Development Tribunal – Decision Notice

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

Appeal number:	**23-059**
Appellant:	Stephen Bates on behalf of Capital Prudential
Respondent: (Assessment manager)	Noosa Shire Council
Site address:	3 Delorme Street, Noosa Heads and described as Lot 148 on RP160425 ─ the subject site

Appeal

This is an appeal under section 229, section 1 of Schedule 1 and item 2 of Table 1 of the *Planning Act 2016* (**PA**) against the Noosa Shire Council's (**Respondent**) decision made on 31 October 2023 to refuse an application to change a development approval for a material change of use of premises to establish a dual occupancy (**Change Application**), given by a Negotiated Decision Notice dated 19 April 2023 (**Negotiated Decision Notice**).

Date and time of hearing:	10am, 7 March 2024
Place of hearing:	Subject site
Tribunal:	Samantha Hall – Chair Warren Rowe – Member
Submissions provided by:	**Appellant** Richard Jones – JDBA Certifiers Jeff Fink – JT Homes Joey Thompson – JT Homes Phil Tillotson – Blackwood Architecture Clancy Sprouster – Capital Prudential **Respondent** Georgina Schramm – Development Planner, Noosa Shire Council Andrew Gaffney – Senior Development Planner, Noosa Shire Council

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(c) of the PA **replaces** the decision of the Respondent to refuse the Change Application, with the following decision:

(a) to approve the part of the Change Application that changes the bike storage space into a laundry room in both dwelling units and to replace condition 6 of the conditions of

approval for material change of use in the Negotiated Decision Notice with the following condition:

> *'6. Where relevant, the approved plans listed in the table in condition 2 of these conditions are to be amended to change the area shown as 'bike store' on the approved Ground Floor Plan DA2.01 to an enclosed 'laundry' as shown on Drawing No. WD201, titled Ground Floor Plan, dated 28/07/2023 and prepared by Black Wood Architecture & Design.*
>
> *All relevant approved plans are to be amended as indicated and submitted to Council and the Development Tribunal.*
>
> *Note: The area identified as 'terrace' on the approved plans is not to be shown on the amended plans as being roofed.'*

and

(b) to refuse the part of the Change Application that provides a roof over the approved 'terrace' area at the rear of each dwelling.

Background

1. The subject site is described as 3 Delorme Street, Noosa Heads (Lot 148 on RP 160425). Noosa Heads is a coastal town and a suburb in the Noosa Shire Council local government area.

2. The houses in Delorme Street are established homes, predominantly single storey and there were no visible signs of other urban rejuvenation in the street. That said the house immediately to the rear of the subject site was a newly built two storey home. Many of the homes in the area were older and the development on the subject site and to the rear of it, could be the early stages of an urban renewal for the area.

3. The subject site is approximately 833m^2 in area and slopes approximately 2.5 metres from west to east. The subject site is located 1 house back from the cul-de-sac end to the street. The subject site is generally regular in shape.

4. The subject site is located within the Medium Density Residential zone of the *Noosa Plan 2020* (**Planning Scheme)**.

5. On or about 4 October 2022, the Appellant lodged a code assessable development application for a development permit for a Material Change of Use of Premises to establish a Dual Occupancy on the subject site (**Original Development Application**). The proposed development was for two 2 storey duplex dwellings, mirror images of the other, including four bedrooms each with an outdoor terrace at the rear of each dwelling opening onto respective plunge pools in the back yards.

6. When the Original Development Application was lodged, there was a single storey dwelling on the subject site.

7. On 8 February 2023, the Respondent decided to approve the Original Development Application, issuing a development approval subject to conditions (**Development Approval**).

8. On or about 7 March 2023, Mr Pat Ferris of JDBA Certifiers, on behalf of the Appellant, made representations to the Respondent about condition 6 of the Development Approval, requesting that the condition be deleted (**Appellant's Representations**).

9. Condition 6 of the Development Approval stated:

> *'Condition 6 –*
>
> *The development must not exceed a plot ratio of 0.4:1 in accordance with approved plan DA5.03, GFA Calculation, prepared by Blackwood Architecture & Design, dated 14 December 2022.'*

10. The Appellant's Representations can be summarised as follows:

    (a) the imposition of condition 6 was not considered 'relevant and reasonable';

    (b) the Council incorrectly applied AO11 (**AO11**) and PO11 (**PO11**) of the Medium Density Zone Code of the Planning Scheme, both of which only applied to a Dwelling House use and not a Dual Occupancy use;

    (c) the Appellant's interpretation of section 26(3) of the *Planning Regulation 2017*[1] was that because AO11 did not apply to the proposed development as it was not a Dwelling House use, the Respondent should not have then considered PO11 – 'put simply, it does not apply to the development';

    (d) new plans were submitted that proposed enclosing the bike store located at the rear of each garage to create a laundry where the bike storage had been located.

11. By Negotiated Decision Notice dated 19 April 2023, the Respondent decided to:

    (a) refuse the Appellant's Representations to delete condition 6 of the Development Approval, giving the following reasons for refusal:

        (i) the Development Approval was appropriately conditioned consistent with part 5.3.3(4) of the Planning Scheme;

        (ii) AO11 and PO11 were relevant to the assessment of the development application and condition 6 ensured the proposed development complied with those outcomes;

        (iii) the Planning Scheme definitions did not exclude a laundry area from gross floor area calculations and the amended plans proposed in the Appellant's Representations exceeded the allowable plot ratio by 14m^2; and

    (b) amend condition 6 of the Development Approval as follows:

> *'**Plot ratio***
>
> *6. The development must not exceed a plot ratio of 0.4:1 in accordance with approved plan DA5.03, GFA Calculation, prepared by Blackwood Architecture & design, dated 14 December 2022.*
>
> *Note: The area detailed as 'bike store' on the approved Floor Plan and corresponding Plan DA5.03 is to remain as bike storage.'*

12. On 12 July 2023, JDBA Certifiers issued a development approval for carrying out building work (assessable under the *Building Act 1975*) (**Building Approval**). The Tribunal was not provided with copies of the plans approved by the Building Approval and is satisfied those plans were not relevant to the current appeal.

[1] The Tribunal notes that the Appellant's Submissions referenced section 26(3) 'of the Planning Act 2016'. However, this reference is an error and the Appellant's Submissions instead quote section 26(3) of the *Planning Regulation 2017*, which states 'an assessment manager may, in assessing development requiring code assessment, consider an assessment benchmark only to the extent the assessment benchmark is relevant to the development'.

13. The Appellant subsequently lodged the Change Application with the Respondent on 15 September 2023, seeking to change the Development Approval.

14. The Change Application proposed a minor change to the Development Approval to vary the approved plans to:

    (a) change the approved bike storage spaces at the rear of the garages to a laundry room; and

    (b) provide a roof made of metal sheeting over the approved terrace areas at the rear of each building.

15. In the application material accompanying the Change Application prepared by JDBA Certifiers and dated 28 August 2023, the Appellant stated that:

    (a) 'The change from Bike Storage to Laundry will have no impact on the external façade of the Dwelling units and represents a very minor alteration to the Plot Ratio (it will increase from 39.29% to 42.44%). It is noted however, that the Medium Density Residential Zone Code is silent on the maximum Plot Ratio for a Dual Occupancy.

    (b) The addition of the rear solid roofing will still allow more than 25m^2 of Private Open Space to each dwelling unit (approx. 32m^2 is provided, excluding the swimming pools). Furthermore, the roof will be well away from the rear boundary, with a 6m rear setback proposed. Site cover will be under 50% (it will be 46.9%).'

16. The Respondent issued the Decision Notice – Minor Change dated 1 November 2023, which stated that on 31 October 2023, the Respondent decided to refuse the Change Application for the following reasons:

    '1. The proposed changes are contrary to PO10 & PO11 of Medium Density Residential Code of the Noosa Plan 2020 as:

        (a) The proposed changes to the built form contribute to the development's calculatable site cover and plot ratio.

        (b) The proposal exceeds the site cover and plot ratio specified for dual occupancy developments and the development does not include at least 3 small dwellings.

    2. No new or additional information relevant to the proposed change has been provided that would warrant changing the approval previously accepted by the applicant.'

17. On or about 13 November 2023, the appeal was filed in the Registry by way of a Form 10 – Notice of Appeal.

18. In the Notice of Appeal, the Appellant appealed against the Respondent's refusal of the Change Application, providing the following grounds for the appeal:

    (a) a reiteration of the Appellant's Representations;

    (b) that AO11 had no acceptable outcome for a Dual Occupancy use and the Respondent was imposing the requirements for a Dwelling House in the absence of the particular requirement;

(c) that the slight increase in plot ratio did not have any impact on the form, area, volume and massing of the proposed development currently under construction in accordance with the Development Approval;

(d) that the only difference being the laundry area currently approved in the garage was now made into a separate room separated from the garage; and

(e) that the drawings submitted as part of the Change Application included a minor change to the rear terrace roof areas with part of the terrace areas being roofed for better use of the outdoor living areas.

Jurisdiction

19. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.[2]

20. 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).

21. Section 1(2)(f) of Schedule 1 of the PA, relevantly refers to 'a decision for … a change application for a development approval that is only for a material change of use for a classified building'.

22. The PA defines a 'change application' as an application to change a development approval.[3]

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

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

25. Under item 2 of Table 1 of Schedule 1 of the PA, for a change application other than an excluded application[4], an appeal may be made against 'the responsible entity's decision on the change application'. The appeal is to be made by the applicant, who in this case was Stephen Bates on behalf of a company, Capital Prudential, the subject site's owner which made the development application. Mr Bates is therefore the Appellant. The respondent to the appeal is the assessment manager, who in this case is the Respondent.

26. In circumstances where the Decision Notice was dated 1 November 2023 and was received on the same day[5], this appeal was to be filed on or before 29 November 2023.[6] This was satisfied, with the appeal being filed on 13 November 2023.

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

Decision framework

28. The Decision Notice was issued by the Respondent on 1 November 2023.

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[2] Section 229(1)(a) of the PA.

[3] Section 78(1) of the PA.

[4] An 'excluded application' is defined in Schedule 2 of the PA to mean a change application that has been called in under a call in provision, been decided by the Planning and Environment Court or has been made to the Minister for an application that was called in under a call in provision. None of these apply to the Change Application.

[5] See Item 3 (Date written notice of decision received) of the Form 10 – Notice of Appeal / Application for Declaration of this appeal.

[6] Section 229 of the PA.

29. The Appellant filed a Form 10 – Notice of Appeal / Application for Declaration on or about 13 November 2023.

30. The appeal was commenced under section 229 of the PA and is to be heard and determined under the PA.

31. 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.[7]

32. 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.[8]

33. The Chairperson of a tribunal must decide how tribunal proceedings are to be conducted[9] and the tribunal must give notice of the time and place of the hearing to all parties[10].

34. This appeal was conducted by way of hearing, preceded by a site inspection by the Tribunal, at 10.00am on 7 March 2024.

35. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting tribunal proceedings and may seek the views of any person[11].

36. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal[12].

37. At the conclusion of the hearing, the Appellant and the Respondent each undertook to take further actions. The Tribunal formalised this by way of the following orders circulated by the Tribunal's Registrar by email dated 8 March 2024 (**Orders**):

> *The Development Tribunal confirms that at the end of the hearing, the parties each undertook to take further actions, as follows:*
>
> 1. ***On or before 21 March 2024**, the Respondent is to provide a written submission to the Registry comprising no more than 2 typed pages that sets out the Respondent's position with respect to the minor change that was sought to the rear terrace roof areas of the proposed development, specifically being the enclosed roofing of each of the pergola [13]areas (Respondent's submission);*
>
> 2. ***On or before 28 March 2024**, the Appellant is to provide a written submission to the Registry comprising no more than 2 typed pages that sets out the Appellant's response to the matters raised in the Respondent's submission.*

[7] Section 253(2) of the PA.
[8] Section 253(4) of the PA.
[9] Section 249(1) of the PA.
[10] Section 249(4) of the PA.
[11] Section 249(6)(d) of the PA.
[12] Section 253(5) and section 246(1) of the PA.
[13] The Tribunal notes that during the hearing and in the evidence presented by the parties, 'terrace' and 'pergola' were used interchangeably. The approved plans in the Negotiated Decision Notice however, describe the same areas as 'terrace'. The Tribunal in this decision, will use the word 'pergola' when quoting evidence given by the parties but will otherwise use the word 'terrace' as used in the approved plans.

38. By an email dated 21 March 2024, Georgina Shramm provided the Respondent's response to paragraph 1 of the Orders (**Respondent's Submissions**), which can be summarised as follows:

    (a) the Change Application triggers assessment against PO10[14] and PO11;

    (b) enclosing the pergolas on each unit results in a site coverage of 46.9%, which exceeds the maximum site coverage in PO10 by 59m^2;

    (c) the Change Application does not comply with AO11, so, pursuant to section 5.3.3(4)(a) and (b) and section 6.1 of the Planning Scheme, it falls to be assessed against PO11 which reinforces the 40% site cover required by AO11;

    (d) non-compliance with PO11, results in the Change Application being assessable against the overall outcomes of the Medium Density Residential Zone Code (**MDRZ Code**) of the Planning Scheme (**Overall Outcomes**);

    (e) the Overall Outcomes contemplate development maintaining low scale character and a high level of residential amenity. The Change Application results in development of a higher density than anticipated;

    (f) without the roof, the pergola areas would present as a lesser scale to neighbouring dwellings in accordance with strategic outcomes 3.3.1(o) and 3.3.3(i) of the Planning Scheme and also the Noosa Design Principles;

    (g) the exceedance of site cover undermines the integrity of the Planning Scheme, conflicts with the Strategic Plan and has the potential to change the characteristics of the area.

39. By an email dated 27 March 2024, Richard Jones of JDBA Certifiers provided the Appellant's response to paragraph 2 of the Orders (**Appellant's Submissions**), which can be summarised as follows:

    (a) given that there is no acceptable outcome in AO10 that relates to a Dual Occupancy, and because the development proposed is not a Dwelling House, it can be taken that the Dual Occupancy development is compliant with AO10 and hence PO10. The Appellant reiterated its previous contention that for Council to be able to lawfully assess the Change Application against PO10, the acceptable outcome would need to have included an additional note '*for all other development – no Acceptable Outcome nominated*', which only then would have necessitated assessment against the relating Performance Outcome;

    (b) based on an interpretation of the definition of 'site cover' in the Planning Scheme and the Queensland Planning Provisions, the Appellant contended that the proposed roofed pergolas constituted 'shade structures' and as both are located in an open space area, they should be excluded from the calculation of site cover. The proposed development would then achieve 40% site cover;

    (c) the proposed development does meet the 'low scale' character of the area, and would be compatible with 'surrounding uses' (as required by section 6.3.2.2 (c) and (d) of the Planning Scheme) given that it complied with the normal acceptable outcomes in the Low Density Residential Zone Code of the Planning Scheme for site cover, plot ratio and boundary setbacks that would apply to new dwelling houses in the adjoining Low Density Residential zoned properties;

[14] Note, it is assumed that the reference to AO10 in paragraph 1 of the Respondent's Submissions is an error, given the Response goes on to state that the proposed development did not comply with AO10 and assessment was required against PO10.

(d) the simple covering of a pergola structure with metal sheet roofing would not negatively impact the 'scale' of the proposed development when viewed from the adjoining dwellings to the east and south, given that the structures would not be enclosed by walls, and they are comfortably offset from the boundaries (1.581m off the eastern boundary and more than 6m from the southern boundary); and

(e) a roofed pergola does represent a 'thinning' of the edges of the built form, given that the structure is not enclosed by walls (apart from the separating walls between the units) – hence it would still present as a 'tree canopy'.

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*
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> *(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 Tribunal's Registrar on or about 13 November 2023;

(b) An email dated 21 March 2024, from Georgina Shramm on behalf of the Respondent to the Tribunal's Registrar, providing the Respondent's response to paragraph 1 of the Orders;

(c) An email dated 27 March 2024 from Richard Jones of JDBA Certifiers on behalf of the Appellant to the Tribunal's Registrar, providing the Appellant's response to paragraph 2 of the Orders;

(d) Supporting material for the Change Application, as well as the Respondent's assessment report of the Change Application prepared by a Consultant Planner and dated 31 October 2023;

(e) the Planning Scheme;

(f) *Planning Regulation 2017*; and

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

Findings of fact

The Tribunal makes the following findings of fact:

Issues in dispute in appeal

42. This appeal has been brought by the Appellant against the Respondent's refusal of the Change Application made by the Appellant, which requested changes to the Development Approval.

43. Based upon the Appellant's grounds of appeal and the Appellant's verbal submissions during the hearing, the Tribunal understands the issues in dispute in the appeal are with respect to the Respondent's refusal of the request in the Change Application to change the approved plans in the Development Approval as follows:

    (a) to change the bike storage space into a laundry room; and

    (b) to cover the unroofed terrace area of both units.

44. While not explicitly identified in the Appellant's grounds of appeal, the Tribunal assumes that the Appellant also appeals against condition 6 imposed by the Negotiated Decision Notice which imposes a plot ratio restriction at odds with the changes sought to the plans and includes a note requiring the bike storage remain as bike storage.

Commencement of development

45. The Tribunal understands that the issues the subject of this appeal relate to two distinct matters, the resolution of which, would not affect the commencement of the construction of the proposed development on the subject site.

46. For this reason, the Tribunal further understands that the Appellant obtained the Building Approval and commenced building the proposed Dual Occupancy units on the subject site, while these issues were being adjudicated with the Respondent.

47. However, during the site inspection, the Tribunal witnessed that both the changes sought by the Appellant in the Change Application, had already been constructed, in the case of the terrace roofs, or were in the process of being constructed, in the case of the enclosure of the bike storage areas to create laundries.

48. Putting aside the question of the lawfulness of such construction, the Tribunal would like to make it very clear that its decision in this appeal has been made without consideration of any consequences to the Appellant because of the Tribunal's decision. That the Appellant chose to construct the proposed development without the minor changes being approved is a matter for the Appellant but that decision and any consequences flowing from it, had no bearing on the Tribunal's decision in this appeal.

The planning framework

Making the Change Application

49. A person may make an application (a change application) to change a development approval.[15]

50. The Change Application was to be made to the assessment manager, being the Respondent.[16]

51. A change application can take the form of a 'minor change' or an 'other change'[17].

[15] Section 78 of the PA.

[16] Section 78A of the PA.

[17] See definition of 'minor change' in Schedule 2 of the PA.

52. The Change Application was made by the Appellant as a 'minor change', which was accepted by the Council. On this basis, the Tribunal is prepared to accept that the Change Application was a 'minor change' for the purposes of the PA.

53. In assessing a Change Application that is for a minor change, the Respondent was relevantly required to consider:

    (a) the information the Appellant included with the Change Application; and

    (b) all matters the Respondent would or may assess against or have regard to if the change application were a development application.[18]

54. In deciding the Change Application, being for a minor change, the Respondent must decide to:

    (a) make the change, with or without imposing or amending development conditions in relation to the change; or

    (b) refuse to make the change.[19]

Assessing the Change Application

55. So, turning to the relevant matters the Respondent would have assessed the Change Application against if it was a development application, that is, as if it was the development approved by the Negotiated Decision Notice, as changed by the Change Application.

56. Table 5.5.2 of the Planning Scheme identified that the category of assessment for a development application for a Dual Occupancy use within the Medium Density Residential Zone would be 'code assessable development'.

57. Section 5.3.3(4)(a) of the Planning Scheme states that code assessable development is to be assessed against all the assessment benchmarks identified in the assessment benchmarks column of the relevant Table of Assessment. In this case, that includes the MDRZ Code.

58. Section 5.3.3(4)(c) of the Planning Scheme further states that code assessable development that complies with the performance or acceptable outcomes complies with the purpose and overall outcomes of the code.

59. This means, that with respect to this appeal, if the proposed development as changed by the Change Application, complies with the performance or acceptable outcomes of the relevant code, here, the MDRZ Code, then the proposed development would comply with the purpose and Overall Outcomes.

60. The relevant performance and acceptable outcomes of the MDRZ Code are AO11 and PO11.

61. If the proposed development as changed by the Change Application did not comply with AO11 and PO11, then the proposed development would need to be assessed against the purpose and Overall Outcomes.

62. The issues in dispute in this appeal are therefore whether the Change Application met the performance or acceptable outcomes of PO11 or AO11 and if not, whether the proposed development otherwise complied with the purpose and Overall Outcomes.

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18 Section 81 of the PA.

19 Section 81A of the PA.

Reasons for the decision

Interpretation of the Planning Scheme

63. The Appellant's Representations, Minor Change Application, Appellant's Submissions and reasons for this Appeal all identify a view that because AO11 does not apply to a Dual Occupancy use, that PO11 would not apply and thus, by exception, the proposed development as changed by the Change Application, should be approved as there would be no restriction upon site cover in the Planning Scheme.

64. The Appellant's Representations contend that AO11 does not apply because '*For a dwelling house, plot ratio of development does not exceed 0.4:1*'. The Tribunal understands that the Respondent agrees that AO11 does not apply to the proposed development as changed by the Change Application, however, the Respondent disagrees with the Appellant's position that PO11 would also not apply.

65. The Respondent's Submissions cite section 6.1 of the Planning Scheme which states that:

> *'Acceptable outcomes are provided for some, but not all, performance outcomes, and identify ways in which performance outcomes can be met. Compliance with the performance outcome should be demonstrated and the acceptable outcomes are considered as one way to satisfy the corresponding performance outcome.'*

66. Section 6.1 of the Planning Scheme also states that each zone code identifies the following:

> *(a) 'the purpose of the code;*
>
> *(b) the overall outcomes that achieve the purpose of the code;*
>
> *(c) the performance outcomes that achieve the overall outcomes and the purpose of the code;*
>
> *(d) the acceptable outcomes that achieve the performance and overall outcomes and the purpose of the code; and*
>
> *(e) the performance and acceptable outcomes for the precinct.'*

67. Based on these sections of the Planning Scheme, it is the Tribunal's view that the proposed development as changed by the Change Application, should be assessed against the relevant acceptable outcome, which in this appeal is AO11. As identified above, the parties have agreed and the Tribunal also agrees, that AO11 does not apply to the proposed development, being for a Dual Occupancy and not a dwelling house.

68. AO11 is however, but one way in which the relevant performance outcome, PO11, can be met. The Tribunal is satisfied that the correct interpretation of the Planning Scheme is that if there is not compliance with AO11 or if AO11 is not relevant to the proposed development, then the proposed development should be assessed against PO11.

69. If there is not compliance with PO11, then consideration will need to be given to the Overall Outcomes and the purpose of the MDRZ Code.

70. Turning then to PO11, it is not restricted in its operation to just dwelling houses. It states that:

> *'Plot ratio of development:*

(a) does not exceed 0.4:1; or

(b) for small dwellings or for development which provides a ratio of at least three small dwellings to one other dwelling, does not exceed 0.5:1.'

71. Paragraph (b) of PO11 would not apply to the proposed development as changed by the Change Application, as it is neither for a small dwelling nor are there at least 3 small dwellings proposed. Paragraph (a), however, would apply, as it is not limited to any particular form of development.

72. Accordingly, the Tribunal is satisfied that the proposed development as changed by the Change Application can and should be assessed against PO11(a) with respect to whether it exceeds 0.4:1 plot ratio. If it does exceed that number, then a consideration of the Overall Outcomes and the purpose of the code would be relevant.

73. It should be noted here too, that the Respondent has raised compliance also with AO10 and PO10, with respect to site cover. This is in response to the second issue in dispute in this appeal, being the covering of the terraces at the rear or the dwelling units. By covering the terraces, the Respondent contends that the proposed development as changed by the Change Application would exceed 40% of the site area, which is the maximum site cover prescribed by AO10 and PO10.

74. AO10 and PO10 are written in similar terms to AO11 and PO11, such that AO10, similarly states '*For a dwelling house, site cover does not exceed 40% of the site area.*' Paragraph (b) of PO10 is similarly limited in its application to small dwellings, however, paragraph (a) of PO10 provides '*site cover of development … does not exceed 40% of the site area*', with no restriction upon the use.

75. The Tribunal is satisfied that the proposed development as changed by the Change Application would not comply with AO10, given the proposed development is for a Dual Occupancy use and not for a Dwelling House. Accordingly, when considering the second issue in dispute in this appeal with respect to the roofing of the terrace areas, the Tribunal needs to assess the proposed development as changed by the Change Application against PO10 with respect to whether it exceeds 40% of the site area.

<u>Issue 1 – change the bike storage to an enclosed laundry</u>

76. The Tribunal accepts that the proposal to enclose the area that was designated as bicycle storage on the approved plans in the Development Approval will add to the plot ratio calculations for the proposed development. It is intended to create a laundry facility by the construction of a solid wall to separate this activity from the garage. This change would add approximately 7m^2 to the GFA of each dwelling unit.

77. If looked at together, the collective increase to both site cover and plot ratio of both changes sought by the Appellant, being the change to the bike storage areas and the roofing of the terrace areas, would significantly exceed the performance outcomes of PO10 and PO11 of the Planning Scheme.

78. However, when considered separately, the change to the bike storage to create an enclosed laundry would still exceed the performance outcomes of PO10 and PO11 of the Planning Scheme. Doing this would add 14m^2 to both the gross floor area and the site cover of the proposed development because the area would cease to be excluded from the definitions of 'gross floor area' and 'site cover' in the Planning Scheme. Both these definitions exclude areas used for car parking. By changing the bike storage area within each of the garages to an enclosed laundry, that area would cease to be used for the parking of vehicles and would thus be included in the calculations of both 'gross floor area' and 'site cover' for each dwelling.

79. When considered separately from the roofing of the terrace area, the Tribunal considers that the impact of the change to the bike storage areas would be minimal. Given the small size of the area involved, being approximately 14 m^2 across both dwellings and the location being internal within the garages, the change proposed to the bike storage areas would not be visible to the surrounding neighbourhood and would therefore have no impact upon the look or feel of the neighbouring properties. The change also would have no effect upon the compatibility of the Duplex Dwelling with surrounding uses.

80. For these reasons, the Tribunal is satisfied that the change to the bike storage areas to create an enclosed laundry, would not conflict in any meaningful way with the purpose and Overall Outcomes. The Tribunal is therefore prepared to approve this part of the Change Application.

Issue 2 – the roofing of the terrace areas

81. There is a difference of opinion between the Appellant and the Respondent concerning the legitimacy of the application of P010 and PO11 to the Change Application. There is however general agreement that the roofing of the terrace areas does raise an issue with respect to an increase in site cover and plot ratio as identified in the Planning Scheme. This matter was considered by the Tribunal earlier in this Decision Notice and the Tribunal has determined that both PO10 and PO11 apply to an assessment of the Change Application.

82. Pursuant to the Change Application, if the roofed terrace areas were included in the calculation, the proposed development would have a site cover of 46.9% and PO10 requires development to not exceed 40% site cover. To be excluded from the site cover calculation, the roofed terrace areas would need to be excluded from the definition of 'site cover' in the Planning Scheme, as identified by the Appellant's Submissions.

83. The definition of 'site cover' in the Planning Scheme excludes buildings or structures that are in a landscaped or open space area and include for example a gazebo or shade structure.

84. In the Tribunal's view, the proposed treatment of the terrace areas in the proposed development does not present as a 'traditional' terrace, such as that envisaged in the definition of 'site cover' in the Planning Scheme.

85. Having had the benefit of viewing the roofed terrace areas, as they were essentially fully constructed at the site inspection, the Tribunal formed a clear view that they each present as a 'room'. The terrace areas may have one wall missing such that they opened freely to the back yard and pool area, but each one presented and is intended to function as a room. Within each terrace area is located an outdoor kitchen and generous space for furniture, such as a large table and chairs. All of which would have no exposure to the elements, given the expanse of roof coverage and partial wall enclosure. It was also noted by the Tribunal, that the terrace areas are substantial constructions, not 'light weight' in either presentation or function and do not provide the same low key impact of a gazebo, shade structure or traditional terrace.

86. For these reasons, the Tribunal considers that the roofed terrace areas would not fall within the exclusion provided in the definition of 'site cover' in the Planning Scheme and therefore, would be included in the calculation of site cover for the proposed development. This means, that the site cover of 46.9% of the proposed development would exceed the 40% maximum provided in PO10.

87. PO11 requires that the plot ratio of development not exceed 0.4:1. Plot ratio is defined in the Planning Scheme to mean 'the ratio of the gross floor area of a building on a site

to the area of the site'. The definition of 'gross floor area' in the Planning Scheme refers to the total floor area of all storeys of a building and lists a number of exceptions, including 'unenclosed private balconies, whether roofed or not'.

88. In constructing a solid roof over the rear terrace areas, the areas are considered by the Tribunal to present as enclosed outdoor rooms rather than as 'roofed unenclosed private balconies'. As identified above, they are substantial constructions with little visual permeability as might be expected with a smaller roofed balcony area. The depth of the terrace areas and the substance of the roofing material that joins directly to the roof of the dwelling, gives an impression that the area is part of the Duplex Dwelling units. This means that an approximate additional 69m^2 is added to the gross floor area of the proposed development and this in turn would result in a plot ratio of approximately 0.49:1. This conflicts with the requirements of PO11 which identifies a maximum plot ratio of 0.4:1.

89. The Tribunal considers that the proposed (constructed) roofed terrace areas conflict with a number of other provisions of the Planning Scheme, none of which were raised by the Respondent. In particular, the Tribunal notes the general and specific requirements of the MDRZ Code.

90. By way of example, the Tribunal considers that the Change Application would also be inconsistent with PO9 (Building Scale and Bulk) and PO19 (Roof Forms), due to the solid roof presentation of the terrace areas, instead of them comprising a light weight, see through built form envisioned in the Development Approval.

91. PO9(b) of the MDRZ Code relates to the proposed development not presenting an appearance of bulk to adjacent properties.

92. PO19 of the MDRZ states that the proposed development's roof design and construction:

> *(b) complements the character of the locality and the topography of the site; and*
> *…*
> *(d) does not create opportunities for overlooking the private open space or internal spaces of neighbouring properties.*

93. The Tribunal further considers that the proposed (constructed) solid roof of the terrace areas is not consistent with the Overall Outcomes. Specifically, section 6.3.2.2(2) of the Planning Scheme relevantly provides:

> *(c) 'Development makes a positive contribution to the look and feel of residential neighbourhoods by maintaining a low scale character with well designed buildings and landscaping that enhance the streetscape.*
> *(d) New uses are located, designed and managed to be compatible with surrounding uses.*
> *…*
> *(j) Development maintains a high level of residential amenity having regard to traffic, noise, dust, odour, lighting and other locally specific impacts.'*

94. The terrace areas as roofed, present as solid structures, with high roofs and would have the appearance of being part of the substantial Duplex Dwelling units, that is, forming part of the dwelling unit. Given the height of the roofs and their impervious nature, they do not complement the character of the backyards of the neighbouring properties but present as quite overbearing.

95. In addition to the specific requirements of the Planning Scheme that have been identified above, the Tribunal is also aware of broader requirements contained in the Strategic Outcomes in the Strategic Framework of the Planning Scheme and in the Noosa Design Principles. Collectively, these documents and the provisions within, identify the general form of urban development in Noosa. In summary and relevant to this appeal, they point to development that will be compact, low-rise and maintaining and respecting the distinct character and amenity of communities. As identified in the paragraph above, it is the Tribunal's view that the roofed terrace areas are not compact, arguably do not present as low-rise and do not respect the character and amenity of the neighbouring backyard areas.

96. Having considered the proposed roofed terrace areas against the relevant provisions of the Planning Scheme, the Tribunal is of the view that there is substantial conflict with the provisions of the Planning Scheme and for that reason, the Tribunal does not approve this aspect of the Minor Change Application.

Conclusion

97. The Tribunal finds that the provisions of PO10 and PO11 of the MDRZ Code apply to the assessment of the Change Application.

98. The Tribunal considers that the proposed conversion of the bicycle storage areas to laundry areas by the construction of a solid wall within the garage, is acceptable. Notwithstanding that this change will add to the overall site cover and gross floor area of the proposed development, given it's a relatively small area and its location internally within each of the dwelling units, this change is unlikely to adversely impact surrounding residences and should therefore be approved.

99. The Tribunal finds that the proposal to enclose the rear terrace areas with solid roofs represents a significant departure from the provisions of the Planning Scheme, in particular PO10 (introducing a 46.9% site cover compared with the 40% maximum identified in PO10) .and PO11 (adding approximately 69m2 to the gross floor area of the proposed development, resulting in a lot ratio of approximately 0.49:1 which exceeds the maximum plot ratio in PO11 of 0.4:1).

100. The roofing of the terrace areas also is inconsistent with other requirements of the Planning Scheme, including PO9 and PO19 of the MDRZ Code, as well as the Strategic Outcomes in the Strategic Framework. It is also considered to be inconsistent with the Noosa Design Principles.

101. For these reasons, the Tribunal finds that the roofing of the terrace areas represents a substantial conflict with a number of the provisions of the Planning Scheme and should not be approved.

102. Accordingly, the Tribunal decides the following:

(a) to approve the part of the Change Application that changes the bike storage space into a laundry room in both dwelling units and to replace condition 6 of the conditions of approval for material change of use in the Negotiated Decision Notice with the following condition:

'6. Where relevant, the approved plans listed in the table in condition 2 of these conditions are to be amended to change the area shown as 'bike store' on the approved Ground Floor Plan DA2.01 to an enclosed 'laundry' as shown on Drawing No. WD201, titled Ground Floor Plan, dated 28/07/2023 and prepared by Black Wood Architecture & Design.

All relevant approved plans are to be amended as indicated and submitted to Council.

Note: The area identified as 'terrace' on the approved plans is not to be shown on the amended plans as being roofed.'

and

(b) to refuse the part of the Change Application that provides a roof over the approved 'terrace' area at the rear of each dwelling.

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Samantha Hall
Development Tribunal Chair

Date: 30 April 2024

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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