



## Development Tribunal – Decision Notice

---

### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>22-045</b>
<b>Appellant:</b>	Daniel Bisset
<b>Respondent/ Assessment Manager:</b>	Robin Mark Wibrow Lic A1177643
<b>Co-respondent/ Concurrence Agency:</b>	Noosa Council
<b>Site Address:</b>	26 Foedera Crescent Tewantin Qld 4565 and described as Lot 70 on RP139233 – the subject site

---

### **Appeal**

Appeal under section 229 and sections 1(2)(a) and (2)(g) and item 1(a) of table 1 of section 1 of schedule 1 of the *Planning Act 2016* against the decision to refuse a development permit for building work associated with a secondary dwelling (Class 1).

---

<b>Date and time of hearing:</b>	4 November 2022 at 10.00 am
<b>Place of hearing:</b>	The hearing was carried out at the subject site.
<b>Tribunal:</b>	John O'Dwyer – Chair Rebecca Moore – Member
<b>Present:</b>	Marcus Brennan of Brennan Planning Pty Ltd – Appellant's Agent Brad Geaney – Noosa Council

---

### **Decision:**

1. The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) confirms the decision of the assessment manager on the advice of Noosa Council as a concurrence agency, to refuse the application.

### **Background**

2. The subject land is an irregularly shaped lot at Foedera Crescent, Tewantin with an extended frontage to Foedera Crescent on the inside of a 90-degree bend in that street, creating a lot typical of a corner allotment. The land slopes up from the western corner to the eastern corner of the lot.
3. The subject site contains a dwelling set back from the south-western part of the frontage to Foedera Crescent with a patio on the south-east side of the dwelling bounded by a retaining wall located approximately 3 metres to the south-east of and parallel to the

south-east wall of the dwelling. The retaining wall rises up from the patio level to create an elevated platform on which a secondary dwelling is proposed to be located. The existing dwelling is on a platform created by a mix of cut and fill to give level access to the south-western part of Foedera Crescent.

4. The secondary dwelling is designed to sit on a flat platform level with the top of the retaining wall from the retaining wall out to the south-east with a skillion roof that slopes from the south-east down to the north-west away from the south-eastern part of Foedera Crescent. The south-east wall will be 3.5 metres high and the north-eastern wall will be 2.55 metres high. This arrangement is to allow maximum light penetration into the existing dwelling. The south-eastern wall is stepped across the front, with the northerly part located approximately 6 metres from Foedera Crescent at the northern end and 5.107 metres at the southern end and with the southerly part stepped back and located over 6 metres from Foedera Crescent at the northern end and 4.5 metres at the southern end.
5. Therefore, the second dwelling is located within the 6 metre frontage setback from Foedera Crescent, thus triggering the referral of the application to Noosa Council (Council) for a referral agency response under the Noosa Plan 2020 (the Planning Scheme) and its Low Density Residential Zone Code.
6. On early 2022, Brennan Planning Pty Ltd as agent for the appellant lodged an application with the assessment manager Robin Wibrow for a development approval for building work – Class 1 – dwelling.
7. On 30 May 2022, Brennan Planning Pty Ltd as agent for the appellant applied to Council for a referral agency response under the Planning Regulation 2017 (PR) Schedule 6 Part 2.
8. Council assessed the application under the Planning Scheme Low Density Residential Zone Code. On 16 June 2022 Council issued its referral agency response directing the assessment manager to refuse the application as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:  

*Noosa Plan 2020 - Low Density Residential Zone Code*  
*PO9 Buildings and Structures are designed and sited to:*  
*f) be consistent with the predominant character of the streetscape*

*It has been considered that the design and location of the proposed dwelling addition provides an insufficient road boundary setback and is not consistent with the predominant character of the streetscape*
9. On 2 August 2022, the assessment manager issued its decision notice to refuse the application on the grounds as set out in the directed refusal.
10. On 29 August 2022, as a result of the refusal, this appeal was lodged.

## **Jurisdiction**

11. This Tribunal has jurisdiction to hear this appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(2)(a) and 1(2)(g) and Table 1 item 1(a) being an appeal by the Appellant against the refusal of the development application by the assessment manager.
12. This appeal was lodged within the statutory time limit, thus enlivening the Tribunal's jurisdiction.

## **Decision framework**

13. This is an appeal against a refusal of a development application, and the onus rests on the Appellant to establish that the appeal should be upheld.

14. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the assessment manager who made the decision appealed against (PA section 253(4)) and for an appeal about a development application, this may mean addressing matters which an assessment manager did not expressly rely on in refusing the application and matters raised at the hearing by any party.
15. Under the PA section 254, 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.
16. In this appeal, the Tribunal considered the appeal documentation, the Planning Scheme, the PA, PR and the submissions by the parties at the hearing.
17. In this appeal, the Tribunal considers the appellant has NOT satisfied the onus to demonstrate the appeal should be upheld.

### **Material considered**

18. The following is a list of the material considered by the Tribunal
  - A. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 29 August 2022, comprising the following documents:
    - Form 10 - Notice of Appeal dated 3 September 2021 and Appendix A Grounds for Appeal
    - Assessment Manager's Decision Notice – Refusal – 22-3540 dated 2 August 2022 including a copy of Council's Reasons for refusal of the carport.
    - Form 18 Notice to the owner that a private building certifier has been engaged on 29 July 2022
    - Council's Referral Agency Response dated 16 June 2022
    - Email dated 21 May 2022 from Marcus Brennan at Brennan Town Planning to Noosa Council to which was attached:
      - The Request for Concurrence Agency Response
      - Cover Letter dated 21 May 2022 setting out the proposal and a response to Low Density Residential Zone Code PO9
      - Site Plan Somerville Design Services Drawing No 100 Version 1 dated 9 June 2022
      - Floor Plan Somerville Design Services Drawing No 101 Version 1 dated 9 June 2022
      - Elevations Somerville Design Services Drawing No 102 Version 1 dated 9 June 2022
  - B. Noosa Council – Noosa Plan 2020
  - C. The Planning Act 2016 (PA);
  - D. The Planning Regulation 2017 (PR);
  - E. The Development Assessment Rules 2017;
  - F. The Building Act 1975 (BA);
  - G. The Building Regulation 2006 (BR);
  - H. The verbal submissions made by the parties at the hearing and during the site inspection as referred to in the body of the decision.

19. The Tribunal in reaching this decision has considered all the above material but only identifies in this decision the material on which it has specifically relied to reach its decision.

### **Findings of fact**

20. PO9 of the Low Density Residential Zone Code is the relevant assessment benchmark that is in contention in this appeal.
21. AO9.1 provides that:

*AO9.1 Buildings and structures have a setback of 6 metres from the road frontage, provided that setback to one frontage may be reduced to 4.5 metres where the lot:*

  - (a) has frontage to more than one road; and*
  - (b) is less than 600m<sup>2</sup> in area; or*
  - (c) is less than 15 metres in width*
22. The Tribunal finds that the subject land does not have the benefit of the reduced frontage as the lot has a frontage to one street only, is in excess of 600 m<sup>2</sup> and is more than 15 metres wide. Even if the Tribunal considered the bend in Foedera Crescent around the lot was in the nature of two frontages, the Tribunal finds the site would still not have the benefit of the reduced frontage as it does not meet the requirement of paragraph (b) or paragraph (c).

### **Reasons for the decision**

23. The parties both considered that section PO9 f) is the critical paragraph to be considered. On consideration of PO9 the Tribunal agreed that paragraph PO9 f) is the relevant paragraph against which to assess this Appeal.
24. The hearing included a site inspection and a view of the Foedera Crescent streetscape. There is an existing paling fence around the part of the frontage containing the proposed dwelling on the subject site that is approximately 2 metres high thus creating a noticeably higher barrier than front fences associated with other properties.
25. The top of the proposed dwelling will extend up to 1.4 metres above the existing paling fence.
26. During the inspection, the appellant's agent identified other structures that were within the 6 metre setback and Council's representative advised only some had the benefit of approvals. The Tribunal considered these other structures were open carports and tensile sunshades with limited visual impact being generally low profile structures.
27. Most of the dwellings in Foedera Crescent have gable roofs with one side of the gable sloping down towards the Foedera Crescent frontage except for the dwellings at 21 and 23 Foedera Crescent where the gables face Foedera Crescent (21 Foedera Crescent is directly opposite the proposed dwelling and 23 Foedera Crescent is east of that site).
28. The proposed dwelling will display a rectangular block appearance showing up to 1.4 metres above the fence along the south-easterly site boundary totally unlike the appearance of any of the other structures in dwellings visible from the road verge around the subject site eastwards or westwards along Foedera Crescent.
29. The Tribunal considers that all 'built' examples that were listed in APPENDIX A – Grounds for Appeal 9b iv) are not comparable to the magnitude of this development application and cannot be considered as precedents for this case.

30. The Tribunal considers that the appellant has not discharged the onus of proof to demonstrate that the development is consistent with the predominant character of the streetscape under PO9 f). Accordingly, the Appeal is refused.

---

**John O'Dwyer**

**Development Tribunal Chair**  
**Date: 24 November 2022**

### **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**

All correspondence should be addressed to:

The Registrar of Development Tribunals  
Department of Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone: 1800 804 833 Facsimile (07) 3237 1248**

**Email: [registrar@hpw.qld.gov.au](mailto:registrar@hpw.qld.gov.au)**