



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-052
Appellant:	Fitzvu Pty Ltd as trustee for the Fitzvu Family Trust (A.C.N. 164 300 305)
Respondent: (Assessment manager)	Daniel Eichhorn
Co-respondent: (Concurrence agency)	Noosa Shire Council (Council)
Site address:	6-8 Coral Sea Court, Sunshine Beach described as Lot 18 and Lot 19 on SP152345 – the subject site

Appeal

Appeal under section 229 and schedule 1, table 1, item 1 (b) of the *Planning Act 2016* against the assessment manager's decision at the direction of the referral agency to refuse a preliminary approval of building work (reference Noosa Council RAP 23/0003) for construction of two storey dwelling, retaining walls and boundary fences.

Date and time of hearing:	Wednesday 13 December 2023 at 10.30 am
Place of hearing:	The subject site
Tribunal:	Derek Kemp – Chair Henk Mulder – Member
Present:	Michael Fimura – Profile Architecture, for the Appellant, Jack Lewis – Pivotal Perspective Pty Ltd, for the Appellant Nadine Gorton – Noosa Shire Council, Co-respondent Georgina Schramm – Noosa Shire Council, Co-respondent

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) **replaces** the decision of the assessment manager to refuse the preliminary approval (Noosa Council RAP 23/0003) with a decision to approve the preliminary approval with the following conditions:

- a) The building work to conform to the amended plans submitted to the tribunal registry on 19 January 2004 identified as the Profile Architecture, 'Appeal Response' drawings numbered consecutively from TP5 A00.01, A00.02 - 2 no, A02.01 to A02.04, A02.10 - 3 no, A04.01 to A04.06, A05.01 to A05.06, A10.03 dated 8/1/2024.

- b) Such other conditions, as the assessment manager reasonably requires to ensure compliance with the building assessment provisions.

Background

The subject site

1. The subject site comprises two vacant blocks, with a combined site area of 1,817sq.m.
2. The site is located on the eastern side, on a private road located above the top of the Coral Sea Court cul-de-sac.
3. These two blocks slope significantly to the south east, with a fall of approximately 12 metres from the highest point on the north west property boundary (fronting the private road) to the lowest point on the south east property boundary (where it meets adjoining properties).
4. This subject site has a 41.131 metre frontage to an easement to the east that has been developed with a private road extending east above the Coral Sea Court cul-de-sac.

The proposal

5. The proposal is for a two-storey detached dwelling designed to step down the slope of the subject site.
6. The proposal has a number of elements that are the subject of this appeal:
 - a. Construction of fences in the form of masonry walls along the east and southern property boundaries.
 - b. Construction of a habitable room at the top most level of the proposed dwelling with an attached awning, part of which exceeds 8 metres above natural ground level.
 - c. Construction of a screen on the deck (variously described as a roof terrace or balcony) proposed off the habitable room at the top most level of the proposed dwelling, part of which exceeds 8 metres above natural ground level.

Assessment of the application

7. On 14 September 2023 Noosa Council advised the appellant of Council's concurrence agency response (Council reference RAP 23/0003) to refuse the proposed dwelling house on the subject land for the reasons that the proposal did not comply with Low Density Residential Code with respect to:
 - a. Acceptable Outcome AO 7.1 and Performance Outcome 7
 - b. Acceptable Outcome AO 16.3 and Performance Outcome 16
 - c. Acceptable Outcome AO 9.4 and Performance Outcome 9
 - d. Acceptable Outcome AO 19.1 and Performance Outcome 19.
8. The grounds for refusal contained in Council's 'Referral Agency Response - Refusal' (RAP 23/0003) advised to the appellant on 14 September were:
 1. *The proposal does not comply with Acceptable Outcome AO7.1 and corresponding Performance Outcome PO7 of the Low Density Residential Zone Code as the development:*
 - i. *is proposed to exceed 8 metres from natural ground level;*
 - ii. *design dominates the landscape and has a presentation of excessive bulk to adjoining residential properties;*

- iii. *development is not responsive of the topography of the site, with extensive cut and fill proposed; and*
 - iv. *has the potential to obstruct views.*
- 2. *The proposal does not comply with Acceptable Outcome AO16.3 and corresponding Performance Outcome PO16 of the Low Density Residential Zone Code as the proposed rooftop terrace will have the potential to obstruct views of dwellings within proximity of the site and create issues of overlooking to neighbouring properties. The privacy walls associated with the proposed roof top terrace will also create excessive bulk to neighbouring properties and are not of a height that will entirely obscure view lines.*
- 3. *The proposal does not comply with AO9.4 and PO9 of the Low Density Residential Zone Code as the development proposes retaining walls and fencing greater than 2 metres in height which will result in overlooking to adjoining properties, does not allow for ground level landscaping and will impact negatively on the adjoining site.*
- 4. *The proposal does not comply with Acceptable Outcome AO19.1 and corresponding Performance Outcome PO19 of the Low Density Residential Zone Code, as the development:*
 - i. *involves extensive earthworks, not consistent with the established character, and*
 - ii. *the side and rear elevations of the dwelling dominate the landscape.*
- 9. On 13 October 2023, Daniel Eichhorn as assessment manager advised the appellant that the development approval was refused as directed by the concurrence agency ('Project BA' Decision Notice Ref: 20234011).

Further plans considered by the Tribunal

- 10. On 20 December 2023, the Tribunal directed that any amended plans and sight line information from the street and from neighbouring property boundaries, be submitted by 10 January 2024.
- 11. Amended plans and sight line information were received by the Tribunal Registry on 19 January 2024.
- 12. On 22 January 2024, the Tribunal requested Council's response to the amended plans and further information provided by the appellants.
- 13. On 23 February 2024 Council provided its written response to the amended plans, which reiterated the original grounds for refusal (as stated above) relating to the proposal not complying with:
 - a. Acceptable Outcome AO7.1 and corresponding Performance Outcome PO7 of the Low Density Residential Zone Code as the development.
 - b. Acceptable Outcome AO16.3 and corresponding Performance Outcome PO16 of the Low Density Residential Zone Code.

Material considered

- 14. The material considered in arriving at this decision comprises:
 - a. 'Form 10 – Notice of Appeal/ Application for Declaration', being the grounds for appeal lodged with the Tribunals Registrar on 16 October 2023. (Including the attachments and the applicant's architect's and planner's responses to Council's

- further information requests and appellant's architect's and planner's responses to Council grounds for refusal forming part of this Notice of Appeal)
- b. The amended plans and further information received from the appellants by the Tribunal Registry on 19 January 2024.
 - c. Council's response to the amended plans and further information received from the appellants received by the Tribunal Registry on 23 February 2024.
 - d. Planning Act 2016
 - e. Building Act 1975
 - f. Noosa Plan 2020
 - g. The verbal submissions made by the parties at the hearing and during the site inspection as referred to in the body of the decision.

Jurisdiction

15. Section 229(1) of the PA provides that schedule 1 ('the schedule') of the PA states the matters that may be appealed to a tribunal. Section 1(1)(b) of the schedule provides that the matters stated in table 1 of the schedule ('table 1') are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that table 1 only applies to a tribunal if the matter involves one of the matters set out in section 1(2).
16. Section 1(2)(g) provides that table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the *Building Act 1975* (BA), other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
17. A refusal of a preliminary approval is a decision with appeal rights to the tribunal, under Section 1(2)(g). These appeal rights can be restricted to certain assessment benchmarks (section 49) that are local planning provisions (BA section 31).
18. Table 1 item 1(a) thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal, with respect to the design and siting of the proposed development.

Decision framework

19. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
20. 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.
21. 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)).
22. The tribunal must not make a change, other than a minor change, to a development application (section 254(3)).

Findings of fact

23. The Tribunal finds the amended plans (submitted to Tribunal on 19 January 2024) to be a 'minor change' (under section 254(3) of the PA) to the original proposal plans (Reference:

Nearby developments

24. To the east of the subject site is a vacant block at 10 Coral Coast Court occupying the top of the private road that fronts the subject site.
25. To the north, at 12 Coral Coast Court, is a very large, high set single storey dwelling that occupies the full frontage at the top of the Coral Sea Court cul-de-sac. The south side of this dwelling at 12 Coral Coast Court is located across the private road facing the subject site. This dwelling is very high set, with extensive high balconies facing down Coral Coast Court and a smaller side balcony facing south across the private road to the subject site. The base of these balconies is approximately 4 metres above the subject site and over 6 metres above the roads on each side of the dwelling. The residential parts of this dwelling are located behind and above these balconies.
26. Further north is the dwelling at 13 Coral Coast Court set well back down a private road forming a driveway to that property. This is a two storey building with a balcony facing east and its side wall and garage facing the driveway leading to Coral Coast Court. None of this building nor its site and access is visible from the subject site. The proposed development on the subject site will not be visible from 13 Coral Coast Court and the building at 13 Coral Coast Court, its outdoor areas and access will not be visible from the proposed development.
27. Approximately 50 metres to west of the subject site, lower down, on the opposite side of Coral Coast Court to the subject site is 11 Coral Coast Court, located approximately 20 metres RL below the subject site. The access to this property is from the private road forming the driveway to 13 Coral Coast Court. The side of this dwelling with small windows and no balconies faces Coral Coast Court. This frontage to Coral Coast Court is well screened by very large mature gum trees and vegetation from Coral Coast Court looking towards the subject site. The access, gardens and frontage to this property are not visible from the subject site nor from the proposed development.
28. Approximately 200 metres down Coral Coast Court, on the opposite side to the subject site is 9 Coral Coast Court. This is a two storey detached house set well back from Coral Coast Court. Neither the access nor the frontage to this dwelling is visible from the subject site.
29. Immediately adjacent, to west of the subject site, is 4 Coral Coast Court. This is a single storey detached dwelling that fronts Coral Coast Court. This dwelling is cut into its site on the eastern boundary facing the subject site. An existing high masonry wall that varies from 1 metre at the front boundary to over 2.4 metres towards the rear of the property establishes the common property boundary to the subject site. There is dense landscaping in places between this wall and the side of the house with its two small vertical windows. The result of this dwelling being down slope from the subject site and being located in a cut behind a high masonry wall means very little below the roof of this property is visible from the subject site and neither the side wall, its garden nor its frontage will be visible from the proposed development.

Streetscape considerations

30. There is no typical streetscape, and no dominant streetscape character in Coral Sea Court. There are a variety of house styles, all with different setbacks, some with frontages and direct access to Coral Sea Court and some without frontage or access from this part of Coral Sea Court. Some of these properties have balconies, some without.

31. The most dominant streetscape feature in this part of Coral Coast Court is the large, very high set modern dwelling at 12 Coral Coast Court, which occupies the highest site and dominates the whole frontage at the top end of this cul-de-sac. This dwelling with its setback, fenestrated living areas behind extensive, full length balconies, is very similar in design to the proposed subject development.
32. The proposed development will have minimal impact on the overall streetscape because it fronts the private road higher up from the top of the Coral Coast Court cul-de-sac and is effectively located 'side on' to Coral Coast Court and the dominant dwelling at 12 Coral Coast Court which takes up the full frontage at the head of the cul-de-sac which is below the subject site.

Reasons for the decision

33. The Tribunal concurs with the appellant's and Council's agreement at the time of the hearing that there are no grounds for refusing the proposed dwelling in the original development application on the basis that the proposed development does not comply with Acceptable Outcome AO19.1 and Performance Outcome 19 of the Noosa Council 'Low Density Residential Code'.
34. The Tribunal concurs with the appellant's and Council's agreement at the time of the hearing that there are no grounds for refusing the dwelling as originally proposed on the basis that the proposed development does not comply with Acceptable Outcome AO 9.4 and Performance Outcome 9 of the Noosa Council 'Low Density Residential Code', given the extent of pre-existing boundary fence heights and the lower height now proposed for the new boundary fence.
35. The Tribunal finds that the proposal as amended will comply with Performance Outcome PO16 of the Noosa Shire Low Density Residential Code in that the roof design does not present an appearance of excessive bulk to the street and neighbouring properties; and will not create opportunities for residents or building users to overlook the private open spaces or view into the habitable windows and doors of neighbouring properties.
36. For clarity, the Tribunal had regard to Acceptable Outcome AO16.3 that states 'Development does not include rooftop terraces'. The Tribunal formed the view that the proposal includes a roof top terrace, not a balcony as claimed by the appellant's representatives – given both the Oxford and Cambridge Dictionaries define a balcony *inter alia* as a platform built out from a wall. The Tribunal formed the opinion that the distinction between a balcony and a rooftop terrace was immaterial in this case, given the Tribunal was of the opinion that the proposed development would comply with Performance Outcome PO16 of the Noosa Shire Low Density Residential Code.
37. The Tribunal finds that the proposal as amended will comply with Performance Outcome PO7 of the Noosa Shire Low Density Residential Code in that:
 - a. the building height does not exceed two storeys and is consistent with nearby premises and the predominant character of the area.
 - b. the design will provide an interesting streetscape and complements the landform and is responsive to the topography of the site.
 - c. the design will not visually dominate the landscape nor present the appearance of excessive bulk.
 - d. the proposal will not significantly nor unreasonably obscure views from neighbouring properties.
38. For clarity, the Tribunal finds that the visual intrusion into the sight line above 8 metres from the natural ground level is of a very minor nature and will provide an interesting streetscape and complement the landform changes without significantly impacting, or

dominating the streetscape, or the sight lines from neighbouring properties. The Tribunal noted that the articulation in the building height and the differing setbacks for the different levels of the proposed development will enhance, not detract, from the streetscape.

39. The Tribunal noted that the only significant impact of the proposed development could be on views from the vacant block to the east, at 10 Carol Coast Court. However, the parts of the proposed development that are above the 8 metres permitted above the natural ground level on the subject site are obscured from view from 10 Coral Coast Court by the parts of the proposed development that are within the permitted 8 metres above natural ground level on the subject site. The Tribunal finds there will be no significant adverse impacts on the views from the property at 12 Coral Coast Court located to the north of the subject site.
40. The Tribunal is satisfied that the proposed development as amended will comply with the criteria sought for development at the subject site.

Derek Craven Kemp
Development Tribunal Chair

Date: 19 March 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

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