



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-034
Appellant:	Samantha Drury
Respondent (Assessment manager):	Rob Wibrow, Building Approvals United Queensland
Co-respondent (Concurrence agency):	Noosa Council (“Council”)
Site address:	335 David Low Way, Peregrin Beach, formally described as Lot 115 on P93138 (“the subject site”)

Appeal

Appeal under section 229(2) and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1, of the *Planning Act 2016* (“the PA”) against the assessment manager’s decision to refuse the appellant’s application for a building works development permit for additions and alterations to an existing Class 1a dwelling house on the subject site (“the application”).

Date and time of hearing and site inspection:	Tuesday, 24 October 2023 at 10:00am
Tribunal:	Neil de Bruyn – Chairperson Stafford Hopewell – Member
Present	Samantha Drury – appellant Marcus Brennan, Brennan Planning – appellant’s representative Jon Ormaza, Luxitecture – appellant’s representative Tara Norley – Council representative Nadine Gorton – Council representative

Decision:

1. The Development Tribunal (“the tribunal”), in accordance with section 254(2)(d) of the PA, **sets aside** the decision of the assessment manager to refuse the application, and orders the assessment manager to:
 - a) remake the decision within 25 business days of the date of receiving this decision notice, as if the concurrence agency had no requirements; and
 - b) in the event that the assessment manager then decides to approve the application, to include the following condition in the resultant building works development permit:

“The design and siting of the approved alterations and additions to the subject Class 1a dwelling house is to be in accordance with the Luxitecture plans dated 1 November 2023 (Dwg Nos 2107 DA A001, A003 to A006, A100 to A104, A200

to A204, A300 to A302, A400 and A500 (all Revision 3, as identified in the revisions list)."

Background:

2. The subject site is a generally rectangular residential site, formally described as Lot 115 on P93138, with an area of 741m². The subject site is located at 335 David Low Way in Peregrine Beach, within the Noosa Council local government area. David Low Way is a distributor road predominantly containing low-rise, low-density residential land uses in the vicinity of the subject site.
3. The subject site is included within the Low-Density Residential Zone under the Noosa Plan 2020, being the current planning scheme for the subject site ("the planning scheme"). The subject site is also within the area of the Coastal Communities Local Plan and is subject to planning scheme overlays relating to biodiversity, bushfire hazard and landslide hazard.
4. The subject site relies on a service road running parallel to the main carriageway of David Low Way for access and falls significantly towards its rear boundary, away from its frontage. The intersection of the service road with the main carriageway is located immediately in front of the subject site, resulting in an articulated frontage. The subject site contains a substantial dwelling house, set well forward towards, and addressing, David Low Way and the aforementioned service road.
5. The appellant proposes to undertake additions and alterations to the existing dwelling house, ultimately resulting in the application to the assessment manager for a building works development permit. Based on the material before the tribunal, the application was made to the respondent on 31 January 2023.
6. Pursuant to section 33 of the Building Act 1975 ("the BA") and section 1.6 of the planning scheme, the Low-Density Residential Zone Code ("the code") under the planning scheme specifies alternative design and siting provisions to those set out in the relevant part of the Queensland Development Code. Of relevance to this appeal, the code includes Acceptable Outcome 7.1 ("AO7.1"), which requires that buildings subject to the code are no more than 8 metres in building height (as defined), and Acceptable Outcome 9.1 ("AO9.1"), which requires that buildings subject to the code have a setback of 6 metres from the road frontage.
7. The tribunal infers, from the submitted material, that the proposed development was initially intended to have a maximum building height of 10.3 metres, and a minimum frontage setback of 3.8 metres, and thus did not achieve either AO7.1 or AO9.1.
8. For section 54 of the PA, schedule 9, part 3, division 2, table 3 of the Planning Regulation 2017 ("the PR") specifies that a development application for building work that does not meet a quantifiable standard for an alternative provision under section 33 of the BA requires referral to the applicable local government as a concurrence agency. Accordingly, on 29 March 2022, the application was referred to Council for a design and siting assessment and referral agency response.
9. Council issued a referral confirmation notice dated 5 April 2022 and an information request dated 21 April 2022. The information request noted that (among other matters not directly relevant to the key issues of this appeal) the proposed development would exceed a maximum building height of 8 metres. The information request also referenced that the proposed development would not achieve AO9.3 of the code, relating to setbacks other than frontage and rear setbacks. As will become clear presently, this aspect appears to have been resolved to the satisfaction of Council. Notably, the information request did not reference AO9.1, relating to frontage setbacks.

10. The appellant provided a response to the information request, dated 2 August 2022. This response included amended plans showing a reduced maximum building height of 9 metres (from the originally proposed 10.3 metres) and pointing out that the areas of the roof structure exceeding eight metres in height were confined to *“three small portions ... located towards the rear of the dwelling”* and that the proposed development would have a compliant maximum building height of 7.4 metres at the front, from which the higher parts of the roof structure would not be *“visually perceptible.”* The response went on to submit that the proposed development would achieve Performance Outcome PO7 of the code, through:
- a) remaining “low-rise” and not exceeding two storeys in height;
 - b) being compatible with the as-built maximum height of the subject dwelling (the proposed maximum RL of 45.53 being only 0.38m higher than the as-built maximum RL of 45.15);
 - c) presenting a compliant maximum height to the David Low Way frontage;
 - d) being generally consistent with the heights of adjoining dwelling houses, when viewed from David Low Way;
 - e) presenting an “interesting and articulated” three-gable façade to the street;
 - f) not being visually dominant within the streetscape or surrounding area;
 - g) respecting the scale of surrounding vegetation; and
 - h) not unreasonably obscuring views from, or overshadowing, any neighbouring properties.
11. The appellant’s response to Council’s information request went on to deal with the issues of side boundary setbacks, the apparent inclusion of a “granny flat” (secondary dwelling) within the design and the design of a proposed boundary wall, as raised in the information request. The issues of the side setbacks and the boundary wall design appear to have been resolved between the parties and do not form part of the issues in dispute for this appeal. As such, no further consideration has been given to these particular aspects by the tribunal. The issue of a secondary dwelling is dealt with later herein.
12. Following some further communications between the parties regarding the issue of building height, it appears that a further response, including amended plans, was provided to Council on 13 February 2023. This response also referenced letters of support from both adjoining neighbours that had been provided to Council. The amended plans included with this further response showed a reduced maximum RL of 44.82 for the roof structure (reduced from the RL 45.53 as originally proposed).
13. On 12 April 2023, Council decided to direct refusal of the application, and issued its referral agency response on 13 April 2023. The grounds for this decision were stated as follows:
1. *The proposal does not comply with Overall Outcome 6.3.1.2 (2)(c) of the Low Density Residential Zone Code given the development would not maintain the low scale character of the zone.*
 2. *The proposed building works do not comply with Acceptable Outcome AO7.1 and corresponding Performance Outcome PO7 of the Low Density Residential Zone Code as the development:*

- a. *Does not present a building height consistent with structures on adjoining and surrounding premises and with the predominant character of the area*
 - b. *Will be visually dominant when viewed from the reserve and adjoining properties to the rear of the site*
 3. *The proposed building works do not comply with Acceptable Outcome AO9.1 and corresponding Performance Outcome PO9 of the Low Density Residential Zone Code as the development:*
 - a. *Is not consistent with the predominant character of the streetscape;*
 - b. *Does not allow for landscaping to the areas proposed to encroach into the front setback*
 - c. *May obstruct views to the south-east from the adjoining property to the north.*
14. As noted in paragraph 12 above, Council's grounds for directing refusal did not mention the issues of side boundary setbacks or the design of a boundary wall, as had been raised in the information request. Whilst the apparent inclusion of a secondary dwelling within the design was also not mentioned in the Council's grounds for directing refusal, this aspect has subsequently been raised by Council in evidence now before the tribunal and will be dealt with presently.
15. On 23 May 2023, the assessment manager duly issued a decision notice refusing the application. The decision notice states that this decision was made solely because of Council's referral agency direction.
16. The appellant duly lodged this appeal with the tribunal registrar on 4 July 2023.
17. A site inspection and hearing were held on the subject site on Tuesday 24 October 2023 at 10:00am.
18. Following the site inspection and hearing, the tribunal issued the following directions to the parties, by email on 25 October 2023:

Following the inspection and hearing of the above-mentioned appeal on 24 October 2023, the tribunal directs the parties as follows:

1. *Council is to provide written details of the approved frontage setbacks of other dwelling houses in the vicinity of the subject site, as mentioned verbally at the hearing and inspection; and*
2. *The appellant is to provide a fully dimensioned plan(s) identifying the setbacks of the proposed alterations and additions to the subject dwelling house to the frontage of the subject site, as well as the current as-built setbacks to the frontage, such setbacks to be determined and shown as per the applicable planning scheme definitions.*

In submitting the plan(s) mentioned in 2. above, the appellant may, but need not, also indicate any changes to the proposed frontage setbacks that she is prepared to make, as mentioned verbally at the hearing and inspection.

The parties are advised that the material mentioned above is to be provided to the Registrar, with a copy to the other party, by no later than 4pm on Friday, 3 November 2023.

19. Council provided its response to the tribunal's directions by email on 30 October 2023. This response included an attachment identifying the front setback and building height details of approved dwelling houses on nearby premises. These identified an approved front setback reduction at 333 David Low Way (directly adjoining the subject site) and approved building heights exceeding 8 metres at 333 David Low Way and at 341 David Low Way. The attachment also noted that another tribunal (then a Building and Development Dispute Resolution Committee) approved a reduction in the front setback of the dwelling at 343 David Low Way in 2012.
20. Council's response also suggested that the proposed development includes a 58m² secondary dwelling which, under the planning scheme, would require a third on-site car parking space. The response went on to submit that a 4.5m setback to the garage door would limit the ability for a third car to park within the driveway.
21. The appellant's response to the tribunal's directions was provided by email on 2 November 2023. This response included amended architectural plans, showing dimensions for the proposed frontage setbacks as well as for the current, as-built setbacks. These amended plans also show an increased minimum frontage setback, measured to the first-floor deck, of 4.35 metres (increased from 3.8 metres), and a minimum frontage setback at the ground floor level of 4.8 metres.
22. The appellant's response also addressed the Council's advice regarding the inclusion of a secondary dwelling within the proposed design. The appellant's response argues that the relevant part of the dwelling house will not constitute a dwelling (as defined), in that it will not include facilities for washing clothes (an intrinsic component of the definition of a dwelling), and therefore will not constitute a secondary dwelling (as defined).

Material considered:

23. The following material has been considered by the tribunal in this appeal (generally in reverse chronological order):
 - a) Brennan Planning email dated 2 November 2023 outlining the appellant's response to the tribunal's direction of 25 October 2023, including updated architectural plans and responding to Council's advice regarding the inclusion of a secondary dwelling and associated car parking requirement;
 - b) Building and Development Dispute Resolution Committee decision on Appeal 43-12, dated 29 October 2012 and relating to the premises at 343 David Low Way, Peregian Beach;
 - c) Australia/New Zealand Standard AS/NZS 2890.1 2004;
 - d) Noosa Council email dated 30 October 2023, outlining Council's response to the tribunal's direction of 25 October 2023 and providing additional comment regarding the inclusion of a secondary dwelling and associated car parking requirement;
 - e) Form 10 – Notice of Appeal lodged with the tribunal's registrar on 4 July 2023, including Appendix A – Grounds of Appeal;
 - f) The assessment manager's decision notice dated 23 May 2023;
 - g) Noosa Council Referral Agency Response – Refusal dated 13 April 2023;
 - h) Brennan Planning email dated 13 February 2023, including amended architectural plans showing those portions of the proposed roof structure that would exceed a maximum height of 8.5 metres;

- i) Brennan Planning email dated 1 December 2022, including letters of support from the adjoining owners of 333 and 337 David Low way;
- j) Various emails between Brennan Planning and Council, ranging from 2 August 2022 to 12 January 2023;
- k) Noosa Council information request dated 21 April 2022, and Brennan Planning email dated 2 August 2022, including the appellant's response to the Council's information request and accompanying architectural plans and three-dimensional renders;
- l) Noosa Council referral confirmation notice dated 5 April 2022;
- m) Brennan Planning email dated 29 March 2022, including Request for Referral Agency Response and Town Planning Assessment Report and appendices (proposal plans, geotechnical investigation report and site photographs) (Brennan Planning, March 2022);
- n) The *Planning Act 2016* and the *Planning Regulation 2017*;
- o) The *Building Act 1975*;
- p) The Noosa Plan 2020 (25 September 2020).

The material provided to the tribunal included a partially completed DA Form 2 (superseded version 1.1) relating to an application for a building work preliminary approval for a new dwelling house (as opposed to the proposed alterations and additions the subject of this appeal). This form has been taken by the tribunal to be non-applicable to this appeal.

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.
- 25. 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).
- 26. 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 BA, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
- 27. 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:

- 28. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
- 29. 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.
- 30. 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)).

31. The tribunal must not make a change, other than a minor change, to a development application (section 254(3)).

Findings:

32. The Council's grounds for directing refusal of the application were solely that the proposed development does not achieve:

- a) Overall Outcome 6.3.1.2(2)(c) of the Low Density Residential Zone Code relating to the intended low-scale character of the zone;
- b) Performance Outcome PO7 ("PO7") of the Low Density Residential Zone Code relating to the building height intended for the zone; and
- c) Performance Outcome PO9 ("PO9") of the Low Density Residential Zone Code, relating to the setbacks intended for the zone.

33. As previously mentioned, the application required referral to Council as a referral agency for a design and siting assessment as the proposed design did not achieve acceptable outcomes under the Low Density Residential Zone Code, an alternative provision under section 33 of the BA and section 1.6 of the planning scheme. The applicable referral trigger in this case is the one in which a proposed development would not achieve a quantifiable standard for a relevant qualitative statement under the applicable alternative provision. Whilst the overall outcome cited in the grounds for directing refusal constitutes a qualitative statement, there is no quantifiable standard specified under the code for this statement.

34. In relation to this aspect, the tribunal finds that the absence of a quantifiable standard for the overall outcome (as a qualitative statement) rules it out as a trigger for the referral in this case,¹ and therefore that this overall outcome does not form an assessment benchmark for the design and siting assessment of the proposed development.² As such, the tribunal finds that the achievement or otherwise of this outcome is not a valid ground for the referral agency's decision. However, if the overall outcome is a relevant assessment benchmark, the tribunal is satisfied that the development maintains the low scale character of the zone and compiles with the overall outcome.

35. In relation to the other stated grounds of directing refusal of the application, the tribunal finds that:

- a) The areas where the maximum height of 8 metres would be exceeded by parts of the roof structure are:
 - i. minor in their areal extent and degree of encroachment above the 8 metres;³
 - ii. largely concealed from general view, being confined to the rear of the proposed dwelling house and all but invisible from the David Low Way, in particular; and
 - iii. a product of the steeply sloping nature of the subject site, in a context where the applicable acceptable outcome of the code does not make any allowance for steeply sloping sites.
- b) In the above context, the height of the proposed development achieves PO7 of the code, in that it would be generally consistent with that of surrounding premises, would not impact adversely upon the local streetscape in any way, would be consistent with

¹ *Planning Regulation 2017*, schedule 9, part 3, division 2, table 3, item 1, column 2, paragraph (b).

² *Planning Regulation 2017*, schedule 9, part 3, division 2, table 3, item 4, column 2.

³ Council officers at the hearing indicated that Council confirmed it previously conveyed position that a maximum building height of 8.5 metres was acceptable to Council. Therefore, the dispute in relation to building height primarily concerned the extent of the exceedance above 8.5 metres. However, the tribunal notes that the relevant acceptable outcome A07.1 is 8 metres and has based its assessment on this criterion.

the local landform, would not visually dominate the surrounding area, would respect the scale of local vegetation would not impact on the amenity of neighbouring dwellings by virtue of view loss or overshadowing (confirmed by letters of support from both direct neighbours) and would maintain a two-storey configuration.

- c) The proposed frontage setbacks proposed in the latest plans (as submitted by the appellant in response to the tribunal's directions of 25 October 2023) represent a suitable design outcome, given the combined effect of the steep slope of the site away from the frontage and the articulated nature of the front boundary of the subject site.
 - d) In the above context, the proposed front setbacks achieve PO9 of the code, in that these will not result in any discernible impact on the amenity of residents or neighbours, any significant obstruction of views or overlooking or any impacts on landscaping, vegetation, the local streetscape character or significant environmental values.
 - e) For the reasons stated above, Council's grounds for directing the refusal of the application are not supported.
36. In its response to the tribunal's directions of 25 October 2023, Council has raised the question of whether the proposed frontage setback to the garage, which it indicates would be 4.5 metres, would be sufficient to accommodate the additional on-site car parking space required under the planning scheme for what it regards as a secondary dwelling within the proposed development.
37. In this regard, the tribunal notes the evidence provided on behalf of the appellant to the effect that the relevant part of the proposed development does not constitute a dwelling, as defined in the planning scheme, due to the proposed absence of clothes washing facilities and the consequential loss of self-containment (key aspects of the definition of 'dwelling' and therefore of that of a 'secondary dwelling').
38. The tribunal also notes that the appellant's plans, as submitted in response to the tribunal's directions of 25 October 2023, show a proposed frontage setback to the outer face of the garage wall of 4.801 metres (not 4.5 metres), with an additional clearance to the garage door itself that can reasonably be assumed to be at least 300mm. On this basis, the tribunal infers that a total dimension of 5.1 metres would be available within the subject site, which would be sufficient to accommodate the length of a B85 design vehicle as defined under AS/NZS 2890.1 2004.
39. For the reasons stated below, the tribunal finds that this particular submission by Council does not constitute a ground to support its direction of refusal of the application, nor for this appeal to be dismissed:
- a) The tribunal accepts the appellant's evidence in this regard.
 - b) In any event, there appears to be sufficient space between a garage door and the site frontage to accommodate a B85 design vehicle.
 - c) In any event, additional space would be available within the front yard area adjacent to the driveway to accommodate a third parked car, should such a need arise.
40. For the above reasons, the tribunal finds that the appellant has established that this appeal should be upheld, as required under section 253(2) of the PA.

Reasons for the decision:

41. The tribunal, in accordance with section 254(2)(d) of the PA, has decided this appeal as set out in paragraph 1 above.

42. The tribunal's reasons for this decision are that the proposed development, as shown on the plans listed under paragraph 1, will comply with PO7 and PO9 of the code, for the reasons stated in paragraphs 34 to 40, inclusive.

Neil de Bruyn
Development Tribunal Chair

Date: 22 November 2023

Appeal rights:

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

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

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

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

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

Enquiries:

All correspondence should be addressed to:

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

Telephone (07) 1800 804 833

Email: registrar@epw.qld.gov.au