



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-041
Appellant:	Travis Quang
Respondent (Assessment Manager):	Luke Owen-Jones, EarthCert Building Approvals
Co-respondent (Concurrence Agency):	Noosa Council ("Council")
Site Address:	31 Oriole Avenue, Peregrin Beach, formally described as Lot 654 on P93128 ("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 for a building works development permit for a Class 10 building (pool house) on the subject site ("the application").

Date and time of hearing and site inspection:	Monday, 14 March 2022 at 10.00am
Tribunal:	Neil de Bruyn – Chairperson Suzanne Bosanquet – Member
Present	Travis Quang – appellant Luke Owen-Jones – EarthCert Building Approvals (assessment manager) (part time only) Brad Geaney – Council Representative Matt Adamson – 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 remake the decision within 25 business days of the date of receiving this decision notice, as if the concurrence agency had no requirements.

Background:

1. The subject site is residential lot of 511m² fronting Oriole Avenue, a local access road, on its eastern side and David Low Way, a major road, on its western side. Pedestrian and vehicular access to the subject site is exclusively from Oriole Avenue, with no access provided from David Low Way. The subject site is included within the Low Density Residential Zone under the Noosa Plan 2020, being the current planning scheme ("the planning scheme") for the subject site. The site contains a detached dwelling house with a swimming pool and associated deck area within the rear yard (towards the David Low Way frontage).

2. The appellant proposes to have a pool house constructed on the western side of the existing swimming pool, located towards the David Low Way frontage and the north-western corner of the subject site. Based on the submitted development plans, the proposed pool house is intended to be approximately 11.1m in total width, approximately 6.1m in depth and 4.44m in maximum height above natural ground level, with an enclosed area for the pool plant and equipment, a shower/bathroom/WC and a semi-enclosed pool house area. Significantly, the proposed pool house is to observe a minimum setback of only 125mm to the David Low Way frontage of the subject site.
3. The appellant made the application to the assessment manager for a building works development permit for the proposed building. There is no evidence before the tribunal as to the date upon which this application was made; however, the absence of this information is not considered to be significant.
4. Pursuant to Section 54(1) of the PA, Section 22(1)(a) of the Planning Regulation 2017 ("the PR") and Schedule 9, Part 3, Division 2, Table 3, Item 1 of the PR, the application was referred to Council as a concurrence agency for design and siting in relation to the proposed development.

5. This referral was triggered as the Low Density Residential Zone Code ("the zone code") under the planning scheme specifies alternative design and siting provisions for Class 10 buildings under section 33 of the Building Act 1975, and the proposed development does not achieve Acceptable Outcome ("AO") 9.1 of the zone code. AO9.1 provides as follows:

Buildings and structures have a setback of 6 metres from the road frontage, provided that setback (sic) to one frontage may be reduced to 4.5 metres where the lot:

- a) has frontage to more than one road; and*
- b) is less than 600m² in area; or*
- c) is less than 15 metres in width.*

6. At the hearing, a Council representative advised the tribunal that the applicable setback under AO9.1, for the David Low Way frontage of the subject site, is 6m, as the setback to Oriole Avenue was previously approved by Council to be approximately 4.5m. The proposed pool house setback to David Low Way, at a minimum of 125mm, would not achieve the minimum 6m setback required by the AO.
7. On 29 July 2021, Council, as a concurrence agency, decided to direct the assessment manager to refuse the application and issued a concurrence agency response of the same date. The central ground for this decision was essentially that the David Low Way setback of the proposed pool house would not achieve the applicable performance outcome ("PO"), PO9(f), of the zone code, in that it would not be consistent with the predominant character of the David Low Way streetscape.
8. PO9, in its entirety, provides as follows:

Buildings and structures are designed and sited to:

- a) provide a high level of amenity to users of the subject site and adjoining premises, including provision of visual and acoustic privacy and access to sunlight;*
- b) not unreasonably obstruct views or cause overlooking of private open space or habitable areas of adjoining premises;*
- c) provide adequate distance from adjoining land uses;*
- d) preserve existing vegetation that will help buffer development;*
- e) allow for space and landscaping to be provided between buildings including adequate area at ground level for landscaping with trees, shrubs and outdoor living;*

- f) *be consistent with the predominant character of the streetscape; and*
 - g) *protect the natural character and avoid adverse impacts on ecologically important areas such as national parks, waterways and wetlands.*
9. The stated grounds underpinning Council's concurrence agency decision are essentially that PO9(f) would not be met as:
- a) The character of the David Low Way streetscape, with respect to design and siting, is predominantly represented by larger buildings set back a "considerable" distance from David Low Way, with only minor, non-habitable outbuildings displaying minor encroachments within the prescribed setback.
 - b) The width and height of the proposed building "*built up to the David Low Way road boundary*" would be inconsistent with the predominant character of the streetscape.
10. Following receipt of the concurrence agency response, the assessment manager issued a decision notice dated 5 August 2021, refusing the application. The only ground for refusal stated in the decision notice is the direction given by the concurrence agency response.
11. The appellant duly lodged this appeal on 9 August 2021. The grounds of appeal, as set out in the appellant's Form 10 – Notice of Appeal, are that the proposed building will not impact adversely on the streetscape, by way of bulk, outlook or views, essentially for the following reasons:
- a) Buildings adjoining David Low Way are not clearly visible from that roadway due to the existence of dense vegetation within a 10m wide "*vegetated passage*" (taken to be a reference to the vegetated strip on the subject site's side of the roadway),
 - b) the proposed pool house will be a single-storey building that will not significantly intrude into the streetscape, or views from adjoining residences, and its height will be within the requirements of the zone code,
 - c) the proposed building will not be visible from any boundary interfaces, and
 - d) the height of the proposed pool house at the David Low Way frontage will be within the height of the vegetation within the road reserve.
12. Further grounds of appeal are set out in a report, dated 22 November 2021 and prepared for the appellant by Schomburgk Planning Pty Ltd. By way of summary, this report states that, in the author's opinion:
- a) There is no homogeneous streetscape character in David Low Way, with variations from section to section;
 - b) the streetscape character in the vicinity of the subject site has a vegetated appearance, with built forms not being clearly visible;
 - c) there are other intrusions into the David Low Way setback, with which the proposed pool house would be consistent;
 - d) the proposed pool house is of a size, scale and location that would be consistent with the character of the relevant part of the David Low Way streetscape;
 - e) the location of the proposed pool house would not conflict with PO9(f); and
 - f) the location and scale of the proposed pool house complies with the high order, overall outcomes of the zone code.
13. On 24 March 2022, the tribunal directed Council to provide, by 4pm on 1 April 2022, full details of any currently planned roadworks (including footpath works), or any other planned works, that could require the removal, or partial removal, of the existing dense vegetation

located along the eastern side of David Low Way and within 100m to the north and south of the appeal site.

14. On 1 April 2022, Council provided the requested details and supporting material, identifying that a 3m wide, shared pedestrian/cyclist pathway is planned within David Low Way adjacent to the appeal site, and scheduled for construction between 2026 and 2031.
15. Also on 1 April 2022, the appellant sent an email to the registrar, providing details of a building located at 7 Oriole Avenue that, according to the appellant, is some 150m from the subject site and *"built 1m off their rear boundary."* The appellant's email included four photographs showing a two-storey building located close to a fence. At the tribunal's request, the registrar forwarded the appellant's above-mentioned email and attached photographs to Council, affording it the opportunity to respond and provide any comments on the appellant's further submissions regarding the building at 7 Oriole Avenue.
16. The Council provided its response by email on 19 April 2022. In its response, Council rejected the further submissions made by the appellant regarding the building at 7 Oriole Avenue, stating in essence that:
 - a) this property is some 200m from the subject site and therefore does not form part of the streetscape of the subject site;
 - b) 7 Oriole Avenue has a greater setback to David Low Way than that proposed for the subject site; and that
 - c) irrespective of the setback at 7 Oriole Avenue, the proposed 0.125m setback is inconsistent with the setbacks of other buildings located along the David Low Way frontage.

Jurisdiction:

17. 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.
18. 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).
19. 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, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
20. 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:

21. For this appeal, the onus rests on the appellant to establish that the appeal should be upheld (section 253(2) of PA).
22. 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.
23. 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:

24. 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 12 August 2021, including the appellant's grounds for appeal;
- b) a copy of the assessment manager's decision notice dated 5 August 2021;
- c) a copy of the Noosa Council's concurrence agency response dated 29 July 2021;
- d) a set of design plans showing the proposed building in the context of the existing house and pool on the subject site, as attached to the assessment manager's decision notice;
- e) a copy of DA Form 2 – Building Work Details, forming a part of the application;
- f) a series of photographs purporting to be the view of the subject site from David Low Way and highlighting, in particular, the dense screening vegetation lining the eastern side of that roadway;
- g) a report dated 22 November 2021, and prepared for the appellant by Schomburgk Planning Pty Ltd;
- h) the *Planning Act 2016* and the *Planning Regulation 2017*; and
- i) the Noosa Plan 2020 (25 September 2020).

Findings:

25. The tribunal finds that the application was correctly referred to Council as a concurrence agency, and correctly assessed by Council against AO9.1 and PO9 of the Low Density Residential Zone Code (as mentioned previously, referred to herein as "the zone code"), comprising of the alternative setback provisions for the building work under section 33 of the Building Act 1975.
26. The tribunal accepts the evidence provided at the hearing by Council's representative to the effect that the acceptable minimum setback under AO9.1 to David Low Way would be 6m. Accordingly, it is clear that the proposed minimum setback of the subject development will not achieve this acceptable outcome.
27. However, the tribunal nevertheless finds that the proposed development will achieve PO9 of the zone code, as explained below.
28. Based upon the evidence before the tribunal, there is no dispute between the parties that the proposed development will satisfy sub-sections (a) to (e), inclusive, of PO9, and also sub-section (g) of that PO. The subject of this appeal is therefore only whether, or not, the proposed development satisfies sub-section (f) of the PO, requiring that the development be sited to be consistent with the predominant character of the David Low Way streetscape.
29. The tribunal finds that the predominant character of the David Low Way streetscape is defined by the substantial screening vegetation lining the eastern side of that roadway in the general vicinity of the subject site, and not by the buildings located behind, and effectively screened by, that vegetation. The tribunal observed, on the day of the site inspection, that the subject site is all but invisible from David Low Way, and *vice versa*. The tribunal also observed that this is the case for other lots extending a considerable distance to the north and south of the subject site.
30. The tribunal finds further that the planned shared footpath works within David Low Way must be taken into account in this appeal, as these planned works are included in the local government infrastructure plan under the planning scheme and are therefore relevant to an assessment of potential streetscape impacts in terms of PO9 of the zone code. That is, were the planned footpath works, for example, to result in the complete removal of the vegetation that currently defines the existing streetscape character, consideration would

have to be given to the impact that the proposed development would then have on the resultant, future streetscape character without the vegetation.

31. In this regard, the tribunal finds that it would be reasonable to conclude that the completion of the shared footpath works would be unlikely to necessitate the complete removal of the screening vegetation. In this regard, the width of the area between the constructed roadway of David Low Way and the subject site's frontage is approximately 10m. A 3m wide shared footpath, with cleared areas on each side of 2m in width (considered a conservative estimate), would still leave a substantial vegetated strip of at least 3m in width adjacent to the subject site's frontage. The tribunal finds that it would be reasonable to conclude that this width would be sufficient to maintain the predominantly vegetated character of the streetscape, and to effectively screen the proposed development, even after a shared footpath and associated clearing have been completed in the future.
32. Accordingly, the tribunal finds that the proposed development would not impact upon the predominant character of the David Low Way streetscape in the vicinity of the subject site, even if or when the planned footpath works are completed, and therefore that the proposed development will not compromise the achievement of PO9 of the zone code, including sub-section (f) of the PO.
33. The tribunal therefore finds that the assessment manager's decision to refuse the application must be set aside, and orders the assessment manager to remake the decision, as if the concurrence agency had no requirements.

Reasons for the Decision:

34. 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.
35. The reasons for this decision are that:
- a) The siting of the proposed building will achieve Performance Outcome PO9 of the zone code; and that
 - b) it is reasonable to conclude that it will continue to do so after the future construction of a planned footpath within the road reserve of David Low Way is completed.
36. For above reasons, the tribunal finds that appellant has established that the appeal should be upheld, as required by section 253(2) of the PA.

Neil de Bruyn

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:

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