



## Development Tribunal – Decision Notice

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

**Appeal Number:** 23-031

**Appellant:** Peter and Anne Cranstoun

**Assessment Manager:** Trevor Gerhardt (Sunshine Coast Building Approvals)

**Co-respondent  
(Concurrence Agency):** Sunshine Coast Regional Council

**Site Address:** 22 Wilson Avenue Dicky Beach and described as Lot 43  
RP53611 – the subject site

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### **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 for refusal of a Development Permit for Building Works for a dwelling house, relying on a direction by the Concurrence Agency to refuse the application in part. The decision followed a referral agency response by the Sunshine Coast Regional Council directing part refusal of the application on the grounds that the proposed dwelling does not meet the provisions of the Sunshine Coast Planning Scheme 2014, Dwelling House Code PO3 (b), (d) and (e); PO18 (b) and (c) and Queensland Development Code P2 (b) and (c).

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**Date and time of hearing:** 11-30 a.m. 29 August 2023

**Place of hearing:** The subject site

**Tribunal:** Anthony Roberts – Chair  
Lindy Osborne Burton – Member

**Present:** Peter and Anne Cranstoun – Appellants  
Trevor Gerhardt (Suncoast Building Approvals) – Assessment Manager  
Angus McKinnon (Sunshine Coast Building Approvals)  
Greg Hoskins – Builder  
Kelly Taylor, Andrew Zarb and Daniel Rundle – Sunshine Coast  
Regional Council

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### **Decision**

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016*, confirms the decision of the Assessment Manager to refuse the application, relying on a direction by the Concurrence Agency to refuse the application in part.

## Background

1. The subject site is:
  - a. a gently-sloping, irregular-shaped allotment located at the corner of Wilson Avenue and Cooroora Street, Dicky Beach with frontages to Wilson Avenue and Cooroora Street;
  - b. 574m<sup>2</sup> in area containing a single-storey dwelling house with outbuildings;
  - c. zoned Low Density Residential under the Sunshine Coast Planning Scheme 2014.
2. The proposed dwelling is:
  - a. two storey with a basement and rooftop deck;
  - b. 9.5m in height to the Cooroora Street frontage;
  - c. designed to take advantage of the ocean views along the Cooroora Street alignment;
  - d. to be located a minimum 1.55m from the frontage boundary (Cooroora Street); ranging between 2.45 and 5.04 from the Wilson Avenue boundary; 3.1m from the western boundary; 0.9m to the northern boundary.
3. As the proposed dwelling triggers assessment against the relevant performance criteria of the Dwelling House Code under the Sunshine Coast Planning Scheme 2014 and the Queensland Development Code due to the proposed siting within the required frontage and side boundary setbacks, the Assessment Manager lodged a request for a referral agency response for building work on 21 April 2023.
4. On 27 April 2023, Council issued a Referral Agency Response recommending part approval for frontage setbacks for the ground and first levels and site coverage and directing part refusal for the setbacks relating to the Cooroora Street frontage (for the second floor and rooftop terrace) and the northern side boundary (for the first, second and rooftop terrace levels) for the following reasons:

**1. The proposal does not meet the Performance Outcomes PO3 (b), (d) & (e) of the**

**Dwelling House Code:**

*PO3 (b) - Where located in a residential zone, the dwelling house is set back from any road frontage so as to create a coherent and consistent streetscape, with no or only minor variations in frontage depth.*

*• With regards to the second floor and rooftop terrace frontage setbacks, 3D modelling undertaken by Council has determined that the proposed second floor and rooftop terrace floor are not minor variations to the frontage depth in the street. The majority of dwellings within Cooroora Street are two storeys, with the upper floors being setback between 3.5 metres to 6 metres from the Cooroora Street front boundary. There are no other dwellings in the street that are three storeys in height with a rooftop terrace level. As such, the proposed second floor and rooftop terrace do not contribute to a consistent and coherent streetscape and do not comply with Performance Outcome PO3 (b).*

*PO3 (d) - Where located in a residential zone, the dwelling house is set back from any road frontage so as to provide reasonable privacy to residents and neighbours on adjoining lots.*

*• 3D modelling indicates that the proposed dwelling (namely the second floor and rooftop terrace) would greatly impact the privacy of the western neighbour. The proposed the rooftop terrace would have direct sightlines to the western neighbour's balcony, directly impacting privacy. As such, the second and rooftop terrace floors of the proposal would not maintain the neighbour's privacy, thereby not complying with Performance Outcome PO3 (d).*

*PO3 (e) - Where located in a residential zone, the dwelling house is set back from any road frontage so as to maintain reasonable access to views and vistas, prevailing breezes and sunlight for each dwelling house.*

*• 3D modelling indicates that the proposed dwelling (namely the second floor and*

rooftop terrace) would greatly impact the amenity of the adjoining dwelling house. The proposed dwelling would severely restrict the western neighbour's views to the ocean in the east from their east-facing balcony. The proposal would significantly impact the western neighbour's views and vistas to the ocean and therefore would not comply with Performance Outcome PO3 (e).

**2. The proposal does not meet the Performance Outcome PO18 (b) & (c) of the Dwelling House Code:**

*PO18 (b) - The dwelling house preserves the amenity of adjacent land and dwelling houses and does not dominate the streetscape having regard to views and vistas.*

- *With regards to the western neighbour, 3D modelling indicates that the proposed dwelling (namely the second floor and rooftop terrace) would greatly impact privacy and amenity. The proposed dwelling would severely restrict the western neighbour's views to ocean in the east from their east-facing balcony. As such the proposal would not comply with Performance Outcome PO18 (b).*

*PO18 (c) - The dwelling house preserves the amenity of adjacent land and dwelling houses and does not dominate the streetscape having regard to building mass and scale as seen from neighbouring premises.*

- *With regards to the western neighbour, 3D modelling indicates that the proposed dwelling would impose significant mass and scale when viewed from the western neighbour's premises. This is greatly emphasised when comparing the existing situation and the proposed dwelling design. As such, the proposed dwelling setbacks for the second floor and rooftop terrace floor to Cooroora Street would not comply with Performance Outcome PO18 (c).*

**3. The proposal does not meet the Performance Criteria P2 (b) & (c) of the Queensland Development Code:**

*P2 (b) – Buildings and structures allow for adequate light and ventilation to habitable rooms of buildings on adjoining lots.*

- *The proposed dwelling would be located within very close proximity to the northern side boundary (900mm on the first floor in lieu of 1.5 metres, 1.55m on the second floor in lieu of 2 metres and 2 metres on the rooftop terrace floor in lieu of 2.5 metres and would be immediately adjacent to windows and habitable rooms on the northern neighbour's dwelling. As such, it is likely that the proposed dwelling would impede the neighbouring dwelling's access to light and ventilation, and would not comply with P2 (b).*

*P2 (c) – Buildings and structures do not adversely impact on the amenity and privacy of residents on adjoining lots.*

- *The close proximity of the dwelling to the northern side boundary and adjoining neighbour's dwelling would likely impact the neighbour's amenity and privacy, particularly given the scale of the proposed dwelling and the close relationship of the windows/open rooftop entertainment area to the adjoining neighbour's dwelling. As such, the proposed patio would not achieve compliance with P2 (c).*

5. The Assessment Manager subsequently issued a Decision Notice on 2 June 2023 refusing the proposed development (in whole) based exclusively on the Referral Agency Response from Council directing refusal in part.
6. The Appellant subsequently appealed this decision by lodging with the Registrar a Form 10 – Notice of Appeal on 15 June 2023.
7. The hearing was held at the subject site on 29 August 2023 at 11-30 a.m. The Tribunal had the opportunity to view the positioning of the proposed dwelling from the subject site, neighbouring properties, and the streetscape more generally.

## 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 15 June 2023
  - b. The *Planning Act 2016* (PA)
  - c. The Planning Regulation 2017 (PR)
  - d. The *Building Act 1975* (BA)
  - e. The Building Regulation 2006 (BR)
  - f. The Queensland Development Code (QDC) Part MP 1.2
  - g. The Sunshine Coast Planning Scheme 2014 (the Plan)
  - h. Sunshine Coast Plan Dwelling House Code (the Code)
  - i. Sunshine Coast Council Assessment Report (CAR23/0121) dated 21 April 2023
  - j. Sunshine Coast Council 3D modelling imagery provided 25 August 2023
  - k. Development Tribunal Decisions 21-066 (12 May 2022); 22-060 (9 February 2023); 3-06-080 (30 August 2006);
  - l. The verbal submissions made by the parties at the hearing and during the 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(a) being an appeal by the Appellants against the refusal of the development application by the Assessment Manager at the direction of the Concurrence Agency.
10. 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).
11. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

## Decision framework

12. 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.
13. 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.

14. Section 33 of the BA (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) allows a planning scheme to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover. The Sunshine Coast Planning Scheme Dwelling House Code contains alternate provisions to the QDC.
15. As the street setbacks do not meet Acceptable Outcome A02.1, AO3 and AO18 set out in the Code, it must be demonstrated to meet the relevant Performance Outcomes of the Code namely, PO2 and PO18. Similarly, as the proposed side boundary setbacks do not comply with Acceptable Solution A2 of the QDC MP 1.2 it must be shown to meet Performance Criteria P2 of the QDC.

### **Matters in dispute**

16. The Council's concurrence decision was for part approval and part refusal of the proposal. The part approval component, which was not incorporated into the Assessment Manager's decision, approved a Cooroora Street boundary setback of 2.37m for the basement level and 2.45m for the first floor and 5.56m Wilson Avenue setback for the first floor.
17. The focus of the disputed matters at the hearing was therefore on the 'neighbouring amenity' considerations of the PO3 and PO18 of the Code and QDC (MP 1.2), only in relation to the second and rooftop level impacts on the northern and western neighbouring properties. For the western neighbour, contention between the parties related to the relevance of, and degree of impact on, vistas and views enjoyed by the adjacent neighbour as well as mutual privacy considerations for the two properties. For the northern neighbouring property, the focus was on potential privacy impacts associated with the proposed development.

### **Findings of fact**

18. The Tribunal makes the following findings of fact:

#### Amenity and privacy impacts on western neighbour (1 Cooroora Street)

19. In relation to the grounds for refusal pertinent to the western neighbour, the Appellants contend that:
- a. The size and shape of the subject site makes the achievement of required setbacks extremely difficult;
  - b. The proposed dwelling is of high design quality and will make a positive contribution to the streetscape;
  - c. The views and vistas from the adjacent western dwelling are not a relevant consideration because they are mainly enjoyed from a balcony which is an alleged unlawful structure and therefore - given Council's practice of disregarding unlawful structures when considering approval precedents - Council's 3D imagery projecting obstructed views from that site should be disregarded;
  - d. The existing dwelling on the subject site is setback only 2m for the entire length and the proposed dwelling would maintain a similar setback;
  - e. Council failed to nominate (through the Information Request stage) an alternative acceptable setback and QDC MP 1.2 table A1 small lot equivalent setback of 1.5m should be applied as a default;

- f. Number 3 Wilson Avenue is a recent example of where Council approved substantial frontage setbacks on a site with similar size and shape constraints;
  - g. The proposed development would enable the owners of the subject site regain visual privacy lost due to the construction of the western neighbour's balcony and previous removal of a vegetated buffer between the properties.
20. Whilst acknowledging the difficulties of developing the site as a reason for part approval for some setbacks in the proposed development, Council contends that the proposed dwelling fails to satisfy criteria PO3 and PO18 of the Code and P2 of QDC MP 1.2 in respect of the second and rooftop terrace levels as:
- a. The proposed Cooroora Street setback is not a 'minor variation' to the frontage depth of the street with the majority of dwellings in that street being two storeys setback 6m to 3.5m at the upper level;
  - b. Council's 3D modelling demonstrates that the privacy of the western neighbour would be greatly impacted by the development as the rooftop terrace has direct sightlines to those premises;
  - c. Council's 3D modelling shows that the proposed dwelling would impose significant mass and scale when viewed from the western neighbour's premises and would severely restrict the existing ocean views achieved from the east-facing balcony;
  - d. The proposed siting, mass and scale would dominate the streetscape and represent an inconsistent streetscape element;
  - e. The Code is the applicable instrument in relation to front boundary setbacks not the QDC. PO18 was drafted specifically to apply in the Dicky Beach (and environs) setting in respect of protection of views from neighbouring properties;
  - f. The alleged unlawful balcony on the western neighbour's dwelling has not yet been investigated but Council's modelling is nevertheless valid and accurate particularly as it was developed from views achieved prior to the addition of the east-facing balcony;
  - g. Examples of setback relaxations and rooftop terraces approved in the vicinity of the site were determined on individual merits at the time and may not represent a precedent.
21. Based upon the site inspection conducted at the hearing, the Tribunal finds that Cooroora Street generally presents as a streetscape of two storey dwellings with the upper level predominately setback in conformity with the specified 6m setback and that the proposed dwelling would 'close off' existing and prospective views of the ocean from dwellings on the northern side of Cooroora Street to the west of the site. As viewed particularly from the western neighbour's dwelling, the proposed location, height and bulk of the dwelling would likely substantially impede existing ocean views from that dwelling.
22. In respect of privacy considerations, whilst the design of the proposed dwelling would likely re-introduce a degree of privacy to the subject site from the western neighbour's balcony, the rooftop terrace element would significantly impact the privacy of the western neighbour's premises. The alleged unlawfulness of the balcony is not a material consideration.
23. The Tribunal notes that, as suggested by Council, the design features of the proposed dwelling could be modified to better comply with the Performance Outcomes intended by the Code – particularly privacy aspects.
24. The Tribunal finds that in the light of the streetscape context of the proposed development, the proposed Cooroora Street setback does not qualify as a 'minor variation' and would be inconsistent with the prevailing streetscape. Further, considering the emphasis placed by the Code (as the relevant instrument) on privacy and amenity (including views and vistas) considerations for adjoining properties the proposed dwelling would presents a substantial visual intrusion to the existing and potential ocean views enjoyed by properties on the northern side of Cooroora Street to the west of the site.

Amenity and privacy impacts on northern neighbour (24 Wilson Avenue)

25. The proposed northern side boundary setbacks are: first floor - 0.9m (to eaves) in lieu of 1.55m; second floor – 1.5m in lieu of 2m; rooftop terrace – 2m in lieu of 2.5m.
26. In relation to the grounds of refusal pertinent to the northern neighbour, the Appellants contend that:
  - a. The adjoining neighbour's property site level is higher than the subject site and there is a substantial boundary fence in place mitigating inter-looking opportunities at the lower level. The upper level maintains a setback of 2m to the wall;
  - b. The dwelling is designed to be oriented to Cooroora Street and upper-level bedrooms do not have windows adjoining the side boundary or windows are high enough to avoid overlooking;
  - c. The proposed setback at the lower level is a minimum of 1.2m as opposed to the QDC 1.5m requirement. QDC would allow a 'built to boundary' wall for up to 9m length and 3.5m height.
27. In relation to the grounds of refusal pertinent to the northern neighbour, Council contends that:
  - a. The intended close proximity of the dwelling to the northern side boundary immediately adjacent to windows of habitable rooms of the neighbouring dwelling would impede access to light and ventilation and impact that neighbour's amenity and privacy;
  - b. The overall length of the proposed setback is Council's major concern.
28. Based on the site inspection at the hearing, the Tribunal finds that given the design of the proposed dwelling (with minimal north-facing windows) and the elevation and design orientation of the adjoining dwelling, the proposed northern side boundary setbacks are adequate to protect light and ventilation of the northerly neighbour and provide an acceptable level of privacy. However, the rooftop terrace, as designed, would result in a significant visual privacy incursion on the northern neighbouring property and does not meet the amenity requirements of the QDC.

## **Reasons for the decision**

29. In this appeal, the Tribunal considers the Appellants have not satisfied the onus of demonstrating the appeal should be upheld. Therefore, the Tribunal has determined to confirm the decision of the Assessment Manager to refuse the application, relying on a direction by the Concurrence Agency to refuse the application in part, for the reasons identified below.
30. The Tribunal found that Performance Outcome PO3 (b), (d) and (e) and Performance Outcome PO18 (b) and (c) of the Code are not able to be met due primarily to the impact of the siting and design of the proposed dwelling on the amenity and privacy of the adjoining western neighbour. The proposed location, design, height and bulk of the dwelling (particularly at the second and rooftop terrace levels) would likely substantially impede existing ocean views from the neighbouring dwelling and would 'close off' existing and prospective views of the ocean from other dwellings on the northern side of Cooroora Street to the west of the site. Additionally, the rooftop terrace as designed and located is likely to introduce an 'overlooking' situation substantially reducing privacy for neighbouring properties. Further, in the light of the Cooroora streetscape context, the proposed street setback does not qualify as a 'minor variation'.
31. The Tribunal also found that while QDC MP 1.2 P2 (b) regarding light and ventilation to adjoining premises may be satisfied due to the design of the proposed dwelling (with minimal north-facing windows) and elevation and design orientation of the adjoining dwelling neighbour, MP 1.2 P2 (c) is unable to be met due to the likely significant visual privacy incursion on the northern neighbouring property introduced by the rooftop terrace.

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**Anthony Roberts**  
**Development Tribunal Chair**

**Date: 27 October 2023**



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