



Development Tribunal – Decision Notice

Planning Act 2016 Section 255

Appeal Number:	22-005
Appellant:	Ryan and Helen Rose
Respondent (Assessment Manager):	Ben Thrower
Co-respondent (Concurrence Agency):	Noosa Shire Council
Site Address:	35 Noosa River Drive, Noosa North Shore and described as Lot 13 on RP 53370 – the subject site

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the Planning Act 2016 against the decision of the Assessment Manager, as directed by the Concurrence Agency, for refusal of a Development Permit for Building Works being a pool and associated works on the grounds that the proposed does not comply and cannot be conditioned to comply with the provisions of the Noosa Plan 2020, several Low Density Residential Zone Overall Outcomes and several Low Density Residential Zone Code Performance Outcomes PO9.

Date and time of hearing:	1.30 pm 6 June 2022
Place of hearing:	'Teams' video hearing
Tribunal:	Markus Pye – Chair Greg Schonfelder – Member
Present:	Ryan Rose – Appellant Ben Thrower – BT Town Planning Consultancy (Appellants agent) Georgina Schramm – Council representative Patrick Murphy – Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the Planning Act 2016, replaces the decision of the assessment manager with another decision, namely, that the development application be approved in accordance with amended drawings DD00 through to DD07 presented to the Registrar on 13 June 2022 including reasonable and relevant conditions imposed by the assessment manager.

Background

1. The subject site of this appeal is:
 - a near flat residential allotment with street access to Homeport Track with rear boundary fronting Noosa River containing a two-storey dwelling house and associated building and

infrastructure such as boat shed, jetty projecting from a retaining seawall to the river frontage, water tanks and noting minimally landscaped grounds;

- the site is located on a strip of some 30 established dwelling houses and or sites with what appear to be associated water related structures as per the subject site, being boat house, jetties, viewing platforms etc. with a mix of setbacks including house setbacks within the designated 10m. There also appears a mix of landscaped qualities of native and exotic mature species.
 - the site is zoned Low Density Residential under the Noosa Plan 2020.
2. The refused proposal being a pool and associated works is an:
 - 1300mm high above ground pool (for practicality of construction) facing approximately 1 metre from the rear Noosa River boundary and includes a pool deck joining the pool to the house. Full dimensions of the works and other specific site dimensions were not initially supplied;
 - As an outcome of the hearing further submissions which included more dimensions enabling a better understanding of the site. The Appellant also submitted a reduced size redesign of the proposal.
 - The Council in return suggested a pool relocation option that the Council would support. This option was not supported by the Appellant.
 3. The hearing for the appeal was not held at the subject site so the Tribunal did not have the opportunity to view the positioning of the proposed structure from the subject site, neighbouring properties, and the streetscape more generally. However the Tribunal utilised photos supplied and requested, along with Google maps as a way of surveying the property and locale which it considered proved adequate.

Material Considered

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence/attachments accompanying the appeal lodged with the Tribunals Registrar 3 March 2022;
2. The Planning Act 2016 (PA);
3. The Planning Regulation 2017 (PR);
4. The Noosa Plan 2020 (Noosa Plan);
5. Noosa Plan 2020 – Low Density Residential Zone Code Overall Outcome;
6. Noosa Plan 2020 – Low Density Residential Zone Code (the Code);
7. The verbal submissions made by the parties at the hearing;
8. Photographic submissions of the river frontage supplied to the Tribunal the day of the hearing;
9. Additional pre or post-hearing written submissions, further information and/or photos made by on behalf of the Appellants dated:
 - a. 6 June
 - b. 8 June 2022
 - c. 13 June 2022 (included redesign)
 - d. 20 June 2022
 - e. 27 June 2022
10. Additional pre or responses to post-hearing Appellants written submissions, further information and/or photos made by referral agency Noosa Shire Council dated:
 - a. 6 June

- b. 8 June 2022
- c. 24 June 2022 (included redesign option)

Jurisdiction:

- 4. 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(a) being an appeal by the Appellants against the refusal of the development application by the Assessment Manager on the direction of the Concurrence Agency.
- 5. Pursuant to section 253(4) of the PA, the Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Assessment Manager. 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 the PA (pursuant to which the registrar may require information for tribunal proceedings).
- 6. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Decision Framework:

- 7. 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.
- 8. 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 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.

Findings of Fact

- 9. The Tribunal makes the following findings of fact:

As the proposed above ground pool and deck triggers assessment against the relevant performance criteria of the Noosa Plan 2020 primarily due to the proposed siting within the

AO 10m setback, the Assessment Manager lodged a Request for a Referral Agency Response with the Noosa Shire Council.

10. On 25 February 2022, Council issued a Referral Agency Response directing the Assessment Manager to refuse the application for the reasons stated as follows:

Council decided to refuse the application for the following reasons:

1. The proposal does not comply with the Low Density Residential Zone Code Overall Outcome 2(j), (n) and (p) of the Low Density Residential Zone Code;
2. The proposal does not comply with the Low Density Residential Zone Code Performance Outcome PO9

11. Accordingly, the Assessment Manager issued a Decision Notice refusing the proposed development based exclusively on the Referral Agency Response from Council issued 25 February 2022.

12. The Appellants Agent subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 3 March 2022.

Reasons for the Decision

13. In this appeal, the Tribunal considers the Appellants have satisfied the onus to demonstrate the appeal should be upheld. Therefore, the Tribunal has determined to replace the decision with another decision for the reasons identified below.

14. The Tribunal understands that there are levels of assessment, from the base quantitative level being AO (Acceptable Outcome), potentially then through various qualitative levels, next being PO (Performance Outcome). At each level if the provisions are satisfied no further assessment is required. In this case as the proposed development did not satisfy AO acceptable outcome, it therefore required Council referral. The Council determined that it did not satisfy PO provisions and, that it also did not satisfy the Low Density Residential Zone Code Overall Outcome.

15. However, the Tribunal's assessment considers it does satisfy the PO provisions and in particular PO9(g). *Protect the natural character and avoid adverse impacts on ecologically important areas such as national parks, waterways and wetlands*, where the Tribunal specifically outlines its decision considerations in response to Council's points of refusal. In considering PO9(g) the Tribunal finds that the provision has been drafted in a way that does not specify how *natural character* or *adverse impacts* may impact, in this case a *waterway*, but the consensus between the Council and the Appellant is that *visual amenity* of the Noosa River's *natural character* may have an *adverse impact* by the presence of buildings and structures.

16. The following are the Tribunal's decision reasons in response to Council's refusal contained in PO9(g):

- a. The proposed building works are not adequately setback from the Noosa River and will impact the visual amenity for users of the Noosa River.

Tribunal response: The Tribunal understands, the term 'visual amenity' refers to the 'views and surroundings that create the backdrop to an area'. The visual amenity for users of Noosa River is determined by what the viewer is focusing on and under those circumstances that they find themselves on the river. This focus may change depending on if viewed day or night, travel speed, and distance from the site where a development may not be recognisable. Or even tide levels where a paddler may not even see a development due to site lines and obstacles such as boats. Also, what the viewer is focusing on with their particular 'likes or dislikes' can add or detract to visual amenity. Simply there are too many variables to suggest

that visual amenity is impacted in any significant way. The Tribunal therefore does not support Council's view.

b. The proposed building works would degrade the site's visual appeal when viewed from the Noosa River through the removal of soft landscaping and vegetation that would otherwise assist to buffer the development.

Tribunal response: The Tribunal is not convinced that the removal of 2 non-native trees and a portion of manicured lawn would degrade the site visual appeal in any meaningful way. It is well within the Owners' right to remove the subject trees and lawn regardless of any development. Further the proposed planting as illustrated in the plans as an integral part of the design and adds an additional buffer against the proposed, and also the existing development. The Tribunal therefore does not support Council's view.

c. The proposed building works would not protect or further enhance the intended natural character of the Noosa River.

Tribunal response: The Tribunal considers 'natural character' is a term used to describe the naturalness of environments. The degree or level of natural character within an area depends on the extent of modifications to the landscape and/or seascape. In this regard the natural character of the subject site has been transformed by removal of the natural riparian zone and shoreline and modified with a jetty, a boat ramp and shed, a seawall, minimal vegetation and lawn. It has been wholly modified from its natural state. The Tribunal does not support Council's view.

d. The works introduce built form within the minimum rear boundary setback which is not in keeping with existing approved development along the Noosa River.

Tribunal response: Where located, the proposal is considered wholly in keeping within the existing assumed approved development along that portion of the Noosa River setback zone. North Shore has a variety of built form residences with ancillary building and structures that are directly and often naturally associated with the Noosa River whether in the setback or not. Council's objection is not considered valid given it is a PO provision where setbacks do not apply. The Tribunal therefore does not support Council's view.

17. Whilst the original proposal was considered inappropriate, the developed design has not only effectively halved the proposed footprint, it has also significantly reduced the visible impact of the proposal to the river. As an element, it now plays a part role from a predominate one across the site. With sympathetic finishes and detailing, soft landscaping and the absence of pool top fencing, it could be argued the pool and deck now 'belongs' there.

Markus Pye

Development Tribunal Chair

Date: 6 July 2022

Appeal Rights

Schedule 1, Table 2, item 1 of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au