



Development Tribunal – Decision Notice

Planning Act 2016 Section 255

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| Appeal number: | 23-048 |
| Appellants: | John Wall and Kate Wall |
| Assessment manager: | Aaron Green |
| Co-respondent (Concurrence agency): | Noosa Shire Council |
| Site address: | 8 Attunga Heights Noosa Heads Qld 4567 described as Lot 23 RP 89506 – the subject site |

Appeal

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the decision of the Assessment Manager, as directed by the Concurrence Agency for refusal of a Development Permit for Building Works for a Class 10a structure being a proposed pergola (roofed) and a Class 10b structure being a trellis. The decision followed a referral agency response by the Noosa Shire Council directing refusal of the application on the grounds that the proposal does not meet the Performance Outcome P12 (a) and (c) of the *Noosa Plan 2020*, “Medium Density Residential Zone Code.”

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| Date, time and place of hearing: | Online hearing facilitated online by the Registrar, Development Tribunal at 2.00pm on 28 November 2023. |
| Tribunal: | Dr Christopher Robertson — Chair Markus Pye — Member |
| Present: | John Wall and Kate Wall – Appellants Benjamin Hennig –Agent for the Appellants Jarrad Postle — Council Representative |

Decision:

The Development Tribunal (Tribunal), in accordance with section s254(2)(d) of the *Planning Act 2016* “PA”, sets aside the decision of the Assessment Manager to refuse the application and orders the Assessment Manager to re-make the decision within 25 business days of the date of this Decision Notice, as if the Concurrence Agency had no requirements and if the Assessment Manager decides to approve the application, then with the following conditions –

1. Pergola location – distance to the rear eastern boundary of a minimum of 4850mm (*considered to be the proposed P2 location*) as indicated on PERGOLA ROOF PLAN;
2. Pergola to retain roof length of approx. 4350mm: as indicated on: PERGOLA ROOF PLAN;
3. Pergola to retain 1500mm side northern boundary clearance as indicated on: PERGOLA ROOF PLAN;
4. Pergola heights retained as proposed as indicated on: PERGOLA SECTION A-A;
5. Proposed trellis screening (*ornamental/horticultural* element) to northern boundary pool side to remain as proposed or modified to integrate with the pergola's relocation.

Background

1. Attunga Heights runs in a north-south direction, with the subject site generally fronting the street in an east-west direction, and is located within the Noosa Heads Local Plan. The total site area is 531m² and is overlooked by adjacent properties to the North and West.
2. Anecdotal evidence was provided that a previous attempt, in the form of a rear fence between the adjacent property to the west and the subject site, was utilised to increase privacy and reduce noise. Due to non-compliance of the new fence the Council required the fence be reduced in height, resulting in the remaining fence section being unable to adequately reduce noise or provide further privacy.
3. The Appellants lodged an application with Professional Certification Group Pty Ltd for a proposed roofed pergola and deck located in the southeast portion of the subject site. The pergola is noted as sited 1500mm from the rear eastern boundary and 1500mm from the side northern side on drawing PERGOLA ROOF PLAN. The proposed pergola ranges from a rear height of RL 65195 to a height of RL 66000 and total roof area of approximately 20m².
4. The proposal triggered a referral agency response to Noosa Council (Schedule 9, Division 2, Table 3). An information request was issued by Noosa Council on 15 March 2023, in which it was noted:

It is suggested that Council is unlikely to support a reduction to the side boundary setback in this instance. It is further suggested that Council may only consider a minor reduction to the rear boundary setback for the proposed pergola and deck.

If an alternative design which reflects the information provided can be achieved, please submit revised plans for further consideration.

5. In its Referral Agency Response, dated 11 August 2023, Noosa Council directed the Assessment Manager (Professional Certification Group Pty Ltd) to refuse the Application citing the following reasons:

Noosa Plan 2020 – Medium Density Residential Zone Code

PO12 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;

It has been considered that the proposed pergola within the rear boundary setback may impact the amenity of the users of the adjoining premises. In addition to the pergola, the existing unapproved deck within the northern side

boundary setback may also impact the amenity of the users of the adjoining premises.

c) provide adequate distance from adjoining land uses;

It has been considered that the proposed pergola within the rear boundary setback does not provide an adequate distance from the adjoining land uses.

6. On 17 October 2023, the Appellants appealed to the Development Tribunal citing the justification that the proposal:

(a) improves amenity of adjacent properties as well as their own in the following ways:

- noise reduction, for all home owners/renters of the properties
- *privacy, for all home owners/renters of the properties*
- *sun and weather protection*
- *overlooking. As we are the lowest property, we have a constant line of vision from any one of the adjoining houses/apartments, whether they are inside or outside on a balcony. It is very uncomfortable to sit outside knowing that at any given time that we are watched - inadvertently or not. We have young children that stay with us and knowing that they can also be watched is unnerving.*

(b) Attempts by neighbours (rear) to erect a screening wall had also been refused by Council.

(c) Further, that:

The proposed architecturally designed pergola does not impact any of the adjoining properties from the point of view of shadowing or loss of vision it only serves to reduce the noise from standard back yard use and also provides all properties with some privacy.

We modified the original application on council advice and removed the side screening (which the owner of 10 Attunga approved) as well as adjusting the position and size of the pergola however this was not enough for council to approve.

Jurisdiction

7. Section 229(1) of the Act identifies that schedule 1 states the matters that may be appealed to the Tribunal.

8. Table 1 of schedule 1 of the Act states the matters that may be appealed to the Planning and Environment Court or the Tribunal subject to (in the case of the Tribunal) the preconditions stated in section 1(2) of schedule 1.

9. The Tribunal has jurisdiction to determine this appeal under section 229(1)(a)(i), schedule 1, section 1, table 1, item 1(a), and schedule 1, section 1(2)(g) of the Act.

Decision framework

10. The Appellant as the recipient of the decision notice must establish that the appeal should be upheld (under section 253(2) of the PA).

11. 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 the subject of this appeal (under section 253(4) of the PA).
12. Section 249 of the PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and the Tribunal may seek the views of any person.
13. The Tribunal is required to decide the appeal in one of the following relevant ways set out in section 254(2) of the PA:
 - (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*

Material considered

14. The material considered in arriving at this decision was:
 - (a) Form 10 Notice of appeal, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 17 October, 2023.
 - (b) *The Noosa Plan 2020*
 - (c) "6.3.2.1 Medium Density Residential Design Code", *The Noosa Plan 2020*
 - (d) "7.2.5 Noosa Heads Local Plan, *The Noosa Plan 2020*.
 - (e) *Planning Act 2016* (QLD)
 - (f) Schedule 1-Minimum Boundary Setbacks for Buildings and Other Structures," *The Noosa Plan*. (Including amendments to 8 June 2018).
 - (g) MP 1.2 Design and Sitting Standards for Single Detached Housing on Lots 450M² and over." Queensland Development Code.
 - (h) PERGOLA ROOF PLAN – defined as plan lodged with Form 10 materials headed "1 PERGOLA ROOF PLAN: Preliminary Not for Construction." Dated: 24.01.23. Version date: 1/06/23.

Findings of fact

15. The proposal as presented seeks to mitigate noise emitting from pool usage and visual intrusion into the pool area from the adjacent properties.
16. As a result of the unique topography, the subject site's smaller allotment size, with particular reference to the immediate proximity of the swimming pool and rear deck to the adjacent properties to the north and west, this area of the subject site is overlooked.
17. The proposal as presented conflicts with *Noosa Plan 2020* – "Medium Density Residential Zone Code under PO12(a):
 -*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 where Acceptable Solution AO12.1, buildings and structures meet the following minimum boundary setbacks:

- (b) *for side boundaries—*
 - (i) *1.5 metres setback up to 4.5 metres height;*
 - (ii) *2 metres setback between 4.5 metres and 7.5 metres height; and*
 - (iii) *2.5 metres where above 7.5 metres height*
- (c) *for the rear boundary - 6 metres*

Reasons for the decision

18. The Tribunal recognises the right of the Appellants and the adjacent property owners to use and enjoy their respective properties without undue noise and privacy intrusions.
19. The Tribunal recognises that under application of the performance-based planning system a sympathetically and suitably designed and located pergola and trellis screening, potentially supported by deep plantings, in consideration of the environs, topography and subject site's attributes, could reduce privacy intrusions and may minimise noise from the pool area to the adjacent properties and achieve the desired Performance Outcome as recognised by the planning scheme.
20. The intent of the proposal was to significantly increase the amenity of the pool area both day and night and in all weather. However, with respect to the Performance Outcome, whilst the proposal illustrates how it provides provision of visual privacy to all affected properties, the proposal does not demonstrate how it mitigates acoustic impacts on adjacent properties. Foliage and a roofed pergola are not considered adequate acoustic mitigating strategies for affected properties by the Tribunal.
21. The Tribunal considered the proposal, with applied conditions, as the achievement of the Performance Outcome on this site.

Dr Christopher Robertson
Development Tribunal Chair

Date: 21 December 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
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