# Development Tribunal – Decision Notice

***Planning Act 2016, section 255***

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| **Appeal Number:** | **22-037** |
| **Appellant:** | Matthew Rose |
| **Respondent: (Assessment Manager)** | Sunshine Coast Regional Council |
| **Site Address:** | 5 Orringa Street, Wurtulla and described as Lot 158 on W93237 ─ the subject site |

**Appeal**

This is an appeal under section 229, section 1 of Schedule 1 and item 1 of Table 1 of the *Planning Act 2016* (**PA**) against the Sunshine Coast Regional Council's (**Respondent**) decision to impose a condition with respect to the maximum site cover of the approved building on a development approval for a material change of use of premises to establish a dual occupancy, given by a Decision Notice dated 27 June 2022 (**Approval**).

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| **Date and time of hearing:** | 1pm on Thursday 25 August 2022 |
| **Place of hearing:** | 10 First Avenue, Maroochydore (Respondent's office) |
| **Tribunal:** | Samantha Hall – Chair<br>Warren Rowe – Member |
| **Present:** | **Appellant**<br>Matthew Rose – Appellant<br>Michael Lyell – Town Planner, Adams & Sparkes Town Planning<br>Cameron Adams – Managing Director, Adams & Sparkes Town Planning<br>Michael Rolton – Building Designer, MRA Design<br><br>**Respondent**<br>Kelly Taylor – Team Leader, Planning Assessment<br>Tracey Douglas – Senior Planner/Project Director<br>Sean Elvines – Planner/Project Manager |

**Decision:**

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(b) of the PA **changes** the decision of the Respondent to approve the development application by deleting condition 4 of the Approval.

**Background**

1. The subject site is described as 5 Orringa Street, Wurtulla (Lot 158 on W93237). Wurtulla is a coastal suburb of Kawana Waters in the Sunshine Coast region and is an area typified by older style low density residential development. Many homes in the area are being renovated and the suburb is undergoing a phase of urban renewal with an increasing number of modern homes being seen amongst the older styles.

2. The subject site is approximately 591m$^2$ in area, a corner block with frontages to Orringa Street (14 metres) and Nooree Street (24 metres) that is relatively flat and generally regular in shape. The subject site currently hosts a single storey, dwelling house set back from the corner into the northern side and rear boundaries. Wurtulla Beach is 600 metres east of the subject site and the Sunshine Coast University Hospital is located approximately 2 kilometres west of the subject site.

3. The subject site is located within the Low density residential zone of the *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**).

4. On or about 4 March 2022, the Appellant lodged with the Respondent, a development application for (**Development Application**):

   (a) a development permit for a material change of use of premises to establish a dual occupancy (**proposed development**); and

   (b) a development permit for operational work (stormwater, earthworks, landscaping, civil works, access and crossover).

5. The Development Application was subject to code assessment, with the *Dual Occupancy Code* of the Planning Scheme (**Dual Occupancy Code**), *Height of Buildings and Structures Overlay Code* of the Planning Scheme and the *Queensland Development Code MP1.3* being the applicable assessment benchmarks.

6. On or around 17 March 2022, the Council gave the Appellant an information request, identifying the key issues arising from the Development Application (**Information Request**) as being:

   (a) Site cover;

   (b) Streetscape character;

   (c) Setbacks;

   (d) Landscaping strip;

   (e) Fencing;

   (f) Waste storage.

7. In respect of the site cover issue, being the issue raised in condition 4 of the Approval the subject of this appeal, the Information Request identified the following:

   (a) The Development Application did not provide sufficient information to demonstrate how Performance Outcomes PO1 and PO2 of the Dual Occupancy Code had been addressed;

   (b) The proposed development was for two, two storey dwellings, which exceeded the 40% site cover imposed by Acceptable Outcome AO2.1 of the Dual Occupancy Code;

(c) Given the size of the subject site, a development that exceeded the site cover requirements would have negative impacts on surrounding dwellings;

(d) The bulk and scale of the proposed development would not be compatible with surrounding development;

(e) It had not been demonstrated that the subject site, being well under the 800m$^2$ requirement for a use of this nature, had sufficient area and dimensions to accommodate the use;

(f) PO2(b) and PO1(e) were not satisfied by the proposed development and it would be an overdevelopment of the subject site;

(g) '*Reduce the site cover in order to achieve site cover requirements to demonstrate compliance with PO2, thereby demonstrating the proposal can satisfy PO1(e) of the code*'.

8. On or around 20 April 2022, the Appellant's town planning representative, Michael Lyell, Senior Town Planner of Adams & Sparkes Town Planning provided a response to the Information Request (**Response to Information Request**).

9. In response to the issues raised in the Information Request about site cover, the Response to Information Request relevantly provided the following:

(a) Amended Proposal Plans were prepared and lodged which changed the site cover of the proposed development to:

(i) Ground floor: 45.98% (a decrease of 1.02%); and

(ii) Upper floor: 34.4% (a decrease of 0.51%);

(b) When the site cover for both floors was combined and averaged, it would result in an average site cover per level of 40.19%, which only marginally exceeded the average site cover of 40% across two storeys provided in AO2.1 of the *Dual Occupancy Code*;

(c) The proposed development satisfied the requirements of PO2 of the Dual Occupancy Code for the following reasons:

(i) It was of a compatible scale to a dwelling house as its site cover was considerably under the 50% site cover requirement for a dwelling house;

(ii) It complied with the frontage and side boundary setback requirements in the Dual Occupancy Code;

(iii) It would not present an appearance of bulk to adjoining premises or the streetscape, meeting both setback and building height requirements;

(iv) It would deliver in excess of 26% of the subject site as soft landscaping;

(v) Sufficient space was provided for on-site stormwater management with a discharge point to Noree Street;

(vi) A greater number of parking spaces were being provided, at 3 spaces per unit.

10. Finally, the Response to Information Request opined the proposed development delivered a sufficient area and dimensions to accommodate the development, inclusive of associated access, parking, landscaping and setback requirements, thus being compliant with PO1 of the *Dual Occupancy Code*.

11. A decision notice dated 27 June 2022 (**Decision Notice**) was given by the Respondent to the Appellant advising that on 20 June 2022, the Development Application was approved subject to conditions (**Approval**).

12. On or about 14 July 2022, the Appellant filed the Form 10 – Appeal Notice with the Registry of the Building Tribunals.

13. The grounds of appeal identified that the Appellant was appealing against condition 4 of the Approval, which stated (**Condition 4**):

> *Site Cover*
>
> *4. The maximum site cover of the development must not exceed 50% for the ground floor and 30% for the upper floor/s.*

14. The Appellant's grounds for appealing against Condition 4 were as follows:

> *Condition 4 of [the Development Permit] details that 'maximum site cover of the development must not exceed 50% for the ground floor and 30% for the upper floor.' The development sought site cover approval of 45.98% on the ground level and 34.4% on the upper level. Whilst this does not satisfy the Site Cover controls under AO2.1 of the Dual Occupancy Code of either 50% on the ground level and 30% for the levels above the ground, or 40% across all levels, the development results in an average site cover across both levels of 40.19%. Which is the equivalent if the development complies with other benchmarks relating to setbacks, car-parking, private open space, landscaping, stormwater management, does not result in an appearance of bulk (when compared to a compliant dual occupancy or dwelling house) and does not result in potential overshadowing or overlooking impacts.*
>
> *For these reasons, the development as proposed satisfies PO2 of the Dual Occupancy Code and Condition 4 should be removed.*

15. The Tribunal conducted a site inspection of the subject site on 25 August 2022, which was followed by a hearing of the appeal at the Respondent's offices.

16. At the hearing, the parties undertook to each provide a written submission to the Registry comprising no more than 2 - 3 typed pages that set out the party's position with respect to the proposed development's compliance or otherwise with the 5 elements of PO2 of the *Dual Occupancy Code*. This undertaking was formalised in directions issued by the Tribunal, via email sent from the Tribunal's Registry to the parties dated 29 August 2022 (**Directions**).

17. In compliance with the Directions, Mr Lyell, on behalf of the Appellant, provided by way of email dated 2 September 2022, the Appellant's position with respect to PO2 of the *Dual Occupancy Code* (**Appellant's Submissions**).

18. In compliance with the Directions, Ms Taylor, on behalf of the Respondent, provided by way of email dated 9 September 2022, the Respondent's position with respect to PO2 of the *Dual Occupancy Code* (**Respondent's Submissions**).

19. By email dated 9 September 2022, Mr Lyell, on behalf of the Appellant, asked the Tribunal to consider also an addendum to the Appellant's Submissions, addressing additional matters raised by the Respondent in the Respondent's Submissions, to those requested by the Directions (**Appellant's Additional Submission**).

20. By email dated 12 September 2022, the Tribunal's Registrar advised the parties that the Tribunal accepted the Appellant's Additional Submission and confirmed that the Tribunal

required no additional information from the parties and would proceed to make its decision.

**Jurisdiction**

21. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.[1]

22. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).

23. Section 1(2)(b)(i) of Schedule 1 of the PA, relevantly refers to 'a provision of a development approval for … a material change of use for a classified building'.

24. 'Provision' is defined in Schedule 2 of the PA in respect of a development approval to mean all words or other matters forming, or forming part of, the approval. The PA goes on to give as an example, a development condition.

25. The PA defines a 'classified building' as including a 'class 1 building'. By reference to Australia's national building classifications, the proposed development encompasses a class 1 building (being a house or dwelling of a domestic or residential nature).

26. So, Table 1 of Schedule 1 of the PA applies to the Tribunal.

27. Under item 1 of table 1 of Schedule 1 of the PA, an appeal may be made against ''a provision of the development approval''. The appeal is to be made by the applicant, who in this case was the Appellant and the respondent to the appeal is the assessment manager, who in this case was the Respondent.

28. In circumstances where the Decision Notice was dated 27 June 2022 and was received on the same day[2], this appeal was to be filed on or before 25 July 2022.[3] This was satisfied, with the appeal being filed on 8 July 2022.

29. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

**Decision framework**

30. The Decision Notice was issued by the Respondent on 27 June 2022. At that time, the PA was in force.

31. The Appellant filed a Form 10 – Notice of Appeal / Application for Declaration on or about 8 July 2022.

32. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.

33. This is an appeal by the Appellant, the recipient of the Decision Notice and accordingly, the Appellant must establish that the appeal should be upheld.[4]

34. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Respondent which decided to give the Decision Notice the subject of this appeal.[5]

[1] Section 229(1)(a) of the PA.
[2] See Item 3 (Date written notice of decision received) of the Form 10 – Notice of Appeal / Application for Declaration of this appeal.
[3] Section 229 of the PA.
[4] Section 253(2) of the PA.
[5] Section 253(4) of the PA.

35. The Chairperson of a tribunal must decide how tribunal proceedings are to be conducted[6] and the tribunal must give notice of the time and place of the hearing to all parties[7].

36. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal[8].

37. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person[9].

38. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.[10].

39. Prior to the conclusion of the hearing of the appeal, the Tribunal requested that additional information be provided by the parties. This request was formalised in the Directions. The parties provided the information sought by the Directions. In addition, the Appellant provided the Further Submissions and the Tribunal considered the circumstances of the Appellant's submission of the Further Submissions and gave leave for that evidence to be considered.

40. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:

> *(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) for a deemed refusal of an application:*
>
> > *(i) ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
> >
> > *(ii) deciding the application.*

**Material Considered**

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

    (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on or about 8 July 2022;

    (b) An email dated 2 September 2022, from Mr Michael Lyell on behalf of the Appellant to the Tribunal's Registrar, providing the Appellant's Submissions required by the Directions.

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[6] Section 249(1) of the PA.
[7] Section 249(4) of the PA.
[8] Section 253(5)(a) of the PA.
[9] Section 249 of the PA.
[10] Section 253 and section 246 of the PA.

(c) An email dated 9 September 2022, from Ms Kelly Taylor of the Respondent to the Tribunal's Registrar, providing the Respondent's Submissions required by the Directions.

(d) An email from Mr Michael Lyell on behalf of the Appellant to the Tribunal's Registrar, providing the Respondent's Further Submissions.

(e) Relevant Plans:

| Plan No. | Rev. | Plan Name | Date |
|---|---|---|---|
| 2130 Sheets 01-03 | | Southern, Western and Eastern Elevations | 4/5/2022 |
| 21030 Sheet 04 | - | *Site Plan*, prepared by MRA Design | 4/5/2022 |
| 21030 Sheet 05 | - | *Floor Plan Layout, prepared by MRA Design* | 4/5/2022 |
| 21030 Sheet 06 | - | *Floor Plan Layout – Upper, prepared by MRA Design* | 4/5/2022 |
| 21030 Sheet 07 | - | *East Elevation, North Elevation, prepared by MRA Design* | 4/5/2022 |
| 21030 Sheet 08 | - | *West Elevation, South Elevation, prepared by MRA Design* | 4/5/2022 |

(f) *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**); and

(g) *Planning Act 2016* (**PA**).

**Findings of Fact**

The Tribunal makes the following findings of fact:

Issues in dispute in appeal

42. It was common ground between the parties that the Development Application did not comply with acceptable outcome 2.1 of the *Dual Occupancy Code*.

43. The issues in dispute therefore came down to whether the Development Application instead complied with the performance outcome PO2.

44. PO2 relevantly provided the following:

> *The dual occupancy:-*
>
> *(a) is of a scale that is compatible with surrounding development;*
>
> *(b) does not present an appearance of bulk to adjacent premises, road or other areas in the vicinity of the site;*
>
> *(c) maximises opportunities for the retention of existing vegetation and allows for soft landscapes between buildings and the street;*
>
> *(d) allows for adequate area at ground level of outdoor recreation, entertainment, clothes drying and other site facilities; and*
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> *(e) facilitates on-site stormwater management and vehicular access.*

The planning framework

45. Accepted development does not require a development approval.[11]

46. Table 5.5.1 of the Planning Scheme identified that the category of assessment for a development application for a dual occupancy use within the Low density residential zone would be ''accepted development''. The sole applicable use code (assessment benchmark) was identified as the ''Dual occupancy code''.

47. This meant that on the subject site, dual occupancy development would be accepted development and not require a development approval where it complied with the acceptable outcomes of the *Dual Occupancy Code*.

48. Section 5.3.3(2) of the Planning Scheme relevantly provided the following:

> *Accepted Development that does not comply with one or more of the nominated acceptable outcomes in the relevant parts of the applicable code(s) becomes code assessable development unless otherwise specified.*

49. The *Dual Occupancy Code* contained a number of acceptable outcomes, including AO2.1, which relevantly required (in the case of 'accepted development') that the site cover of a dual occupancy not exceed:

> *(a) …;*
>
> *(b) 40% where the dual occupancy is 2 or more storeys in height; or*
>
> *(c) 50% for the ground floor and 30% for the upper floors where the dual occupancy is 2 or more storeys in height.*

50. As was acknowledged by the parties, the Development Application did not comply with acceptable outcome AO2.1 and therefore instead of the Development Application being accepted development as set out in Table 5.5.1 of the Planning Scheme, it became code assessable development.

51. Section 5.3.3(3)(a) of the Planning Scheme then relevantly identified the assessment benchmarks for code assessable development that occurred as a result of development becoming code assessable pursuant to section 5.3.3(2) of the Planning Scheme, as follows:

> *(ii) where made assessable development requiring code assessment pursuant to subsection 5.3.3(2) above: -*
>
> *(A) must be assessed against the assessment benchmarks for the development application, limited to the subject matter of the relevant acceptable outcomes that were not complied with or were not capable of being complied with under sub-section 5.3.3(2) (that is, the performance outcome(s) corresponding to the relevant acceptable outcome(s)); and*
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> *(B) must still comply with all relevant acceptable outcomes identified in subsection 5.3.3(1) other than those mentioned in sub-section 5.3.3(2).*

52. This meant that the Development Application was to be assessed against all the relevant acceptable outcomes in the *Dual Occupancy Code* with which it complied and in respect of any acceptable outcome with which it did not comply, the Development Application

[11] Section 1.4 of the Planning Scheme and section 44(4) of the PA.

was to be assessed against the corresponding performance outcome for that acceptable outcome.

53. Accordingly, the Development Application was to be assessed against the following:

    (a) Acceptable outcomes AO1.1 and AO3.1 to AO14.2; and

    (b) PO2.

54. The Tribunal understands that it was agreed between the parties that the Development Application complied with all the acceptable outcomes of the *Dual Occupancy Code* except for AO2.1.

55. Accordingly, it is the assessment of the Development Application against PO2 that is in issue in the appeal.

The parties' evidence

56. At the hearing of the appeal, both parties gave some evidence with respect to each of the five elements of PO2 of the *Dual Occupancy Code*.

*The Respondent's evidence*

57. The Respondent first addressed PO2 in the Information Request, although not by addressing each of its five elements. Instead, the Respondent relied more generally on amenity impacts to neighbouring residents arising from bulk and scale of the proposed development and focussing on PO2(b) in requiring the Appellant to demonstrate compliance with PO2.

58. At the Hearing, the Tribunal invited the Respondent to state its position regarding compliance with each of PO2(a), (b), (c), (d) and (e).

59. The Respondent's oral evidence was that the Respondent's delegate report accepted compliance with PO2(d) and PO2(e). With respect to PO2(c), there was no noticeable existing vegetation on the subject site that would need to be retained and therefore the Respondent was comfortable that requirement was met.

60. What was clearest about the Respondent's evidence regarding PO2 was that it strongly contended for non-compliance with PO2(a) and (b), which related to scale and bulk of the proposed development.

61. While there was general agreement between the parties that the proposed development did not comply with the requirements of AO2.1, there was disagreement about the quantum of the noncompliance. The Appellant contended that the site cover for the ground and upper floor was 45.98% and 34.4% respectively. The Respondent's position was that according to the Respondent's calculations, the ground floor and upper floor site cover was 46.8% and 36% respectively. More importantly, the Respondent was concerned that this resulted in an actual gross floor area increase of 212.7$m^2$ above what the Planning Scheme provided for.

62. The Respondent consistently (in the assessment and decision of the Development Application, at the hearing and in the Respondent's Submissions) contended that the increase in site cover beyond that allowed for in the Planning Scheme, would have a detrimental impact on the bulk of the proposed development when it was viewed from adjoining premises and the street. The Respondent further contended that the additional square meterage above the 30% identified in AO2.1 for the upper floor, was not considered insignificant.

63. In the Respondent's Submissions, the Respondent drew on the acceptable outcome in AO1.2(a) of the *Dual Occupancy Code*, which required a minimum site area of 800m$^2$. The Respondent considered the subject site, at 591m$^2$, was not of sufficient size for the proposed development to meet the requirements of PO2(a) and (b). The proposed development would present as two large two storey dwellings, side by side, both achieving driveway access from Noree Street, with each having the appearance of being on a small lot. The Respondent concluded that together with the noncompliance with the requirements of AO2.1 of the *Dual Occupancy Code*, this was an over-development of the site that would present an appearance of bulk and not be in keeping with the built form of development within the immediate area.

*The Appellant's evidence*

64. The Appellant's evidence at the hearing focussed on the agreed issue in dispute, namely the Respondent's contention that the proposed development did not and could not, in its present form, comply with PO2 of the *Dual Occupancy Code*.

65. The Appellant's town planning representatives, Mr Lyell and Mr Adams, explained how, in their opinion, the exceedance of the site cover specified in AO2.1 of the *Dual Occupancy Code* was not significant, being over by only a small percentage and that this would not negatively impact on adjoining residences, the existing streetscape or the wider area.

66. Mr Lyell and Mr Adams identified similar developments in the immediate vicinity that had been approved by the Respondent and which provided a precedent and an indication that the general area could be defined as an area in transition. These contentions negated some of the arguments made by the Respondent about the density and site cover of neighbouring properties, many of which were older homes and likely to be renovated in due course.

*67.* The Appellant's representatives further contended that the design of the proposed development was of a quality which would add considerable value to the existing streetscape and the surrounding area. The materials proposed included natural finishes, a green roof to have a softening effect and the splitting of the two units so that they looked like two detached houses, with each house given different façade treatments, separate driveways and pedestrian accesses.

*68.* Finally, the Appellant's representatives contended that in terms of bulk, while the proposed dwelling exceeded the site cover of AO2.1, the proposed dwelling would be well under the height limit set by the Planning Scheme, by approximately 2 metres. Therefore, it would not exceed any neighbour expectations in terms of height.

*69.* The Appellant's Submissions expanded upon the oral submissions made during the hearing with respect to three other dual occupancy developments within the vicinity of the subject site, each of which exceeded the maximum site cover required by AO2.1 of the *Dual Occupancy Code*, as well as the nearby Master Planned Bokarina Beach development. These examples formed the basis of the Appellant's contention that the site cover of the proposed development was compatible with surrounding development, thus complying with PO2(a) of the *Dual Occupancy Code*.

*70.* To demonstrate compliance with PO2(b) of the *Dual Occupancy Code*, the Appellant's Submissions addressed 'bulk' by considering setbacks, building height and site cover. The Appellant contended that the proposed development fully complied with all development setback requirements of the Planning Scheme and similarly, that it would be well beneath the maximum building height permitted by the Planning Scheme. That left site cover, which the Appellant contended was 'all but achieved' when site cover was considered across both levels of the proposed development.

*71.* As noted above, in the hearing, the Respondent acknowledged that it accepted the proposed development complied with PO2(c), (d) and (e) and while the Appellant's Submissions did address these and the Tribunal has considered them within the context of the Respondent's Submissions, neither set of submissions raised any new issues that deterred from the Respondent's original position. The Tribunal therefore accepts that the proposed development does meet the requirements of PO2(c), (d) and (e) of the *Dual Occupancy Code*.

*72.* The Appellant's Additional Submissions sought to clarify an error alleged by the Appellant with respect to the Respondent's calculation of site cover, which was acknowledged by the Respondent to be an approximation given the Respondent's software limitations.

*73.* The Tribunal accepts the Appellant's calculation of the site cover of the proposed development as the more accurate one, given the Appellant's town planning consultants prepared the design drawings and had the relevant CAD file and software. Accordingly, the Tribunal accepts that the site cover for the ground and upper floor was 45.98% and 34.4% respectively.

*74.* The Appellant's Additional Submissions provided a varied list of examples of dual occupancies, all of which were in nearby Warana and Buddina and were on lots less than 800m$^2$ in area that exceeded the site cover requirements of AO2.1 of the *Dual Occupancy Code*.

75. Finally, the Appellant's Additional Submissions addressed comments made by the Respondent in the Respondent's Submissions with respect to the landscaping strip and condition 5 of the Development Approval. While a consideration of PO2(c) of the *Dual Occupancy Code* does necessitate a consideration of landscaping between buildings and the street, the Respondent did indicate in the hearing that it had no concerns with the proposed development's compliance with PO2(c) and the Tribunal is satisfied that the Respondent's Submissions do not detract from this. Given condition 5 of the Development Approval is not the subject of this appeal, the Tribunal does not consider it necessary to consider landscaping any further.

**Reasons for the Decision**

<u>The site inspection</u>

76. The subject site was a corner site comprising an area of 591m$^2$. It was occupied by a single story residential dwelling which was accessed via a single drive way from Orringa Street.

77. The surrounding area comprised generally single storey, detached, low set, low density residential dwellings. Few double storey or dual occupancy developments were in the immediate vicinity.

78. It was noted that several dual occupancies had been developed within close proximity to the subject site and there was some discussion, but no resolution, during the hearing concerning the site cover calculation that applied to each of these. It was also noted that the subject site was relatively close to development that was occurring in accordance with the requirements of the Bokarina Beach Master Plan which provided for developments with a site cover of 60%.

79. A site inspection was conducted, however, access onto the subject site was unable to be arranged due to the subject site being tenanted.

<u>Assessment of the Development Application</u>

80. Being code assessable development, this appeal must be decided in accordance with subsection 60(2) of the PA, which requires that the Tribunal:

*(a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and*

*(b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and …*

*(c) may impose development conditions on an approval; and*

*(d) may, to the extent the development does not comply with some or all [of] the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.*

81. Relevantly then, Table 5.5.1 of the Planning Scheme identified the sole assessment benchmark for this application as being the *Dual Occupancy Code*, and on the evidence before this Tribunal it is only compliance with PO2 that is in dispute between the parties.

82. For the reasons that follow, this Tribunal finds that the proposed development complied with PO2 of the *Dual Occupancy Code*.

83. Acceptable Outcome AO2.1 required that site coverage of the dual occupancy not exceed 50% for the ground floor and 30% for the upper floors, where the dual occupancy was two or more storeys in height. The Appellant's evidence stated the site cover for the ground floor and upper floor of the proposed development were 45.98% and 34.4% respectively. The Respondent's calculation of the proposed ground floor and upper floor site cover was 46.8% and 36% respectively. As discussed above, the Tribunal accepts the Appellant's evidence with respect to the percentage of site cover and is satisfied that the site cover of the proposed ground floor and upper floor of the proposed development is 45.98% and 34.4% respectively.

84. PO2(a) of the *Dual Occupancy Code*, seeks to ensure that new development that does not specifically comply with the maximum site cover specified in AO2.1 is of a scale that is compatible with surrounding development.

85. The Tribunal considered the submissions of the parties with respect to this matter and formed a view that, notwithstanding the non-compliance with the site cover provisions of AO2.1, the impacts of that non-compliance would not be significant. Indeed, the proposed development would meet the site cover requirement for the ground floor and only exceed that for the upper floor by 4.4%. The increase in site cover for the upper floor would be difficult to determine visually from adjoining properties and from the surrounding street frontages. Further, the Tribunal is of the opinion that any reduction to the proposed site cover for the upper floor, would make little discernible difference to the appearance and presentation of the proposed development to the surrounding area.

86. Relevantly, acceptable outcome AO3.2 required the proposed development to be set back at least 4.5m from the street frontage. The proposed development provided for two 9.5m x 0.7m concrete planter boxes being 4.1m from the Nooree Street frontage. Condition 5 of the Development Approval requires the proposed development comply with the 4.5m setback. This will require a minor amendment to the approved plans which will result in a small positive impact on the appearance and presentation of the proposed development on adjoining neighbours, the street scape and the area in general. Condition 2 of the Development Approval requires the Approved Plans be amended to address any changes required by the conditions of the Development Approval. Once the amendment to the Approved Plans has been made in accordance with condition 5 of the Development Approval, all setback requirements would be met. Together with the fact that the site cover requirement for the ground floor would also be met, a 4.4% exceedance of the upper floor site cover limit, would, in the Tribunal's view, not result in the proposed development being of a scale that is incompatible with the surrounding dwellings.

87. In respect of PO2(b) of the *Dual Occupancy Code*, this performance outcome seeks to ensure that new development '*does not present the appearance of bulk to adjacent premises, road or other areas in the vicinity of the site'*. As discussed earlier in the Tribunal's assessment of this appeal, the non-compliance with the requirements of AO2.1 of the *Dual Occupancy Code* are not considered significant enough to have a negative impact with respect to the proposed development's appearance of bulk to adjacent premises, roads or the area in general.

88. Having found in favour of the Appellant with respect to the proposed development's compliance with PO2(a) and PO2(b) of the *Dual Occupancy Code*, which were of most concern to the Respondent, the Tribunal briefly turned to the remaining three elements of PO2.

89. When considering PO2(c) and (d) of the *Dual Occupancy Code*, which relates to the ability of a site to accommodate sufficient area for landscaping, retention of existing vegetation and areas for outdoor recreation, it has already been noted by the Tribunal that this requirement was not in dispute between the parties.

90. Lastly, the Tribunal finds that the Development Application complies with PO2(e), as conceded by the Respondent.

Conclusion

91. Based on the above analysis, the Tribunal finds that the proposed development meets the requirements of PO2 of the *Dual Occupancy Code* and that accordingly, the restriction imposed by condition 4 of the Development Approval is not reasonably required.

92. The Tribunal therefore orders that the decision of the Respondent to approve the Development Application be changed by deleting condition 4 of the Decision Notice.

**Samantha Hall**

**Development Tribunal Chair**
**Date: 7 November 2022**

**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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Department of Energy and Public Works
GPO Box 2457
Brisbane QLD 4001

**Telephone: 1800 804 833**
**Email: registrar@epw.qld.gov.au**