



## Development Tribunal – Decision Notice

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

<b>Appeal number:</b>	<b>23-038</b>
<b>Appellant:</b>	Motolake Pty Ltd
<b>Assessment manager:</b>	Gladstone Regional Council
<b>Site address:</b>	10 Ocean Avenue, Seventeen Seventy Qld 4677 and described as Lot 5 on S85613 – the subject site

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### **Appeal**

Appeal under section 229 and schedule 1, section 1, table 1, item 1(d) of the *Planning Act 2016* (PA) against a decision to give a preliminary approval when a development permit was applied for a Material Change of Use made assessable by the planning scheme, being a dwelling house in a character residential zone.

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<b>Date and time of hearing:</b>	23 October 2023 at 11.00 a.m.
<b>Place of hearing:</b>	Council Offices, Agnes Water
<b>Tribunal:</b>	Anthony Roberts - Chair David Job - Member John Bright - Member
<b>Present:</b>	Allan Bougoure - Appellant Stephen Enders - Zone Planning Group Shaunte Farrington - Zone Planning Group Helen Robertson - Gladstone Regional Council Tegan McDonald - Gladstone Regional Council

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### **Decision:**

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the Planning Act 2016 **replaces** the decision of the Assessment Manager on 8 May 2023 with another decision, namely approving a Development Permit for the proposed siting, design, built form, excavation and landscaping elements in respect of Development Application DA/8/2023 (dated 13 February 2023) and as amended by the Appellant's post-hearing submission to the Tribunal (dated 1 December 2023), subject to the following conditions:

- a. That the proposed tree/palm plantings shown on Landscape Plan Drawing 316-LO1 prepared by LA3 Pty Ltd (included in the Appellant's submission to the Tribunal dated 1 December 2023) be mature trees (in excess of 2m in height) and that mature tree/palm plantings be incorporated into the area shown as lawn adjacent to the driveway;

- b. Drawings A.O4.2(C) and A.O7.4(C) indicate the front face of the 'catch pool' overhanging the front walls to lower-level office and garages by approximately 1250mm and 50mm respectively. The Tribunal requires that this design element be retained in the final development;
- c. Other reasonable and relevant conditions imposed by the Assessment Manager that are not inconsistent with the above.

## Background

1. The subject site is:
  - a. located in the area known as the 1770 Headland;
  - b. a 637m<sup>2</sup> allotment situated midway along Ocean Drive and sloping from the rear to the street frontage with a fall of approximately 3m;
  - c. vacant and largely unvegetated;
  - d. zoned Character Residential under the Gladstone Regional Council Planning Scheme (version 2 2015).
2. The proposed dwelling house:
  - a. comprises three levels stepped up the site to a maximum height of 8.4m above natural ground level with 6m front and rear setbacks and 2.6 and 2.7m side setbacks;
  - b. open in design with verandas and suspended mid-level swimming pool;
  - c. involves excavation for the lower-level ranging from 1m to maximum depth of 2.42m;
  - d. includes a hardstand parking area adjacent to the driveway located 2.7m from the western side boundary.
3. On 10 February 2023, the Appellant lodged a Development Application with Gladstone Regional Council for a Material change of Use for a dwelling house. The Development Application was subject to Code Assessment against relevant provision in the Character Residential Zone, Flood hazard Overlay and Steep Lands Overlay codes.
4. On 3 March 2023, Council issued an Information Request seeking responses to several non-compliances with the applicable Performance Outcomes in the relevant codes. The Appellant provided a response to this Information Request on 27 March 2023. Subsequently, the Council advised on that it was not satisfied with the Appellant's response and, in return, on 14 April 2023 the Appellant advised Council to decide the application.
5. On 8 May 2023, Council issued a Decision Notice providing a Preliminary Approval – in place of a Development Permit – subject to conditions. The reasons for the decision were stated as follows:

*The development is not compliant with the Character Residential Zone Code. The proposal is non-compliant with PO2, PO7, PO8 and PO10, outcomes 2b, 2d and 2h and the zone purpose statement 1a, b and c. The non-compliance requires holistic design changes in order to comply with the zone requirements therefore a preliminary approval with conditions is provided.*

6. On 3 July 2023, The Appellant subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal.
7. Following an inspection of the subject site and the streetscape more generally, the hearing was held at Council's office at Agnes Water on 23 October 2023 at 11.00 a.m.

## Material considered

8. The Tribunal considered the following material:
  - a. 'Form 10 – Appeal Notice', grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar;
  - b. The *Planning Act 2016* (PA);
  - c. The Planning Regulation 2017 (PR);
  - d. The Queensland Development Code MP 1.2 (QDC);
  - e. The *Building Act 1975* (BA);
  - f. The Building Regulation 2021 (BR);
  - g. The Gladstone Regional Council Planning Scheme 2017 (Planning Scheme);
  - h. Character Residential Zone, Flood Hazard Overlay and Steep Lands Overlay codes under the Planning Scheme (the Code/s);
  - i. Post-hearing submissions made by the Appellant's agent on 1 December 2023 and by Council on 20 October 2023, 5 December 2023 and 13 December 2023;
  - j. The verbal submissions made by the parties at the hearing and site inspection.

## Jurisdiction

9. The Tribunal has jurisdiction to hear the appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(1)(b), 1(2)(g) and Table 1, item 1(d) being an appeal by the Appellants against a decision to give a preliminary approval when a development permit was applied for.

## Decision framework

10. Section 253 of the PA sets out matters relevant to the conduct of this appeal. Subsections (2), (4) and (5) of that section are as follows:
  - (2) Generally, the appellant must establish the appeal should be upheld.
  - (4) The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.
  - (5) However, the tribunal may, but need not, consider— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.
11. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and is not relevant here) are as follows:
  - (1) This section applies to an appeal to a tribunal against a decision.
  - (2) The tribunal must decide the appeal by-
    - (a) confirming the decision; or
    - (b) changing the decision; or
    - (c) replacing the decision with another decision; or
    - (d) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time; or
    - (e) [not relevant].
  - (3) However, the tribunal must not make a change, other than a minor change, to a development application.

12. Under the Planning Scheme, Table 5.5.4 of the Character Residential Zone Code identifies a Dwelling House as 'Accepted Subject to Requirements' – subject to compliance with all applicable Acceptable Outcomes (AOs) being demonstrated. Dwelling houses are subject to code assessment if compliance with all Acceptable Outcomes cannot be achieved.
13. As the proposal does not meet the Acceptable Outcomes, assessment is made against the corresponding Performance Outcomes (POs) stated in the Codes.

### **Matters in dispute**

14. Council's reasons for decision cited a number of POs under the Character Residential Zone Code that the development failed to satisfy namely: PO2 building/floor height; PO7 driveways; PO8 landscaping, and; PO10 effects of development.
15. At the hearing, discussions centred on matters of potential agreement and remaining disagreement with a view to narrowing the number of disputed matters. Both parties confirmed a preparedness to enter post-hearing negotiations with the prospect of an agreed further submission/s to the Tribunal. Accordingly, the Tribunal issued directions allowing a time interval for this to occur. As an agreed submission/s did not eventuate, but rather individual submissions were made, the Tribunal considered the matter without the benefit of an agreed outcome by the parties.
16. The Tribunal identified the matters remaining in dispute that are critical to the determination of the appeal as: building/floor height/excavation (PO2 and PO8); landscaping (PO8) and effects of development PO10.

### **Findings of fact**

17. The Tribunal makes the following findings of fact:
18. In respect of the matters in dispute, the Appellants contend that:
  - a. The proposed development is stepped into the topography to optimise the utilisation of the site and enjoyment of the dwelling and to present a favourable architectural aesthetic;
  - b. The maximum building height above natural ground level is below the 8.5m height limitation (at 8.4m) and although comprising three levels represents a 'low rise' two storey building as defined by the Planning Scheme;
  - c. The building height does not protrude above the ridge line when viewed from the adjacent coastline or ocean. As much of the building mass is hidden below natural ground level it does not 'dominate natural landscape values';
  - d. The design and finish of the dwelling will make a positive contribution to the coastal and visual character of the area;
  - e. The proposed dwelling house is of a similar scale and comprises similar materials and finishes to existing dwellings in the area;
  - f. The siting and design of the dwelling will have no impact on neighbouring properties;
  - g. Site excavations are substantially contained within the building envelope thereby minimising external evidence of earthworks and retaining walls;
  - h. There are numerous instances in the immediate vicinity of the site where dwelling house developments with similar AO non-compliance have been approved;
  - i. The minimal excavation/cantilever built form preferred by Council could potentially result more visually dominant and unsightly development in the Character Residential zone.

19. In respect of the matters in dispute, Council contends that:
- a. Agnes Water and Seventeen Seventy are coastal communities that have developed a distinctive built form character that responds to the coastal setting. The intent of the Planning Scheme is to preserve this character;
  - b. The majority of the dwelling house is considered 3 storeys and does not present as low rise, or of a size and scale that ensures the built form does not dominate the natural landscape values of the 1770 Headland;
  - c. The excavation (up to 2.5m below natural ground level) is not considered minimised but rather maximised to fit additional built form on the site. The Planning Scheme AOs allow for 1m of cut and a building height of 8.5m and provide an example of how to achieve the built form expectations i.e., incorporation of suspended floors;
  - d. The development does not follow the contours of the land and minimise disturbance of the natural ground form and dominates the natural landscape values rather than respecting them and as required by the Planning Scheme;
  - e. The established character of the immediate area is largely 1 and 2 storey buildings that are considered low rise and do not dominate the natural landscape. They appear sympathetically sited with minimised disturbance of the natural ground form;
  - f. The extent of the driveway and carparking hard surface area is excessive adding to the dominance of the development at street level;
  - g. Assessment benchmarks do not require the assessment manager to have regard to existing built form character. Regard to previous decisions is not a relevant matter. Council acknowledges there is a chance that previous decisions may be deficient and therefore Council's obligation is to ensure all new applications are assessed on their own merits.

Building height/floor height/excavation (PO2 and PO8)

20. The Purpose of the Character Residential Zone Code is in part 'to ensure that development recognises and respects the important scenic and heritage character of the Town of Seventeen Seventy'. One specified outcome to achieve this purpose is 'development respects the topography of the locality by ensuring buildings follow the contours of the land and minimise disturbance to the natural ground form'.
21. To this end, PO2 of the Code states that buildings are to be:
- a. low rise
  - b. low density
  - c. of a size and scale that ensures the built form does not dominate natural landscape values, and
  - d. designed and located so as not to adversely impact on the coastal and visual character of the area.
22. The corresponding AOs specify quantitative benchmarks including: maximum height of 8.5m; maximum 2 storeys; uppermost habitable floor level no greater than 5.1m above ground level; and, first habitable floor level no greater than 3m above ground level.
23. PO8(c) requires that development and landscaping 'minimises earthworks and the use of retaining walls'. The corresponding AO specifies a maximum excavation cut of 1m below ground level and maximum fill of 1m above ground level.
24. Based upon the site inspection conducted and the submissions made by the parties the Tribunal finds that the stepped design of the proposed development, which keeps within the maximum building height limitation, meets the low rise/low density characterisation and would not dominate the natural landscape values or adversely impact the important scenic and heritage character of the 1770 Headland as highlighted by the Planning scheme.

25. The Tribunal considers that the development consists of stepped-level and open built form that is a practical response to the natural landform and coastal character of the locality and is in keeping with the predominant character of neighbouring development.
26. There is dispute between the parties as to whether the proposed dwelling should be considered a '2-Storey' or '3-Storey' building. **'Storey'** is defined by the Planning Scheme as –

*A space that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but not a space that contains only:*

- a. a lift shaft, stairway or meter room*
- b. a bathroom, shower room, laundry, water closet, or other sanitary compartment*
- c. a combination of the above*

*A mezzanine is a storey.*

*A roofed structure on or part of a rooftop that does not solely accommodate building plant and equipment is a storey.*

*A **basement** is not a storey.*

**'Basement'** is defined by the Planning Scheme as –

*A space that is situated between one floor level and the floor level next below where no part of the space projects more than one metre above ground level.*

27. The Appellant's position is that the proposed development complies with the building height restrictions of the Planning Scheme. Also the lower-level is a basement (therefore not a storey) because, being fully contained within the building envelope, its height above natural ground level is only externally apparent along the building's back elevation where the height is less than 1m.
28. Council's position is that, although not externally apparent, part of the lower-level is higher than 1m above natural ground level. Based on the Planning Scheme's definition this lower-level cannot be considered a basement. The building is therefore three storeys.
29. The Tribunal acknowledges that there remains disagreement between the parties as to whether the development constitutes two or three storeys by Planning Scheme definition. In this respect, it is considered that the overall visual impact of the development, determined in the main by apparent development bulk from a streetscape perspective, rather than the number of levels or storeys by definition, is the predominant consideration.
30. The Tribunal notes that the Appellants have proposed to soften the visual impact of the development at street level by removing the hardstand car parking area but is of the view that external colour selections, architectural treatment of the ground level façade together with enhanced landscaping along the site frontage is required to further soften the visual presentation of the building at street level.

#### Landscaping (PO8)

31. The Tribunal notes that the original Development Application failed to provide a landscaping plan and that such a plan was provided to Council post-hearing.

Recognising the site and neighbouring area is largely devoid of vegetation, it is the Tribunal's view that comprehensive landscape treatment of the site, incorporating the planting of mature trees, will enhance the visual presence of the development in the streetscape.

#### Effects of development PO10

32. PO10 emphasises the need for development to respond sensitively to the site and surrounding topography and like PO8 intends that any earthworks associated with development is minimised.
33. As stated above in respect of PO2 considerations, the Tribunal considers that the architectural design and built form of the development is entirely appropriate to the site conditions and site location. The architectural treatment of the lower-level front walls with overhanging elements from the above floor is considered an important design element whereby the morning sun will create a horizontal shadow line thereby ameliorating the visual impact of the streetscape presentation of this lower level façade.
34. The Tribunal considers that the absence of suspended floor design treatment does not inherently result in a more visually dominant or intrusive built form.
35. Further, the Tribunal concurs with the Appellant's view that development that strictly complies with the stipulated AOs may well be more visually intrusive and dominate the landform to a higher degree, therefore potentially defeating the intent of the Character Residential zoning in this location.
36. Whilst the Tribunal concurs with Council's view that each new development should stand on its own merits, material compiled by the Appellant's does demonstrate that Council has approved a number of developments with similar AO non-compliance issues in the vicinity of the site under the current Planning Scheme. The overall potential visual impact of some of these examples is arguably more substantial than the subject proposal when the apparent bulk of development from a streetscape perspective is considered.
37. Whilst the Tribunal acknowledges that those approvals have no direct bearing in this appeal, the Tribunal notes that they tend to illustrate the observation made by the Appellant in paragraph 35.

#### **Reasons for the decision**

38. In this Appeal, the Tribunal considers the Appellant has satisfied the onus to demonstrate the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision of the Assessment Manager for the reasons identified below.
39. The Tribunal considers that the overall visual impact of the development, determined in the main by apparent development bulk from a streetscape perspective, rather than the number of levels or storeys by definition, is the predominant consideration. In this respect, the Tribunal finds that the proposed stepped-level and open built form, which keeps within the maximum building height limitation, is a practical response to the natural landform and coastal character of the locality, meets the low rise/low density characterisation and would not dominate the natural landscape values or adversely impact the important scenic and heritage character of the 1770 Headland.

40. The Tribunal finds that the development is in keeping with the predominant character of neighbouring development and could potentially make a positive contribution to the streetscape.
41. However, the Tribunal's view is that comprehensive landscape treatment of the site (including planting of mature trees and additional landscaping replacing the previously proposed hardstand carpark), is required to enhance the visual presence of the development in the streetscape.
42. The Tribunal therefore finds that, with appropriate conditioning, the proposed development can satisfy the applicable Performance Outcomes of the Planning Scheme and that a Development Permit should be issued.

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**Anthony Roberts**

**Development Tribunal Chair**

**Date: 2 February 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:

The Registrar of Development Tribunals  
Department of Housing, Local Government, Planning and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone 1800 804 833**

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