



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

**Appeal Number:** 21-049

**Appellant:** Thanh Tran

**Respondent:** Bundaberg Regional Council  
**(Assessment Manager)**

**Site Address:** 11 Cullen Street, Walkervale and described as Lot 11 on RP59334 – the subject site

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### Appeal

This is an appeal under section 229, section 1 of Schedule 1 and item 1 of Table 1 of the *Planning Act 2016 (PA)* against the Bundaberg Regional Council's (**Respondent**) decision to refuse a development application for a development permit for a material change of use for dual occupancy on the subject site (**Dual Occupancy Application**), given by a Decision Notice dated 30 July 2021 (**Refusal**).

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**Date and time of hearing:** 11.30am on Monday 13 December 2021

**Place of hearing:** The Subject Site

**Tribunal:** Samantha Hall – Chair  
Victoria Jones – Member  
Andrew Magoffin - Member

**Present:**

**Appellant**  
Thanh Tran – Appellant  
Tabitha Loveday  
Shane Booth – Insite SJC

**Respondent**  
Richard Jenner – Manager Development Assessment  
Sarah Watts – Principal Planner

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### Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(c) of the PA **sets aside** the decision of the Respondent to refuse the Dual Occupancy Application, and orders that the Dual Occupancy Application is approved subject to the conditions set out in **Attachment 2**.

## Background

1. The subject site is described as 11 Cullen Street, Walkervale (Lot 11 on RP59334). Walkervale is a southern suburb of Bundaberg typified by low density residential development, built around a grid-like street pattern.
2. The Site is approximately 1,012m<sup>2</sup> in area, relatively flat and currently hosts a dwelling house near its street frontage. Walkervale State School is less than 150 metres south of the subject site.
3. The subject site is located within the Low density residential zone of the *Bundaberg Regional Council Planning scheme 2015 (Planning Scheme)*.
4. On or around 17 June 2021, the Appellant lodged the Dual Occupancy Application with the Respondent. The Respondent accepted the Dual Occupancy Application as being properly made that same day.
5. The Dual Occupancy Application was subject to code assessment due to its non-compliance with AO5.1 of the Dual Occupancy Code (**AO5.1**)<sup>1</sup>, given a dual occupancy development already existed at 7 Cullen Street, meaning 9 Cullen Street, which was located between 7 Cullen Street and 11 Cullen Street, would be adjoined by more than one dual occupancy development, fronting that same street, if the proposed development was approved.
6. The Appellant's town planning representative, Mr Shane Booth, Principal Planner of Insite SJC, by letter dated 17 August 2021 written for the purposes of this appeal, identifies (in paragraph 2) the following:
  - (a) Further representations regarding the Dual Occupancy Application and compliance with AO5.1 were provided to the Respondent by way of email dated 22 June 2021;
  - (b) A copy of a development approval for a similar development application for a dual occupancy development at 14 Griffith Street, Bundaberg South (described as Lot 24 on RP13463) was provided to the Respondent by way of email dated 22 June 2021.
7. On 30 July 2021, the Respondent refused the Dual Occupancy Application and gave the following reasons for the Refusal:
  - "1. *The proposed development does not comply with provisions of the Bundaberg Regional Council Planning Scheme 2015, namely:*
    - (a) *The proposed Dual Occupancy does not comply with the purpose of the Dual Occupancy Code because:*
      - (i) *It does not maintain the amenity and enjoyment of neighbouring premises because:*
        - A. *It does not achieve dispersal of dual occupancies within the low density residential neighbourhoods;*
        - B. *It results in unacceptable impacts to the amenity of neighbouring properties in terms of privacy, residential character and traffic;*

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<sup>1</sup> See section 9.2.5.3 (Specific Benchmarks for Assessment) of the Dual Occupancy Code of the Planning Scheme.

- (b) *The proposed Dual Occupancy does not comply with Overall Outcomes (2)(b) – (d) of the Dual Occupancy Code because:*
  - (i) *It is not sited and designed to protect the amenity and privacy of adjoining residential premises;*
  - (ii) *It does not achieve a dispersal of dual occupancies with the low density residential neighbourhoods; and*
  - (iii) *It results in a progressive increase in residential densities in a way that is not planned and not consistent with infrastructure assumptions.*
- (c) *The proposed Dual Occupancy does not comply with Performance Outcome PO5 of the Dual Occupancy Code as:*
  - (i) *The failure to achieve dispersal of dual occupancies in the low density residential neighbourhood results in:*
    - A. *An unacceptable change to the character of the low density residential neighbourhood; and*
    - B. *The failure to protect the amenity of the low density residential neighbourhood in terms of privacy, residential character and traffic.*

2. *The discretion under Section 60(2)(b) of the Planning Act 2016 cannot be exercised in favour of approval because the proposed development does not comply with the provisions of the Bundaberg Regional Council Planning Scheme 2015 as identified in paragraph 1 above and such non-compliance warrants refusal because:*

- (a) *The proposed development is inconsistent with reasonable community expectations as informed by the Bundaberg Regional Council Planning Scheme 2015 (in terms of privacy, residential character, amenity and traffic) and the expectations of those persons living and investing in the locality in which the proposed [sic]*
- (b) *The proposed development results in the progressive increase in residential densities in a way that is not planned or contemplated under the Bundaberg Regional Council Planning Scheme 2015, with such dispersal intend (sic) to assist with:*
  - (i) *protecting the amenity of residential neighbourhoods (in terms of privacy, residential character and traffic);*
  - (ii) *protecting the residential character of residential neighbourhoods; and*
  - (iii) *ensuring that residential densities are consistent with infrastructure assumptions and planned or existing community facilities.”*

8. On or about 18 August 2021, the Appellant filed the Form 10 – Appeal Notice with the Registry of the Building Tribunals.

9. The grounds of appeal identified that the Appellant was appealing against the Refusal and the grounds for the appeal can be summarised as follows:

- (a) The Appellant acknowledged that the Dual Occupancy Application did not comply with the acceptable outcome – AO5.1(a) and (b);

- (b) AO5.1(a) and (b) was an “acceptable outcome” and one way of achieving the performance outcome;
  - (c) The Dual Occupancy Application complied with PO5 of the Dual Occupancy Code (**PO5**) or could be conditioned to comply with PO5 because the dual occupancy would be located, designed and constructed to:
    - (i) be dispersed across predominantly low density residential neighbourhoods because it was within the Low density residential zone and there were less than four (4) dual occupancy developments within a 1 kilometre radius of the subject site;
    - (ii) provide an attractive address to the street frontage because there would be no change to the amenity or character of Cullen Street as the dwelling at the front of the subject site which fronts the street would remain and the proposed second dwelling would be at the rear of the subject site;
    - (iii) make a positive contribution to the preferred streetscape character of the locality because again, the streetscape would remain unchanged as the existing dwelling fronting Cullen Street would remain;
    - (iv) minimise opportunities for residents to overlook the private open space of neighbouring properties because the proposed dwelling would be single storey and the location of it and the siting of the adjoining dwellings was such that no overlooking would occur. In addition the neighbouring properties would be separated by a 1.8m high fully screened fence;
    - (v) provide opportunities for casual surveillance of public and communal spaces because it had windows that faced the public and communal spaces within the site;
  - (d) The Respondent gave a development approval for a similar dual occupancy development application on 24 February 2021, located at 14 Griffith Street, Bundaberg South (described as Lot 24 on RP13463) (**Griffith St Approval**), in which a dual occupancy development was approved that would result in a dwelling house located in the Low density residential zone to be adjoined by more than one dual occupancy development fronting the same street.
10. A site inspection and the hearing of the appeal was held at the subject site by the Tribunal on 13 December 2021.
11. At the hearing the Respondent undertook to provide additional information to the Tribunal’s Registry.
12. By email dated 14 December 2021, the Tribunal’s Registrar made a direction to the Respondent, pursuant to section 250 of the PA (**Directions**) to provide the following documents to the Registry on or before 4pm on Friday 17 December 2021:
- (a) *“An informal submission made by a neighbour in respect of the proposed development sent to the Council by email;*
  - (b) *The Council officer’s report which assessed the development application made to the Council;*
  - (c) *A copy of the plan tabled at the hearing which identified the existing dual occupancies in the area; and*
  - (d) *A copy of the plan tabled at the hearing which identified the dual occupancy at 14 Griffith Street, Bundaberg South.”*

13. By email dated 15 December 2021, from Ms Sarah Watts of the Respondent to the Tribunal's Registrar, the Respondent provided the documents as required by the Directions.
14. By email dated 22 February 2022, the Tribunal's Registrar conveyed the following to the parties:
  1. *The Development Tribunal has considered the submissions made by the parties and the evidence provided at the hearing and has reached an initial decision in respect of the appeal;*
  2. *The Development Tribunal intends to approve the proposed development and replace the Council's refusal of the development application with an approval;*
  3. *The Development Tribunal requests the Council to submit the following for the Tribunal's consideration on or before 4pm on Friday 4 March 2022, namely - any conditions the Council would like the Development Tribunal to impose upon the approval;*
  4. *Any conditions provided by the Council are of course to comply with sections 65 and 66 of the Planning Act 2016; and*
  5. *The Development Tribunal will consider any conditions provided by the Council and will proceed to finalise and issue its Decision Notice in respect of the appeal.*
15. By email dated 4 March 2022, from Mr Richard Jenner of the Respondent to the Tribunal's Registrar, the Respondent provided draft development conditions.
16. By email dated 23 March 2022, from Mr Zack McKay on behalf of the Appellant to the Tribunal's Registrar, the Appellant provided its response to the draft development conditions.
17. By email dated 24 March 2022, from MR Richard Jenner of the Respondent to the Tribunal's Registrar, the Responded provided a further response.

## **Jurisdiction**

18. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.<sup>2</sup>
19. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).
20. Section 1(2)(a)(i) of Schedule 1 of the PA, relevantly refers to "the refusal, or deemed refusal of a development application for ... a material change of use for a classified building".
21. The PA defines a "classified building" as including a "class 1 building". By reference to Australia's national building classifications, the proposed development encompasses two class 1 buildings (an existing one and a proposed one).
22. So, Table 1 of Schedule 1 of the PA applies to the Tribunal.
23. Under item 1 of table 1 of Schedule 1 of the PA, an appeal may be made against "the refusal of all or part of the development application". The appeal is to be made by the applicant, who in this case was the Appellant and the respondent to the appeal is the assessment manager, who in this case was the Respondent.

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<sup>2</sup> Section 229(1)(a) of the PA.

24. In circumstances where the Decision Notice was dated 30 July 2021 and was received on the same day<sup>3</sup>, this appeal was to be filed on or before 27 August 2021.<sup>4</sup> This was satisfied, with the appeal being filed on 18 August 2021<sup>5</sup>.
25. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

### **Decision framework**

26. The Decision Notice was issued by the Respondent on 30 July 2021. At that time, the PA was in force.
27. The Appellant filed a Form 10 – Notice of Appeal / Application for Declaration on or about 18 August 2021.
28. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.
29. This is an appeal by the Appellant, the recipient of the Decision Notice and accordingly, the Appellant must establish that the appeal should be upheld.<sup>6</sup>
30. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Respondent which decided to give the Decision Notice the subject of this appeal.<sup>7</sup>
31. The Chairperson of a tribunal must decide how tribunal proceedings are to be conducted<sup>8</sup> and the tribunal must give notice of the time and place of the hearing to all parties<sup>9</sup>.
32. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal<sup>10</sup>.
33. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person<sup>11</sup>.
34. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.<sup>12</sup>
35. Prior to the conclusion of the hearing of the appeal, the Tribunal requested that additional information be provided by the Respondent. This request was formalised in the Directions. The Respondent provided the information sought by the Directions.
36. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
  - (a) *confirming the decision; or*
  - (b) *changing the decision; or*

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<sup>3</sup> See Item 3 (Date written notice of decision received) of the Form 10 – Notice of Appeal / Application for Declaration of this appeal.

<sup>4</sup> Section 229 of the PA.

<sup>5</sup> For completeness it is noted that the filing fee for the appeal was received by the Registrar on 24 August 2021, also before 27 August 2021.

<sup>6</sup> Section 253(2) of the PA.

<sup>7</sup> Section 253(4) of the PA.

<sup>8</sup> Section 249(1) of the PA.

<sup>9</sup> Section 249(4) of the PA.

<sup>10</sup> Section 253(5)(a) of the PA.

<sup>11</sup> Section 249 of the PA.

<sup>12</sup> Section 253 and section 246 of the PA.

- (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) *for a deemed refusal of an application:*
  - (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
  - (ii) *deciding the application.*

## **Material Considered**

37. The material considered in arriving at this decision comprises:

- (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on or about 18 August 2021;
- (b) An email dated 15 December 2021, from Ms Sarah Watts of the Respondent to the Tribunal's Registrar, providing the following documents as required by the Directions:
  - (i) An informal submission made by a neighbour in respect of the proposed development sent to the Council by email dated 4 April 2021;
  - (ii) The Council officer's report dated 30 July 2021, which assessed the Dual Occupancy Application made to the Respondent;
  - (iii) A copy of the following plans, all dated 10 December 2021, which were tabled at the hearing:
    - A a plan titled "Cullen St Zoning" which identified the zoning of the Site and surrounding area;
    - B a plan titled "Griffith St" which identified the dual occupancy at 14 Griffith Street, Bundaberg South; and
    - C a plan titled "Cullen St Zoning" which has red markings to identify the existing dual occupancies in the area of the proposed development;
- (c) Subject site and surrounding area photographs taken by Victoria Jones during the site inspection on 13 December 2021 (included in **Attachment 1**);
- (d) Draft conditions provided by the Respondent under the cover of an email dated 4 March 2022 from Mr Richard Jenner of the Respondent to the Tribunal's Registrar;
- (e) *Bundaberg Regional Council Planning Scheme 2015 (Planning Scheme)*; and
- (f) *Planning Act 2016 (PA)*.

## **Findings of Fact**

The Tribunal makes the following findings of fact:

### Issues in dispute in appeal

38. It was common ground between the parties that the Dual Occupancy Application did not comply with acceptable outcome AO5.1(a) and (b).

39. The issues in dispute therefore came down to whether the Dual Occupancy Application instead complied with the performance outcome PO5.
40. PO5 relevantly provided the following:
- The dual occupancy is located, designed and constructed to:-*
- (a) be dispersed across predominantly low density residential neighbourhoods;*
  - (b) provide an attractive address to all street frontages;*
  - (c) make a positive contribution to the preferred streetscape character of the locality;*
  - (d) minimise opportunities for residents to overlook the private open space of neighbouring premises; and*
  - (e) provide opportunities for casual surveillance of public and communal spaces.*
41. While the Decision Notice also included non-compliance with the purpose and overall outcomes of the Dual Occupancy Code as reasons for refusal by the Respondent, the evidence provided by the parties at the hearing of the appeal focussed largely on addressing PO5.
42. The Tribunal considered the purpose and overall outcomes of the Dual Occupancy Code as raised by the Respondent in the Decision Notice and was comfortable that those issues were effectively duplicated in PO5(a) to (e).

#### The planning framework

43. Accepted development does not require a development approval.<sup>13</sup>
44. Table 5.4.1 of the Planning Scheme, identified that the category of assessment for a development application for a dual occupancy use within the Low density residential zone would be “accepted subject to requirements”. The sole applicable use code (assessment benchmark) was identified as the “Dual occupancy code”.
45. This meant that dual occupancy development would be accepted development and not require a development approval where it complied with the Acceptable Outcomes of the Dual Occupancy Code.
46. Section 5.3.3(2) of the Planning Scheme relevantly provided the following:
- “Accepted Development that does not comply with one or more of the nominated acceptable outcomes in the relevant parts of the applicable code(s) becomes code assessable development unless otherwise specified.”*
47. The Dual Occupancy Code contained about a dozen Acceptable Outcomes, including AO5.1(a) and (b), which required (in the case of ‘accepted development’) that a dual occupancy in the Low density residential zone does not result in a dwelling house in that same zone *“to be adjoined by more than one dual occupancy development fronting the same street”*.
48. As was acknowledged by the parties, the Dual Occupancy Application did not comply with acceptable outcome AO5.1(a) and (b) and therefore instead of the Dual Occupancy Application being accepted development as set out in Table 5.4.1 of the Planning Scheme, it became code assessable development.

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<sup>13</sup> Section 5.3.3(1) of the Planning Scheme and section 44(4) of the PA.



49. Section 5.3.3(4)(b) of the Planning Scheme then relevantly identified the relevant assessment benchmarks for code assessable development that occurred as a result of development becoming code assessable pursuant to sub-section 5.3.3(2), as follows:
- (a) *“be assessed against the assessment benchmarks for the development application, limited to the subject matter of the required acceptable outcomes that were not complied with ... under sub-section 5.3.3(2); and*
  - (b) *comply with all required acceptable outcomes identified in sub-section 5.3.3(1), other than those mentioned in sub-section 5.3.3(2).”*
50. This means that the Dual Occupancy Application was to be assessed against all the relevant acceptable outcomes in the Dual Occupancy Code with which it complied and in respect of any acceptable outcome with which it did not comply, the Dual Occupancy Application was to be assessed against the corresponding performance outcome for that acceptable outcome.
51. Accordingly, the Dual Occupancy Application was to be assessed against the following:
- (a) Acceptable outcomes AO1 to AO4.2 and AO6.1 to AO12.2; and
  - (b) PO5.
52. The Tribunal understands that it is agreed between the parties that the Dual Occupancy Application complied with all the acceptable outcomes of the Dual Occupancy Code except for AO5.1(a) and (b).
53. Accordingly, it is the assessment of the Dual Occupancy Application against PO5 that is in issue in the appeal.

#### The parties' evidence at the hearing

54. At the hearing of the appeal, both parties gave evidence with respect to each of the five elements of PO5.

#### *The Appellant's evidence*

55. In essence, the Appellant's submission in respect of PO5(a) was that the proposed development would not result in dual occupancy developments becoming other than dispersed throughout the neighbourhood. To support that position, the Appellant relied upon its assessment that there are “less than four” dual occupancy developments within a one-kilometre radius of the site.<sup>14</sup>
56. For PO5(b), the Appellant contended that the proposed development would address the sole street frontage in a way that was unchanged from the existing scenario (pre-development). That position was substantiated by identifying that the existing dwelling house (to be retained as part of the proposed development) was sited near the street front and the proposed new dwelling was to be located at the rear of the lot.
57. For PO5(c), the Appellant's case for compliance was effectively a repetition of the reason the Appellant contended for compliance with PO5(b).
58. PO5(d) sought to “minimise opportunities for residents to overlook the private open space of neighbouring premises”. The Appellant contended that the proposal development complied with that provision because:

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<sup>14</sup> Insite SJC, 17 August 2021.

- (a) the proposed new dwelling was single-storey only;
- (b) the physical relationship between the proposed new dwelling and dwellings on neighbouring lots would foster a compliant outcome; and
- (c) a 1.8-metre high fence along the site's boundary would prevent overlooking in the relevant respects.<sup>15</sup>

59. In respect of providing "opportunities for casual surveillance of public and communal spaces" (PO5(e)), the Appellant's position was that the "dual occupancy has been designed with windows that face the public and communal open spaces within the site" to achieve the requisite outcome.<sup>16</sup>

*The Respondent's evidence*

60. The Respondent addressed PO5 in the Refusal, although not by addressing each of its five elements. Instead, the Respondent relied more generally on matters of adverse character and amenity impacts, which it said would result from the proposed development being constructed. The Respondent contended that those adverse impacts would stem from a failure to achieve dispersal of dual occupancy developments throughout the neighbourhood.
61. At the Hearing, the Tribunal invited the Respondent to state its position regarding compliance with each of PO5(a), (b), (c), (d) and (e).
62. What is clearest about the Respondent's evidence regarding PO5 is that it strongly contended for non-compliance with PO5(a) – dispersal of dual occupancy developments across predominantly low density residential neighbourhoods.
63. On the Tribunal's understanding of it, the Respondent's position regarding PO5(a) was that all of the dual occupancy developments in the neighbourhood of the subject site were clustered in the one location (with the subject site being in that very location). On that basis, the Respondent submitted that the proposed development failed to achieve a dispersal of dual occupancy developments in a predominantly low density residential neighbourhood.
64. A primary concern of the Respondent's regarding what it considered to be non-compliance with PO5(a) was the matter of community expectation. The Respondent stated that it was the community's expectation that no dwelling house in this zone would be adjoined by more than one dual occupancy development and, on the facts on this case, the proposed development ran counter to that expectation.
65. At the Hearing, the Respondent almost conceded that non-compliance with PO5(b) might not be a defensible position. At the very least, Mr Jenner conceded that the Appellant's case for compliance was aided by the re-use of the existing house (as one half of the dual occupancy development) and acknowledged that the new dwelling would be well setback from the street frontage. On those bases, the Respondent was "less concerned" about compliance with PO5(b).
66. For PO5(c), the Respondent contended for non-compliance on the basis that a doubling of the (site) density could lead to impacts on streetscape character in the locality, although it offered no substantiation of that position.
67. As stated at 588 above, PO5(d) was directed to matters of privacy and overlooking of neighbours. Again, the Respondent's position on the question of compliance was that the

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

doubling of the density increased the potential for overlooking, but that the matter came down to building design. In that context, Mr Jenner cited no issue with the proposed new dwelling, from an overlooking respect, given it was proposed to be single-storey.

68. For PO5(e), the Respondent's position was that it either did not apply to the proposed development or that the proposed development was compliant because the existing dwelling (to be retained) fronted the street and afforded opportunities for casual surveillance of the public realm.

## **Reasons for the Decision**

### The site inspection

69. Inspection confirmed that the subject site was flat with a street frontage of 20.1 metres. Notably, the footprint of the existing dwelling to be retained was compact and setback approximately 9 metres from the southern side boundary, providing ample width for a driveway extending from the existing street crossover to the proposed rear dwelling.
70. Given that the proposed development complied with provisions for site suitability, site cover, building height, open space, safety and security, services and utilities, car parking and access, the inspection focused on the streetscape character of the Low density residential zone to assess the single aspect of non-compliance, i.e. AO5.1.
71. The reason for the proposed development's deemed non-compliance with AO5.1 was that a dual occupancy already existed in the same street at number 7. Accordingly, consideration focused on the existing streetscape character. The dual occupancy at 7 Cullen Street had a traditional-style house at the front which appeared like a single house. The rear dwelling was concealed from view behind the original house (see **Attachment 1**). This situation could be deemed non-compliant with the safety and security provisions in A08.1 and A08.2 of the Dual Occupancy Code regarding sightlines from the street to the front door of the rear dwelling, but from a streetscape character perspective, the existence of a second dwelling in this arrangement has negligible impact. It could be argued that the greater site coverage has led to the absence of a backdrop of backyard greenery, but many of the front and back yards in this neighbourhood did not have tall trees or established gardens.
72. The recently completed dual occupancy at 14 Griffith Street, Bundaberg South, which was cited by the Appellant, and another at 160 Targo Street, Walkervale, were scenarios where both dwellings were relatively new (See **Attachment 1**). These did not appear to introduce greater density, but they did demonstrate how completely new buildings, no matter what arrangement, style and materials, can introduce greater change to streetscapes, which suggests that if conservation of the traditional character of neighbourhoods is a desired outcome, retention of existing houses and front gardens, as proposed at 11 Cullen Street, typically has less impact.
73. Having regard to these various streetscape character considerations, the proposed development on the subject site would achieve an acceptable outcome. Retention of the existing traditional timber house would maintain the existing streetscape presence. The second dwelling at the rear would be visible if the front gates were open because of the wide 9 metres view corridor from the street frontage to the proposed dwelling, but that would not intrude on the character of Cullen Street.

### Assessment of the Dual Occupancy Application

74. Being code assessable development, this appeal must be decided in accordance with subsection 60(2) of the PA, which requires that the Tribunal:

- (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and*
- (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and ...*
- (c) may impose development conditions on an approval; and*
- (d) may, to the extent the development does not comply with some or all [of] the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.*

75. Relevantly then, Table 5.4.1 of the Planning Scheme identifies the sole assessment benchmark for this application as being the Dual Occupancy Code, and on the evidence before this Tribunal it is only compliance with PO5 that is in dispute between the parties.
76. For the reasons that follow, this Tribunal finds that the proposed development complies with PO5.
77. In respect of PO5(a), the Tribunal is satisfied that the evidence provides that there are very few dual occupancy developments in the low density residential neighbourhood of the subject site. Although those few examples of dual occupancy development discussed by the parties are near to the subject site, the Respondent's position that if the proposed development were approved they would become other than "dispersed across [a] predominantly low density residential neighbourhood ..." is not compelling.
78. To assess what constitutes a proper dispersal of this use across a low density residential neighbourhood logically requires one to:
- (a) at least roughly define the physical extents of the neighbourhood in question;
  - (b) identify the number of dual occupancy developments in that neighbourhood, perhaps as a percentage of all dwellings; and
  - (c) observe the pattern of distribution of those dual occupancy developments, within that neighbourhood.
79. In contrast, the mere fact that a dwelling house will become adjoined by more than one dual occupancy development has little probative value when assessing a proposal against PO5(a). The Dual Occupancy Application (and this Appeal) has arisen from non-compliance with AO5.1. AO5.1 is merely one example of how a proponent demonstrates compliance with PO5; non-compliance with AO5.1 itself cannot be determinative of the Dual Occupancy Application.
80. So, the Tribunal has looked beyond AO5.1 when assessing the proposed development against PO5, and it accepts the Appellant's evidence that the neighbourhood in question would be approximately a one kilometre radius of the subject site. The Tribunal further accepts the Appellant's evidence that there are very few dual occupancy developments within that one kilometre radius of the subject site<sup>17</sup>. As a percentage of all dwellings in that "neighbourhood", dual occupancy developments comprise a very small percentage, with the predominant housing form being dwelling houses on large suburban lots<sup>18</sup>. On

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<sup>17</sup> Indeed, the plan titled "Cullen St Zoning" prepared by the Respondent has red markings to identify the three existing dual occupancies in the area of the proposed development.

<sup>18</sup> Again, the plan titled "Cullen St Zoning" prepared by the Respondent clearly shows the predominance of dwelling houses on large suburban lots with the three dual occupancy dwellings circled in red. Incidentally, the Tribunal notes that from an aerial perspective of the roof form of the neighbourhood, the dual occupancy dwellings present very little difference to that of the dwelling houses, particularly those with large back or front yard sheds.

these bases, the Tribunal is satisfied that the proposed development complies with PO5(a).

81. In closing out on PO5(a), the Respondent's submission that the community expects that no dwelling house will be adjoined by more than one dual occupancy is not a persuasive argument. If that does indeed characterise the community expectation, then the expectation has been formed from a misunderstanding of performance-based planning, where 'acceptable outcomes' are not "hard-and-fast" rules that admit of no possible alternative outcomes.
82. Having found in favour of the Appellant on compliance with PO5(a), we briefly turn to the remaining four elements of PO5.
83. When considering PO5(b) and (c), which relate to the streetscape impacts, the retention of the existing dwelling, nearer to the street frontage than the proposed new dwelling which is largely behind it, tips the compliance deliberations in the Appellant's favour. For all intents and purposes, the presentation of the subject site to the street will remain unchanged, more particularly so when the front driveway gate is closed. Accordingly, the Tribunal finds that the Dual Occupancy Application complies with PO5(b) and PO5(c). Further, conditions imposed upon an approval of the Dual Occupancy Application could address any concerns about the presentation of the subject site to the street frontage after the proposed development is constructed.
84. For PO5(d), the fact the new dwelling is to be single-storey supports a finding of compliance by the proposed development, as Mr Jenner for the Respondent admitted. At the site inspection, the Tribunal observed the high fence separating the subject site from each neighbour, the location of the shed on 15 Cullen Street that would adjoin the proposed development and the substantial setback of 9 Cullen Street from the proposed location of the new dwelling. Accordingly, the Tribunal is satisfied that the Dual Occupancy Application complies with PO5(d). Again, conditions imposed upon an approval of the Dual Occupancy Application could address any concerns about opportunities for overlooking. The Tribunal notes that Mr Booth for the Appellant was receptive to reasonable conditions of approval being imposed that dealt with overlooking concerns through fencing and landscaping requirements.
85. Lastly, the Tribunal finds that the Dual Occupancy Application complies with PO5(e), as conceded by the Respondent.
86. As a supplementary note regarding PO5(c) and (d), the Respondent's argument that a "doubling of the density" was somehow indicative of non-compliance cannot be accepted. The proposed development complied with AO1 and AO2 of the Dual Occupancy Code, where AO1 required a minimum lot size of 800m<sup>2</sup> for dual occupancy developments (the subject site complies being 1,012m<sup>2</sup>) and AO2 prescribes a maximum residential density of 25 dwellings per hectare (two dwellings on 1,012m<sup>2</sup> equates to a density of around 20 dwellings per hectare).

### Conclusion

87. The Tribunal was required to look beyond AO5.1 when assessing the Dual Occupancy Application against PO5 and it is satisfied that the location and design of the proposed development would be such that the requirements of PO5(a) to (e) would be met.
88. Accordingly, the Tribunal finds that the Dual Occupancy Application did comply with the relevant performance outcome, PO5.
89. Given there are very few dual occupancy developments within the "neighbourhood" of the subject site which is dominated by dwelling houses, the Tribunal does not support what

it understood to be the Respondent's primary concern that the proposed development did not comply with PO5(a).

90. The Tribunal is also satisfied that the location and design of the proposed development is such that it complies with PO5(b) to (d) but that should the Respondent have any continued concerns about any of the requirements of PO5(b) to (d), those would reasonably be capable of being addressed by way of conditions on the approval.
91. Finally, the Tribunal accepts that the Dual Occupancy Application complies with PO5(e) as conceded by the Respondent.
92. On this basis, the Tribunal is prepared to set aside the decision of the Respondent to refuse the Dual Occupancy Application and instead order that the Dual Occupancy Application be approved.
93. By email dated 22 February 2022 from the Tribunal's Registrar to the parties, the Tribunal foreshadowed this decision and afforded the Respondent an opportunity to provide, for the Tribunal's consideration, any conditions that the Respondent would like the Tribunal to impose upon an approval of the Dual Occupancy Application.
94. The Respondent duly provided such conditions (**proposed conditions**) and the Tribunal considered the proposed conditions, as well as subsequent correspondence provided by both parties with respect to their views about specific conditions.
95. The Tribunal accepts that the Respondent considers the proposed conditions to be a reasonable and relevant imposition upon the proposed development, however, the Tribunal does not agree that all the proposed conditions should be imposed upon an approval of the Dual Occupancy Application.
96. The Tribunal approached its consideration of the proposed conditions within the context that the Dual Occupancy Application would have been accepted development for which a development approval would not have been required, but for its non-compliance with PO5. The Tribunal also considered the requirements of the PA and the Planning Scheme when assessing a development application of this nature.
97. Within this context, the Tribunal is satisfied that the conditions in **Attachment 2** are an appropriate response to an assessment of the Dual Occupancy Application and adequately address the concerns raised by the Respondent about the proposed development, in particular with respect to the presentation of the subject site to the street frontage after the proposed development is constructed and the opportunities for overlooking neighbouring properties.
98. Therefore pursuant to section 254(2)(c) of the PA, the Tribunal:
  - (a) sets aside the decision of the Respondent to refuse the Dual Occupancy Application; and
  - (b) orders that the that the Dual Occupancy Application is approved subject to the conditions set out in **Attachment 2**.

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**Samantha Hall**

**Development Tribunal Chair**

**Date: 19 April 2022**

Attachment 1 – Photographs of the subject site and surrounding area

Site inspection photographs, 13 Dec 2021  
Appeal No. 21-049, 11 Cullen Street, Walkervale

**Subject streetscape**



15 Cullen Street (NB there is no 13 Cullen St)



11 Cullen Street – subject property – traditional house to be retained



9 Cullen Street



9 to 7 Cullen Street



11 Cullen Street – backyard (location of proposed second dwelling)



11 Cullen Street – rear of existing house to be retained



Rear of 15 Cullen Street from 11 Cullen Street – shed close to side boundary



Rear of 11 Cullen Street looking to 9 Cullen Street – substantial setback from shared side boundary



View over back fence - backyard of Targo Street house



View over back fence - backyard of Targo Street house



## Nearby dual occupancies



7 Cullen Street, dual occupancy, battle-axe layout



7 Cullen Street, single-storey dual occupancy (rear dwelling not visible from street)



14 Griffith Street – BEFORE - Single, traditional highset dwelling



14 Griffith Street – AFTER – single storey dual, occupancy, battle-axe layout, loss of trees



160 Targo Street, attached dual occupancy



160 Targo Street, single-storey dwellings, side by side

## Attachment 2 – 11 Cullen Street Conditions

<b>GENERAL</b>		
1	<p>Carry out the development in accordance with the following approved Drawings and Documents:</p> <ul style="list-style-type: none"> <li>a. Locality Plan, drawing number DD01;</li> <li>b. Site Plan – Proposed, drawing number DD02;</li> <li>c. Floor Plan – Existing dwelling, drawing number DD03;</li> <li>d. Elevations – Existing dwelling, drawing number DD04;</li> <li>e. Floor Plan – Proposed Dwelling, drawing number DD05;</li> <li>f. Elevations – Proposed Dwelling, drawing number DD06.</li> </ul> <p><b>Note:</b> This approval does not imply permission to enter neighbouring properties to carry out any construction (including, but not limited to, associated drainage and earthworks). Permission to enter neighbouring properties must be obtained from the relevant property owners.</p>	At all times
2	Comply with all conditions of this development approval prior to the commencement of the use and maintain compliance whilst the use continues.	As indicated
3	Where there is any conflict between the conditions of this Development approval and details shown on the Approved Drawings and Documents, the conditions prevail.	At all times
4	The full cost of all work and any other requirements associated with this development must be met by the developer, unless specified in a particular condition.	At all times
<b>USE SPECIFIC</b>		
5	<p>Provide a fence along both side property boundaries with a minimum height of 1.8m behind the front building line or 6m from the front boundary (whichever is lesser) and a height of 1.2m in front of this point.</p> <p>Where side boundary fencing is continuous, the height may be tapered from 1.2m up to 1.8m over a maximum distance of 2.5m.</p> <p>The erection of a second boundary fence parallel to any existing fence is prohibited and clothes drying facilities are not to be attached to the fence.</p>	Prior to the commencement of the use and then to be maintained

6	<p>Provide one (1) letter box for each dwelling unit plus one (1) letter box for the use of any body corporate or management.</p> <p>All letter boxes must form an integral part to the building / landscaping design and must be located on the primary road frontage.</p>	<p>Prior to the commencement of the use and then to be maintained</p>
7	<p>Provide two (2) dedicated on-site car parking spaces per dwelling, of which a minimum of one (1) space per dwelling is to be covered. Car parking spaces (covered/uncovered) associated with the existing dwelling are to have minimum dimensions of 5.5m (L) x 3.0m (W).</p>	<p>Prior to the commencement of the use and then to be maintained</p>
8	<p>No covered car parking area associated with the existing dwelling is to locate within 2.5m of a property boundary.</p>	<p>Prior to the commencement of the use and then to be Maintained</p>
<b>LANDSCAPING</b>		
9	<p>Prepare and submit for approval to the Assessment Manager a landscape plan. The plan must be prepared in accordance with the applicable Planning scheme codes, the Planning scheme policy for development works, and the conditions of this approval.</p> <p>The plan is to include, but not be limited to the following:</p> <ol style="list-style-type: none"> <li>a. the area set aside for landscaping</li> <li>b. removal of any hardstand area within 2m to the northern property boundary;</li> <li>c. a 2m wide landscaped buffer incorporating advanced plantings suitable to establish a dense vegetated screen, for the entire length of the northern (side) property boundary;</li> <li>d. a 1.0m wide landscaped buffer incorporating advanced plantings suitable to establish a dense vegetated screen, for the entire length of the western (rear) and southern (side) property boundary;</li> <li>e. location and name of existing trees;</li> <li>f. clothes lines are to be located clear of landscape areas.</li> <li>g. a plan and schedule of all species which identifies: <ol style="list-style-type: none"> <li>i. the location and sizes at planting and at maturity</li> <li>ii. the botanical and common names</li> <li>iii. the location of all areas to be covered by turf or other surface materials including pavement</li> </ol> </li> </ol> <p>Inclusion of a controlled underground or drip irrigation system. Any such system is to be fitted with an approved testable backflow prevention device. Landscaping is to be constructed in accordance with the approved plan and maintained thereafter.</p>	<p>Prior to the commencement of the use and then to be maintained</p>

<b>OPERATIONAL WORK ASSOCIATED WITH THE MCU</b>		
10	<p>Ensure all Operational work that is Accepted development complies with the nominated assessment benchmarks or a Development application for Operational work is submitted to and approved by Council.</p> <p><b>Note:</b> Where Accepted development does not comply with a nominated requirement for accepted development, a Development application for Operational work must be submitted to Council.</p>	Prior to the commencement of work
11	<p>Provide certification from a Registered Professional Engineer of Queensland (RPEQ) that any operational work that is Accepted development has been designed and constructed in accordance with the conditions of this Development approval and any other relevant approval issued by Council.</p> <p><b>Note:</b> Council does not require the submission of an Operational works development application for work that is nominated as Accepted development where the works comply with the nominated requirements for Accepted development and are certified by a RPEQ.</p>	Prior to the commencement of the use
<b>BUILDING WORK ASSOCIATED WITH THE MCU</b>		
12	Ensure all assessable building work is carried out in accordance with a valid Building development approval.	Prior to the commencement of work
13	Ensure all external finishes, including façade treatments and materials, are in accordance with the Approved plans.	Prior to the issue of a Certificate of classification/final inspection and then to be maintained
<b>SCREENING OF PLANT AND SERVICES</b>		
14	Install and maintain suitable screening to all air conditioning, service facilities, or similar equipment located on the rooftop or to an external face of the building. The screening structures must be constructed from materials that are consistent with materials used elsewhere on the building façade or as an architectural feature of and visually consistent with the profile of the building.	Prior to the commencement of the use and then to be maintained

<b>CONSTRUCTION MANAGEMENT</b>		
15	<p>Unless otherwise approved in writing by the Assessment Manager, ensure no audible noise from work is made:</p> <ol style="list-style-type: none"> <li>a. on a business day or Saturday, before 6:30am or after 6:30pm</li> <li>b. on any other day, at any time.</li> </ol>	At all times during construction
16	Contain all litter, building waste, and sediment on the building site by the use of a skip and any other reasonable means during construction to prevent release to neighbouring properties or public spaces.	At all times during construction
17	Remove any spills of soil or other material from the road or gutter upon completion of each day's work, during construction.	At all times during construction
<b>STORMWATER</b>		
18	Design and implement a stormwater drainage system connecting to a lawful point of discharge, in accordance with section SC6.3.5.3 of the planning scheme's Planning Scheme Policy for Development Works.	Prior to site work commencing and at all times during construction
<b>EASEMENTS</b>		
19A	<p>Lodge to the State (Titles office) for registration the following easement:</p> <ol style="list-style-type: none"> <li>a. minimum 3m wide sewerage easement in gross over all existing and proposed reticulated sewerage traversing the site;</li> <li>b. where the lawful point of discharge for stormwater requires an alignment through neighbouring properties: <ol style="list-style-type: none"> <li>(i) connected minimum 3m wide drainage easements in gross linking the development site to Alice Street via: <ul style="list-style-type: none"> <li>• lot 11 on RP59334 (11 Cullen – subject site)</li> <li>• lot 12 on RP59334 (9 Cullen)</li> <li>• lot 1 on SP298231 (7 Cullen)</li> <li>• lots 6, 7 &amp; 8 on RP58927 (5, 3, 1 Cullen respectively)</li> <li>• lot 4 on RP58927 (158 Targo)</li> <li>• lot 4 on RP53266 (42 Alice), or</li> </ul> </li> <li>(ii) connected minimum 3m wide drainage easement/s in gross linking the development site otherwise through downstream land to a local government road (Alice, Targo or Cullen Streets).</li> </ol> </li> </ol>	Prior to the commencement of the use
19B	Submit all draft easement documentation to the Assessment Manager for endorsement.	Prior to the commencement of the use

19C	All works must be clear of any existing or proposed easements on the subject land, unless agreed in writing by the Grantee.	At all times
<b>WATER</b>		
20	Provide a reticulated water supply service in accordance with the applicable Planning scheme codes and the Planning scheme policy for development works.	Prior to the commencement of the use and then to be maintained
<b>SEWERAGE</b>		
21	Provide a reticulated sewerage service in accordance with the applicable Planning scheme codes and Planning scheme policy for development works.	Prior to the commencement of use
<b>ROADWORKS, ACCESS, AND CAR PARKING</b>		
22	Design and construct the site access and driveways in accordance with the Approved plans, applicable Planning scheme codes, and the Planning scheme policy for development work.	Prior to the commencement of the use and then to be maintained
23	Construct a concrete access driveway and internal site access (extending into the site for a distance of not less than 7.2m), to a minimum 3.5m width and clear of dedicated landscaping areas.	Prior to the commencement of the use and then to be maintained
24	Submit a completed copy of Council's 'Application to carry out works in, on, over or under Council owned and maintained property' form for approval prior to work within the road reserve being undertaken.	Prior to the commencement of work
25	Remove all disused or redundant vehicular crossings, kerb drainage outlets, and footpath crossovers and reinstate kerb and channel, and footpaths as required.	Prior to the commencement of the use
<b>WASTE MANAGEMENT</b>		
26	Provide an impervious bin storage area (bin enclosure) for the storage of refuse bins in accordance with the following: <ul style="list-style-type: none"> <li>a. designed so as to prevent the release of contaminants into the environment;</li> <li>b. sufficiently sized to accommodate all refuse bins required by the Assessment Manager for the scale of the development;</li> <li>c. screened from the road frontage or other public space, and adjoin properties by landscaping or constructed screening;</li> <li>d. must be maintained in a clean and sanitary manner.</li> </ul>	Prior to the commencement of the use and then to be maintained

**EXISTING DWELLING – EXTERNAL APPEARANCE**

27	Wall and roof finishes of the existing dwelling are to be renewed or replaced so as to provide a surface that is free of flaking paint, stains or rust. Wall finishes are to match the colour and finish of surrounding wall areas of the building or structure.	Prior to the commencement of the use
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## **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)**