



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21- 061
Appellant:	Tim Ditchfield Architects Pty Ltd
Respondent (Assessment Manager):	Stewart Magill, Pure Building Approvals
Co-respondent (Concurrence Agency):	Noosa Shire Council ("Council")
Site Address:	48 Mossman Court, Noosa Heads QLD 4567, Lot 140 on N21859 ('the subject site')

Appeal

Appeal under section 229 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, under section 78 of the PA ("the application"), for a minor change to a Development Permit for building works (detached house).

Date and time of site inspection (by the chairperson only):	Thursday 10 March 2022 at 9.30 am
Date and Time of Hearing:	Thursday 10 March 2022 at 9.30 am
Tribunal:	Mark Chapple – Chairperson Stephanie Raven – Member Rebecca Moore – Member
Present:	Tim Ditchfield – representative of the appellant Tim Ditchfield Architects Pty Ltd Denis MacKenzie – representative of the subject site owner Lynden Investment Group Pty Ltd. Stewart Magill – Representative of the Respondent Pure Building Approvals. Jon Day - Representative of the Respondent Pure Building Approvals. Kerri Coyle – Council Representative Maxwell Potter – Council Representative

Decision:

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 this decision notice as if the concurrency agency had no requirements, and

- b) if the re-made decision is one that approves the application, to include the following additional conditions in the development permit given:
- that the screening in place on the roadway side of the dwelling be maintained and not removed without the prior written approval of the council.
 - That the site cover as a per centage of the site area must not exceed 53.3% on the ground level and 32.9% for the upper level.

Background:

1. The subject site is included in the Low-Density Residential Zone on the Planning Scheme, Noosa Plan 2020 and addresses Mossman Court on the northerly side and a waterway which is part of the Noosa River system on the southerly side.
2. A two-story house has been erected on the subject site pursuant to Development Permit that had involved the Council giving a referral agency response of 22 October 2021, Council reference RAP21/0004.01.
3. The Appellant applied to the Respondent to make a change to the Development Permit for the dwelling house which involved that application being referred to the Council for a referral agency response by way of an application to the Council of 23/11/2020.
4. The change application involved the addition of: (i) an office on the upper level of the roadway side of the house which had been approved as an open void, (ii) screening across the road frontage side of the house at the upper level and (iii) planters across the front of house in front of the proposed screens on the upper level. The screening and planters were in place at time of inspection and hearing.
5. The Council gave a Referral Agency response of 22 October 2021 directing the Respondent to refuse the application stating that the application did not comply with the "*Overall Outcome 2(c) and the Performance Outcome PO8 -a), c) and d) of the Low Density Code as the changes:*"
 - a. *Contribute additional site cover, with the total site cover now proposed comprising 53.3 % for the first story and 32.9% for the second storey which is of greater size than the approved dwellings houses in Mossman Court. Therefore the development is not of a scale compatible with the surrounding development and the increased site cover is not in context with the site.*
 - b. *The proposed increased site cover reduces the available area for soft landscaping*
 - c. *The proposed increased site cover presents an appearance of bulk to adjacent properties, the streetscape and waterway to the rear."*
6. The Respondent issued a Decision Notice of 25 October 2021 refusing the application for minor change giving the Council's Referral Agency Direction as the sole reason.
7. The appellant thereafter lodged this appeal on 28 October 2021, essentially on the grounds summarised below:
 - a) That the council had adopted the wrong approach in calculating site cover
 - b) A house at 47 Mossman Street (the same street as the subject site) had been approved with site cover exceeding *Performance Outcome PO8 -a),c) and d) of the Low Density Code*.
 - c) The development had 20% of the site area dedicated to "*soft landscaping*" as required by the Noosa Plan.
 - d) That the proposed change would "*not adversely affect the scale of the building or the appearance of bulk when viewed from the streetscape*".

Jurisdiction:

9. 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.
10. 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 a list of matters set out in section 1(2).
11. 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 (Qld) 1975, other than one that must be decided by the Queensland Building and Construction Commission. The application is for *building work* within the BA sec.5 which was subject to a *building development application under the BA sec. 6* requiring assessment pursuant to *the building assessment provisions* as defined in the BA sec 30. The Tribunal notes that the application was referred as an application for a “minor change” in the letter of Pure Approvals of 13/9/21 however the application did not follow the process for a “*minor change*” in the PA. The Tribunal finds that the work is not a “minor change” and so is not excluded from the scope of the BA sec. 6 on that basis.
12. 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:

13. For this appeal, the onus generally rests with the appellant to establish that the appeal should be upheld (section 253(2) of PA).
14. The tribunal is required to hear and decide the 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.
15. The Tribunal is required to decide the 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)).

Material Considered:

16. The following material has been considered by the Tribunal in this appeal:
 - a) ‘Form 10 – Notice of Appeal’ lodged by the appellant with the tribunal’s registrar on 1 November 2021, including the submission supporting the appeal from Pure Building Approvals in a letter dated 1 November 2021
 - b) Drawings from Tom Ditchfield Architects DD1.01 J, DD2.01 J, DD 2.02 J, DD3.01 J, DD3.02 J, DD 4.01 J, DD4.02 J, DD 4.03 J and, DD10.2 G,
 - c) Decision Notice Refusal - Stewart Magill 25/10/2021
 - d) Referral Agency Response – Noosa Shire Council 22 October 2021
 - e) Request for Referral Agency Response from Noosa Shire Council for Building Works made by Stewart Magill 23/11/2020
 - f) Letter from Stewart Magill of Pure Building Approvals to the Council of 23/11/2020
 - g) Drawings from Tom Ditchfield Architects DD1.01 D, DD2.01 D, DD2.02 D, DD3.01D, DD 3.02 D, DD3.03 D, DD 3.04 D, DD4.01 D, DD4.02 D, DD 4.03 D and WD6.02
 - h) Council Information Request 7/12/2020
 - i) Email Shelby Hawkins of the Council to Jon Day 25 January 2021.

- j) Email Jon Day to the Council of 4 February 2021
- k) Letter Jon Day to the Council 4 February 2021
- l) Drawings from Tom Ditchfield Architects DD1.01 E DD 2.01 E, DD2.02 E, DD 3.01 E, DD3.02 E, DD 3.02 D, DD 3.04 D, DD 4.01 E, DD 4.02 E, DD 4.03 E, 10.02 A 10.01 A, 10.03 A.
- m) 4 sheets of photographs of dwellings in Mossman Court and Witta Circle.
- n) Email Jon Day to Antoinette Becker 5 February 2021
- o) Council Information Request 26 February 2021
- p) Email Jon Day to Blake Coulston 5 March 2021.
- q) Drawings from Tim Ditchfield Architects DD1.01 G, DD2.01 G, DD 2.02 G, DD 3.01 G, DD 3.02 G, DD 3.03 G, DD3.04 G, DD4.01 G, DD4.02 G, DD4.03 G, 10.03 G, 10,02 G, 10,21 A.
- r) Drawings from Tim Ditchfield Architects 10.21 A, and 10.22 A (which relate to 45 Mossman Court)
- s) Drawings Paul Clout Design 01.0 and 02.0 (which relate to 47 Mossman Court)
- t) Drawings Tim Ditchfield Architects 10.02 A (which relate to 52 Mossman Court)
- u) 4 Sheets of Photographs of dwellings in Mossman Court and Witta Circle
- v) Email Jon Day to Blake Coulston 14/04/2021
- w) Drawings Tim Ditchfield Architects WD 2.02 C, WD 4.01 C, and 10.02 C.
- x) Email Blake Coulston to Jon Day 21/04/2021
- y) Email Jon Day to Blake Coulston Blake Coulston to 27/04/2021
- z) Drawing Tim Ditchfield Architects WD 2.02 D and 10.02 D
- aa) Email Blake Coulston to John Day 11/05/2021
- bb) Email Patrick Murphy to Tim Ditchfield and Blake Coulston 13/05/2021
- cc) Council Referral Agency Response 24 May 2021 and drawings from Tim Ditchfield Architects DD1.01 H, WD 2.02 H, DD2.01 H, DD 2.02 H, DD 3.01 H, DD 3.02 H, DD 3.03 H, DD3.04 H, DD4.01 H, DD4.02 H, DD4.03 H, 10.03 GH, endorsed as approved.
- dd) Email Jon Day the Council 13/09/2021
- ee) Letter Jon Day to the Council 13/09/2021
- ff) Request for Referral Agency Response from the Council made by Pure Building Approvals
- gg) Drawings from Tim Ditchfield Architects DD1.011, DD2.011, DD2.021, DD 3.011, DD 3.021, DD 4.011, DD 4.021, DD 4.031, 10.02 F, 10.03 I.
- hh) Email Maxwell Potter to Jon Day 7 October 2021
- ii) Email Jon Day to Maxwell Potter 18 October 2021
- jj) Council Referral Agency Response Refusal 22 October 2021
- kk) Architect's Statement
- ll) 4 sheets of photographs of dwellings in Mossman Court and Witta Circle

- mm) Photograph of Dwelling at 48 Mossman Court as depicted prior to installation of screens on the Mossman Court frontage.
- nn) Drawing Tim Ditchfield Architects ES 01 A
- oo) Development Assessment Report with respect to application for a minor change to a referral agency approval by Maxwell Potter of the Council.
- pp) Unsigned Affidavit of Scott Gavin Peabody.
- qq) Drawing EW-1-02 Issue B (referred to in the affidavit of Scott Gavin Peabody item pp)
- rr) Computer generated image dwelling at 26 Mossman Court from Shaun Lockyer Architects Pty Ltd.

The Referral Agencies Response and Assessment Manager's Decision:

17. Under cover of a letter of 13 September 2021 the Appellant requested from the council a Concurrence Agency Response with respect to a minor change application to the existing approval to build a dwelling on the subject site.

18. In their letter Pure Building Approval summarised the changes to the existing approval as follows:

“

- *Inclusion of fixed louvre screens on the frontage elevation*
- *Inclusion of planting on top of the lower-level eaves*
- *Addition of office on the upper level”*

19. The *Request for Referral Agency Response Form* completed by the Appellant included in Item 7 *Reasons for and Justification for the Request* the statement “it is requested that council assess the inclusion of the office which will result in exceeding site cover”

20. In its letter of 22 October 2021, the Council as Referral Agency directed the Assessment Manager refuse the application stating that the application did not comply with the “*Overall Outcome 2(c) and the Performance Outcome PO8 -a), c) and d) of the Low Density Code as the changes:*

Contribute additional site cover, with the total site cover now proposed comprising 53.3 % for the first story and 32.9% for the second storey which is of greater size than the approved dwellings houses in Mossman Court. Therefore, the development is not of a scale compatible with the surrounding development and the increased site cover in not in context with the site.

The proposed increased site cover reduces the available area for soft landscaping

The proposed increased site cover presents an appearance of bulk to adjacent properties, the streetscape and waterway to the rear.”

21. In compliance with the council's direction the Assessment Manager made a decision of 25 October 2021 refusing the application.

22. Performance Outcome PO8 referred to by the council in their response provides:

Performance Outcomes	Acceptable Outcomes
<i>Built Form</i>	

Performance Outcomes	Acceptable Outcomes
<u>Site cover and gross floor area</u> PO8 Development: 1. is of a scale compatible with surrounding development and the particular circumstances of the <u>site</u>; 2. has a low <u>site</u> impact to maximise the opportunity to retain <u>site</u> characteristics, such as native <u>vegetation</u> and natural landforms; 3. allows the opportunity to provide <u>soft landscaping</u> between buildings; 4. does not present an appearance of bulk to adjacent properties, roads or other areas in the vicinity of the <u>site</u>.	AO8.1 <u>Site cover</u> of all buildings and structures on <u>site</u> does not exceed: 1. for a single <u>storey building</u> – 50%; 2. for a <u>building</u> of 2 storeys – 1. 50% for one of the storeys; and 2. 30% for the other <u>storey</u>; or 3. 40% for both storeys. <i>Editor's note—refer to Figure AP3-9A</i> AO8.2 Irrespective of <u>site cover</u>, the total <u>gross floor area</u> of combined buildings does not exceed 500m² with the exception of the following properties at <u>Park Road</u> Noosa Heads, where a maximum <u>gross floor area</u> of 150m² applies: 1. Lot 57 RP230895; 2. Lot 56 RP230895; 3. Lot 55 RP52918; 4. Lot 54 RP52918; and 5. Lot 3 RP122368. Alternative provision to the QDC

23. Throughout the approval process there had been a difference of opinion between the council on the one hand and the Appellant and Assessment Manager on the other as to what elements of the building should be included in site cover. A major component of this disagreement concerned the river terrace on the water frontage side of the house.

24. In its assessment of the request (Item (oo) of the material considered by the Tribunal) the council refers to an Affidavit of Scott Peabody architect who the Tribunal was told conducted an architectural review at the request of the council in connection with an application to the Planning and Environment Court. The Tribunal was provided by Kerri Coyle of the council at the hearing with what she said was an unsigned copy of the affidavit, which is Item (pp) of the material considered by the Tribunal. The Tribunal notes that the other parties had seen the affidavit prior to the hearing.

25. In paragraph 14 of the affidavit of Scott Peabody states “*I have calculated the site cover of the proposed dwelling to be approximately 324 m2 or 53.3%*”. In paragraph 18 Scott Peabody states “*Based on my calculation, the site cover of the ground level measures approximately 324m2 or 53.3 %*” In paragraph 19 (e) Scott Peabody states “*I have measured the river terrace area below the roof structure on the south east elevation as this area is considered to be covered by a building or structure and is not considered to be an eave*”. On plan EW-1-02 issue B, in exhibit **SGP -01** to his affidavit and Item (qq) of the material considered by the Tribunal, the site cover of the second storey of the house is recorded as calculated by Scott Peabody at 200m2 or 32.9%.

Findings of Fact:

26. The Tribunal finds that the site cover of the dwelling after the proposed changes is 324 m2 or 53.3 % for the ground floor and 200m2 or 32.9% for the second story and in doing so accepts the calculations of Scott Peabody.
27. There is no remnant native vegetation and no natural landforms at the site.
28. Both the Appellant and the Council referred to other dwellings in Mossman Court or approved for Mossman Court and records of the site cover of those dwellings in support of their arguments as to the comparative scale of dwellings in Mossman Court. The Tribunal did not place any weight on the records of site cover of the other dwellings on the basis the Tribunal was not confident of the accuracy of those records.

Reasons for the Decision:

29. The tribunal, in accordance with section 254(2)(d) of the PA, has decided this appeal as set out under the heading 'Decision' at the beginning of this decision notice.
30. The reasons for this decision are that:
- a) Based on the Tribunal's factual finding of site area the dwelling does not satisfy Acceptable Outcome A08.1 (2) and must as a result satisfy Performance Outcome PO8.
 - b) The building is of a scale compatible with the other dwellings in Mossman Court.
 - c) The absence of native vegetation and natural landforms means the considerations referred to in PO8 (2) are not relevant.
 - d) The proposed change would not impact soft landscaping between buildings.
 - e) The addition of the office would not add to the appearance of bulk as the space to be occupied by the office will be viewed from the street between substantial stone clad parapets at the first floor and roof level.
 - f) The motorised aluminium screening blades which have already been installed significantly enhance aesthetic value of the building on the Mossman Court frontage.
 - g) For the reasons set out in sub paragraphs b), c), d), e) and f) of this paragraph the proposed changes satisfy Performance Outcome PO8.

Mark Chapple

Development Tribunal Chair
Date: 10 May 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