



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-015
Appellant:	Daniel Burke
Respondent: (Assessment manager)	Richard Holden
Co-respondent: (Concurrence agency)	Noosa Shire Council (Council)
Site address:	25 Witta Circle, Noosa. described as Lot 101 on Crown Plan N21846 – the subject site

Appeal

Appeal under section 229 and schedule 1, table 1, item 1 (a) of the *Planning Act 2016* against the assessment manager's decision at the direction of the referral agency to refuse a building development application (reference Noosa Council RAP 22/0018) for construction of an awning/shade structure, new construction of breeze block fence and new construction of planter box gatehouse.

Date and time of hearing:	Monday 5 June 2023 at 10.00 am
Place of hearing:	The subject site
Tribunal:	Derek Kemp – Chair Suzanne Bosanquet – Member
Present:	Daniel Burke – Appellant, property owner Kylee Burke – Property owner Marcus Brennan – Town Planner, for the Appellant Nadine Gorton – Noosa Shire Council, Co-respondent Georgina Schramm – Noosa Shire Council, Co-respondent

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 to refuse the Application (Noosa Council RAP 22/0018) with a decision to approve the application (RAP 22/0018) with the following conditions:

- a) The Building Work to conform to the Amended Plans submitted to the Registry on 5 June 2023 (identified as Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue 1, dated 15/6/2022).

- b) The proposed gatehouse and entry structure conform to the Amended Plans submitted to the Registry on 15 June 2023 on 5 June 2023 (identified as Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue I, dated 15/6/2022).
- c) The proposed retractable awning to be entirely located on the subject site and generally conform to the Amended Plans submitted to the Registry on on 5 June 2023 (identified as Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue I, dated 15/6/2022).
- d) Such other conditions, as the assessment manager reasonably requires to ensure compliance with the building assessment provisions.

Background

The subject site

1. The subject site is a rectangular level block with a site area of 610.59 sq. m. developed with a two storey dwelling.
2. This subject site has a 17m frontage to Witta Circle to the west, and 21.8m boundary to the Noosa Sound river system to the east, with frontage to the Noosa Lion's Park on the opposite bank.

The proposal

3. The proposal (Reference: Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue B, dated 31/3/2022) is for:
 - a. Construction of a new retractable awning shade structure – to replace an existing structure at the rear, river side of the property
 - b. Construction of a breeze block wall – 5.562m long by 2.69m high along part of the rear east part of the property boundary to form the rear wall of an outdoor BBQ area kitchen.
 - c. Construction of a gatehouse entry structure – replacing the existing awning and planter structure at the front of the subject property.

Assessment of the application

4. On 16 May 2022, Brennan Planning lodged a request to Council for a referral agency response for the building work under Schedule 9, Division 2, Table 3 of the *Planning Regulation 2017*.
5. On 27 May 2022, Council issued an information request in relation to the referral application. Council's issues detailed in the request included: a. Site cover; and b. The alterations to the wall on the southern boundary.
6. On 29 July 2022, the Applicant responded to Council's information request. The response included a cover letter addressing Council's issues raised and revised proposal plans.
7. On 29 July 2022, Council provided an email titled 'Feedback re: RAP22/0018 - Response to Information Request – 25 Witta Circle, Noosa Heads' which detailed outstanding issues in relation to the proposed Referral Application. In particular, it raised issues about the site cover calculations, in that the retractable awning (covered area on the water side), and the gate house, were not included in the calculations.

8. On 20 September 2022, the Appellant provided a response to Council's email of 29 July 2022 in an email titled 'RAP22/0018 - Response to Further Advice – 25 Witta Circle, Noosa Heads'. The response included a statement addressing Council's issues raised and the included following attachments: a. Attachment 1 - Amended Proposal Plans; b. Attachment 2 – Site Cover Calculations; c. Attachment 3 – Legal Opinion 10.
9. On 20 September 2022, the Appellant provided a further email response titled RAP22/0018 - Further Response (Tribunal Decision) – 25 Witta Circle, Noosa Heads which included a recent Tribunal decision in relation to a similar matter involving a dwelling house that was found to exceed site cover requirements prescribed by AO8.1 of the Low Density Residential Zone Code.
10. On 10 November 2022, Council advised the owners K.J. Bourke and D.J Bourke (c/o Brennan Planning Pty) of the Council's 'Referral Agency Response – Refusal' for their application (RAP 22/0018).
11. On 12 December 2022, Suncoast Building Approvals received a building application for the proposed works from the owner Daniel Bourke.
12. On 3 March 2023, the assessment manager refused the application for the proposed works based on the direction of the concurrence agency.
13. The grounds for refusal contained in Council's 'Referral Agency Response - Refusal' (RAB 22/0018) advised to the owners K.J. Bourke and D.J Bourke (c/o Brennan Planning Pty) on 10 November 2022 were:
 1. *The proposal does not comply with Overall Outcome 6.3.1.2 c) of the Low Density Residential Zone Code given the development would not make a positive contribution to the streetscape and would not maintain the low density and scale character of the zone.*
 2. *The proposed building works do not comply with Acceptable outcome AO8.1 and corresponding Performance Outcome PO8 of the Low Density Residential Zone Code as the development:*
 - a) *Would not be at a scale compatible with surrounding development;*
 - b) *Does not complement the low density character of the locality given the removal of vegetation and landscaping that would otherwise provide good separation between buildings;*
 - c) *Creates unnecessary excessive bulk to side neighbours, road frontage and the canal.*
 3. *The proposed building works do not comply with Acceptable outcome AO9.1 & AO9.3 and corresponding Performance Outcome PO9 of the Low Density Residential Zone Code as the development:*
 - a) *Does not contribute positively to, or provide a high level of residential amenity to adjoining residences;*
 - b) *Does not complement the low density character of the locality;*
 - c) *Creates unnecessary excessive bulk to side neighbours;*
 - d) *Is not consistent with the predominant character of the streetscape;*
 - e) *Does not allow for landscaping to separate buildings and provide visual buffer.*
 4. *Additional works have occurred on site, without approval, which increase the extent of site cover.*

Further plans considered by the Tribunal

14. During the appeal, the appellant and Council agreed that the issue of the gatehouse entry could be resolved by amended plans for this structure.
15. On 6 June 2023, the Tribunal directed that any amended plans to be submitted by 20 June 2023.
16. These 'amended plans' were received by the Registry on 15 June 2023 (Reference: Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue I, dated 15/6/2022).
17. On 16 June 2023 the Tribunal requested Council's response to these amended plans.
18. On 4 July 2023 Council provided its written response to these amended plans which *inter alia* advised the Tribunal:

Gatehouse - The proposed amendments to the gatehouse and planter box are considered to align with the street character and are comparable to the adjoining dwelling's (27 Witta Circle) gatehouse. The gatehouse is considered to comply with the Performance outcome PO9 of the Zone Code.

Retractable awning – While the proposed retractable awning is to replace the existing awning, the existing awning was not approved, as supported by the approved building plans (refer attachment A). The awning and associated posts are built to the rear boundary, adjoining the Noosa River. The inclusion of the awning does not comply with the rear boundary setback and increases the development's site cover by approximately 13%.

(...)

Council remains of the view that proposed retractable awning does not comply with: a. Acceptable Outcome AO8.1 and corresponding Performance Outcome PO8 (site cover) of the Low Density Residential Zone Code; and b. Acceptable Outcome AO9.3 and corresponding Performance Outcome PO9 (setbacks) of the Low Density Residential Zone Code.

The proposed building encroachments and ground floor site cover would result in the development unreasonably impacting on the low density residential character of the area and fail to respect the visual amenity of adjoining residences, to the street and from the canal. The development is not able to incorporate landscaped setbacks to enhance visual amenity and buffer the development from the road, and surrounds.

Nearby developments

19. To the south is a two storey dwelling with a substantial gatehouse, entry structure that is approximately 4m in length to Witta Circle and 2m in width formed with a planter box on top.
20. This adjacent dwelling at 27 Witta Circle presents as a solid wall with no openings along the part of the property boundary where the appellant has constructed the solid masonry wall proposed in their application.
21. Substantial 1.5m high masonry walls front Witta Circle on the subject site, nearby and adjacent properties at 25, 27 and 31 Witta Circle. Higher 2.4m masonry walls front nearby Witta Circle properties at 18, 41 and 43 Witta Circle.

22. Substantial gatehouse entry structures front Witta Circle at nearby properties, including at 22, 27, 37, 39, 43, 47 Witta Circle.

Material Considered

23. The material considered in arriving at this decision comprises:
- a. 'Form 10 – Notice of Appeal/ Application for Declaration', being the grounds for appeal lodged with the Tribunals Registrar on 4 May 2023.
 - b. Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue B, dated 31/3/2022.
 - c. Brennan Planning request to Council for a Referral Agency Response lodged a 16 May 2022. – including Brennan Planning 'Town Planning Assessment Report 25 Witta Circle, Noosa Heads Concurrence Agency Referral – Additions and Alterations to a Dwelling House (dated May 2022).
 - d. Noosa Shire Council Information Request issued on 27 May 2022
 - e. Brennan Planning's 29 July response to Council's Information request - including a covering letter addressing Council's issues raised and revised proposal plans.
 - f. Noosa Shire Council's email to Brennan Planning's on 29 July 2022 ('Feedback re: RAP22/0018 - Response to Information Request – 25 Witta Circle, Noosa Heads') which detailed outstanding issues in relation to the proposed Referral Application.
 - g. Brennan Planning's email to Council on 20 September 2022, responding to Council's email of 29 July 2022 (including a statement addressing Council's issues and Attachment 1. Amended Proposal Plans; Attachment 2. Site Cover Calculations; Attachment 3. Legal Opinion from P & E Law dated 14 September 2022 addressing the site cover issue).
 - h. Brennan Planning's email to Council on 20 September 2022, providing a recent Tribunal Decision in relation to a similar matter (involving a dwelling house that was found to exceed site cover requirements prescribed by AO8.1 of the Low Density Residential Zone Code).
 - i. Noosa Shire Council letter dated 10 November 2022 to the owners K.J. Bourke and D.J Bourke (c/o Brennan Planning Pty) advising of the Council's 'Referral Agency Response-Refusal' for their application (RAB 22/0018).
 - j. Richard Holden (Suncoast Building Approvals) letter dated 3 March 2023 advising the owners of the refusal of their application for the proposed works based on the direction of the referral agency (Noosa Shire Council).
 - k. The 'amended plans' were received by the Registry on 15 June 2023 (Reference: Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue I, dated 15/6/2022).
 - l. The Noosa Shire Council's written response to these amended plans provided to the Tribunal Registry on 4 July 2023.

Jurisdiction

24. Section 229(1) of the PA provides that schedule 1 ('the schedule') of the PA states the matters that may be appealed to a tribunal. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule ('Table 1') are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that table 1 only applies to a tribunal if the matter involves one of the matters set out in section 1(2).
25. Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the Building Act 1975, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.

26. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision framework

27. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
28. The tribunal is required to hear and decide an appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal, or any information provided under section 246 of PA.
29. The tribunal is required to decide an appeal in one of the ways mentioned in section 254(2) of the PA, and the tribunal's decision takes the place of the decision appealed against (section 254(4)).
30. The tribunal must not make a change, other than a minor change, to a development application (section 254(3))

Findings of fact

31. The Tribunal finds the amended plans (submitted to Tribunal on 15 June 2023 (Reference: Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue I, dated 15/6/2022) to be a 'minor change' (under Section 254(3) of the PA) to the original proposal plans (Reference: Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue B, dated 31/3/2022) submitted to Council for Referral Agency Response on 16 May 2022 (Reference: RAP 22/0018).

Reasons for the decision

32. The Tribunal concurs with the Appellant's and Council's agreement at the time of the hearing that there is no ground for refusing the proposed construction of a breeze block wall (5.562m long by 2.69m high) along part of the rear, east part of the property boundary to form the rear wall of an outdoor BBQ area kitchen.
33. The Tribunal concurs with the Appellant's and Council's view that there is no ground for refusing the proposed construction of the proposed gatehouse and entry in accordance with the amended plans received by the Tribunal on 15 June 2023 (Reference: Renegade Design Studio, Project 21-18, 25 Witta Circle, Issue I, dated 15/6/2022 and Council's written response to these amended plans received by the Tribunal Registry on 4 July 2023).
34. The Tribunal finds that the only matter that remains in dispute, and the subject of this appeal, is the refusal of the construction of a new retractable awning shade structure (Reference Noosa Shire Council response to the latest amended plans received by email to the Registry on 4 July 2023).
35. The Tribunal formed the opinion that:
- a. the shade structure and alignment with rear boundary is in keeping with the existing pattern of development along the riverfront.
 - b. it does not adversely affect visual amenity of neighbouring properties.
 - c. the existing and proposed replacement for the shade structure is not visually dominate.

- d. it has a low and slim profile that is complementary to the overall aesthetic of the dominate house aesthetic presented at the rear.
 - e. It helps alleviate the bulk of the dominant house aesthetic by adding a shade profile that introduces depth, breaking down the scale of the house proper and introduces better proportions that are more domestic and human in scale.
 - f. The provision of the shade structure improves amenity for the residents and facilitates their rights to enjoyment of their property.
36. The Tribunal formed the opinion that the proposed retractable awning would not adversely affect the visual amenity from the river or from the Lion's Park opposite.
37. The Tribunal noted that a blank wall set-back 1.5 metres from the rear boundary could be built up to 4.5 metres high from ground level, which would have far greater impact on the views from the river and the Lion's Park opposite than the proposed minor structure proposed for the retractable awning.
38. Consequently, the Tribunal formed the opinion that the proposed development would:
- a. comply with Overall Outcome 6.3.1.2 c) of the Low Density Residential Zone Code and make a positive contribution to the streetscape and maintain the low density and scale character of the zone.
 - b. comply with Performance Outcome PO8 of the Low Density Residential Zone Code as the development:
 - i. would be at a scale compatible with surrounding development;
 - ii. would complement the low density character of the locality;
 - iii. would not create excessive bulk to side neighbours, road frontage or a canal
 - iv. would introduce depth and break down the overall scale of the existing dwelling when viewed from the Noosa River and Lion's Park across the river.

Derek Craven Kemp

Development Tribunal Chair
Date: 9 August 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:

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

Telephone (07) 1800 804 833

Email: registrar@epw.qld.gov.au