from neighbouring properties.

38. The Tribunal considers that the proposed rooftop terrace, in its amended form, satisfies The Purpose and Overall Outcomes and respective Performance Outcomes PO7 (building height), PO9 (setback) and PO16 (roof design) of the Noosa Plan 2020 – Low Density Residential Zone Code.

Anthony Roberts
Development Tribunal Chair

Date: 17 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:

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