



## Development Tribunal – Decision Notice

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### Planning Act 2016

<b>Appeal Number:</b>	<b>31-18</b>
<b>Appellant:</b>	Mrs Cheryl Mair
<b>Respondent:</b>	Noosa Shire Council ( <b>Council</b> )
<b>Concurrence Agency:</b> (if applicable)	n/a
<b>Site Address:</b>	26 Dolphin Bay Drive, Sunshine Beach, Qld 4567, and described as Lot 1 SP299953 – the subject site

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### Appeal

Appeal under section 229 of the *Planning Act 2016* (**PA**) against the conditions of a development approval being the development permit titled “Development Permit for Operational Work – Vehicle Crossover & Clearing Veg” issued for the subject site by way of a Negotiated Decision Notice dated 2 July 2018).

More specifically the Appellant seeks:

- The appeal be allowed;*  
*Conditions 3, 5 and 6 be deleted;*
  - Conditions 7, 8, 9, 10 and 29 be amended by deleting references to “prestart” and “prestart meeting”; and*
  - Such further or other such orders as the Development Tribunal deems fit.*
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<b>Date and time of hearing:</b>	14 November 2018 at 10.00 am
<b>Place of hearing:</b>	The subject site - 26 Dolphin Bay Drive, Sunshine Beach, Qld 4567, and described as Lot 1 SP299953
<b>Tribunal:</b>	Mr Richard Prout – Chair Ms Astrid Chan - Member Ms Jennifer Mullaney – Member
<b>Present:</b>	The Tribunal (as stated above) Mrs Cheryl Mair – Property owner and Appellant Mr Duncan Mair – Appellant’s representative  Mr Mark Lewis – Council representative Mr Shane Adamson – Council representative

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## **Decision:**

For the reasons set out below, the Development Tribunal (**Tribunal**), in accordance with section 254 of the PA **confirms** the decision of the Noosa Shire Council as set out in its Negotiated Decision Notice dated 2 July 2018.

## **Background and site details**

The subject site is a 1039 m<sup>2</sup> allotment located at 26 Dolphin Bay Drive, Sunshine Beach and is zoned Open Space Conservation Detached Housing under the Noosa Plan 2006. The allotment is rectangular corner allotment which fronts Dolphin Bay Drive to the south and Enterprise Street to the west, with a total street frontage of 76.984 m.

The allotment is constrained by a number of easements that crisscross the middle portion of the site, one containing a Unitywater sewer main and two containing Council stormwater infrastructure.

The easements in favour of Council transfer stormwater from a street gully in Dolphin Bay Drive and stormwater from the allotments to the north of the subject site, discharging the stormwater into a natural watercourse in the Dolphin Bay Drainage Reserve which is located on the eastern side of the subject site.

The discharge point for the Council stormwater infrastructure was originally a small portion of road reserve located on the eastern side of the subject site adjoining Dolphin Bay Drive. The subject site previously wrapped around this small portion of road reserve on two sides.

In July 2016, the Appellant sought the Council's preliminary view on the possible road closure of this section of road reserve. In August 2016, the Council advised the Appellant that the proposed road closure was not supported because the road reserve contained Council stormwater drainage assets.

In October 2016, a meeting was held between the Appellant/Appellants representative and Council officers, where options for the relocation of the stormwater assets at the cost of the Appellant were discussed.

In December 2016, a formal submission was made to Council advising that the Appellant would undertake the design and construction for the relocation of the Council stormwater infrastructure, in order to facilitate the road closure. As part of this submission the Appellant also agreed to provide a stormwater drainage easement in the Council's favour to ensure access for maintenance purposes.

In December 2016, the Appellant was advised by Council that it agreed in principle to the road closure subject to the following occurring first:

- a development approval being obtained for the relocation of the stormwater drainage infrastructure; and
- the stormwater infrastructure being included in an easement in favour of the Council, as it was necessary for maintenance and public interest purposes.

In April 2017, the Appellant made application for Road Closure to the Department of Natural Resources Mines and Energy (DNRME), stating that:

*We have liaised in detail with the Noosa Council regarding this application for Road Closure. We (Council and my Client) are at a stage where both parties agree on the design for lodging a robust operational works application. We intend lodging that operational works application upon favourable advice from you, so we may gain confidence our application will be worthwhile.*

In May 2017, the Appellant lodged an application for operational works (Council reference OPW17/0179) with the Council, also in May 2017, the DNRME sought confirmation of the in-principle support for the Road Closure from the Council.

In May 2018, the Council advised the DNRME of the conditional support for the road closure advising that:

*Council supports the road closure application based on the condition that a formal Operational Works Application is made to Council to relocate the Council Infrastructure from that portion of the road reserve. The applicant has already prepared plans for the relocation in preparation to make the Operational Works Application however were waiting on our support for the road closure.*

The DNRME issued the Appellant with a letter of offer for the road closure, but did not include the conditions which formed the basis of the conditional in-principle support from the Council for the road closure.

In June 2017, an information request was issued by the Council for the Operational Works application (OPW17/0179), however the Appellant did not respond to the information request and the application subsequently lapsed.

In September 2017, the DNRME registered the survey plan making the area of road being closed forming part of the subject site and issued a registration confirmation statement to the Council.

In November 2017, the Council received a recording advice that the application for the road closure had been finalised.

In February 2018, the Appellant lodged a development application for operational work for a proposed vehicle crossover and vegetation clearing. The vehicle crossover was required to provide access to a proposed new garage. It should be noted that at present the subject site does not have any off street parking.

Under the Noosa Plan 2006, an application for code assessment was required for the driveway as it was not complying with the acceptable solutions under the Detached House Driveway Code.

As the proposed driveway was within the allotment boundary affected by the existing Council stormwater infrastructure namely, the proposed driveway was located over the stormwater discharge point form Easement H.

Also, the proposed development was located within the Environmental Enhancement area under the Biodiversity Overlay Map (OM4.1). Consequently, the removal of vegetation on that part of the subject site required a development permit.

As per the Council records the existing dwelling at the site was approved in 1998 without an allowance for off street covered parking or a vehicle crossover.

As per Acceptable Solution S25.1 (Carparking Spaces) of the Noosa Plan 2006, a minimum of one off street carparking space is required for each dwelling unit.

In May 2018, the Council provided a Decision Notice dated 21 May 2018, granting a preliminary approval subject to conditions. The Appellant subsequently suspended the appeal period and made representations to the Decision Notice seeking a development permit.

On 3 July 2018, the Council provided the Appellant with a Negotiated Decision Notice dated 2 July 2018, advising that on 28 June 2018, the representations had been considered and the approval changed to a development permit subject to conditions.

The Tribunal received application for appeal Form 10 from the Appellant on 27 July 2018.

## **Jurisdiction**

The Appellant, lodged the Appeal with the Tribunal under section 229 of the PA, against the conditions of approval, imposed on a Negotiated Decision Notice for a Development Permit for Operational Work - Vehicle Crossover & Clearing Veg.

Section 1(1) and section 1(2)(b)(ii) of Schedule 1 of the PA provide as follows:

### *1 Appeal rights and parties to appeals*

*(1) Table 1 states the matters that may be appealed to—*

*(a) the P&E court; or*

*(b) a tribunal.*

*(2) However, table 1 applies to a tribunal only if the matter involves—*

*(b) a provision of a development approval for—*

*(i) a material change of use for a classified building; or*

*(ii) operational work associated with building work, a retaining wall, or a tennis court;*

After lodgement of the Appeal, the Council solicitor raised the issue of jurisdiction in writing with the Tribunal Registrar and the Appellant, letter dated 9 August 2018. The Appellant's representative, provided an email on 14 August 2018, to the Tribunal Registrar responding to the issues raised in the Council solicitor's letter.

In assessing the issue of Jurisdiction the Tribunal noted the following:

### **1. Does this appeal fall within the matters referred to in Table 1 (Appeals to the P&E Court and, for certain matters, to a tribunal) of the PA:**

This appeal falls within Item 1(c) of Table 1 (Development applications) of the PA because the relevant development approval:

- is a "development approval" as defined in Schedule 2 (Dictionary) and section 49(1) (A development Approval) of the PA (i.e. the relevant development approval is the development permit titled "Development Permit for Operational Work – Vehicle Crossover & Clearing Veg" issued by way of a Negotiated Decision Notice dated 2 July 2018); and
- is not an excluded application (i.e. section 1(3) of Schedule 1 does not apply).

### **2. Does section 1(2)(b)(ii) of Schedule 1 of the PA apply to this appeal:**

Although the appeal falls within Item 1(c) of Table 1 (Development applications), under section 1(2)(b)(ii) of Schedule 1 of the PA, the Tribunal will only have jurisdiction if the matter the subject of this appeal involves a provision of a development approval for operational work associated with building work, a retaining wall or a tennis court.

### **3. Operational work**

The works to be performed under the Negotiated Decision Notice dated 2 July 2018 (DP for Operational Work) fall within the meaning of "operational work" as defined under section 6 and Schedule 2 of the PA, because such work:

- is not "building work", "plumbing work" nor "drainage work" as defined under the PA;

- is clearly in, on, over or under the subject site; and
- will materially affect the premises or use of the premises because the works will enable the Appellant to have vehicle access to that part of the property which she did not previously have before.

#### **4. Associated with building work**

The Tribunal notes there is no definition of “associated with” or “associated with building work” under the PA.

The Tribunal further notes that the subject site has no provisions for off street parking as required by the Noosa Plan 2006 i.e. no existing crossover and no existing off street parking.

#### **Conclusion regarding jurisdiction**

The Tribunal finds the works to be performed under the DP for Operational Work would most likely not be completed by the Appellants but for the proposed works to build a new three bay garage, plus additional bike store located in the north east corner of the allotment.

It should be noted that the proposed location of the garage is the only suitable location on the site to build a garage, due to the location of the existing dwelling, existing swimming pool and the easements that crisscross the middle portion of the site.

The Appellant has already obtained a Development Approval for Building Work for the new garage and bike store, however without a complying access the building cannot be used for its intended purpose and is therefore not practical to build.

Given the above, the Tribunal is of the opinion that the works to be performed under the DP for Operational Work (namely the proposed driveway, vehicle crossover and vegetation clearly) are associated with building work and meet the test for section 1(2)(b)(ii) of Schedule 1 of the PA and as such the Tribunal has the jurisdiction to hear the Appeal.

#### **Decision framework**

The Tribunal notes:

- The onus rests on the appellant to establish that the appeal should be upheld (s. 253(2) of the PA);
- The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (s. 253(4) of the PA); and
- The tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

#### **Material Considered**

The material considered in arriving at this decision comprises:

1. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registry on 27 July 2018;
2. Assessment Manager Decision Notice, Reference Number OPW18/0016, dated 21 May 2018, Preliminary Approval for Operation Works – Clearing and Vehicle Crossover;
3. Assessment Manager Negotiated Decision Notice, Reference Number OPW18/0016, dated 2 July 2018, Development Permit for Operational Work – Vehicle Crossover & Clearing Veg;

4. The following drawings by Casswell Consulting, dated 2/7/2018 Version 1, Drawing Number 17058-S02, Proposed Garage, Slab and Footing Plan, Drawing Number 17058-S05, Proposed Garage, Retaining Wall and Slab Details;
5. DA Form 1 – Development application details, application for Operation Work, lodged by Appellant, received by Council on 8 February 2018;
6. Supporting Information Report, dated 8 February 2018, no authors details;
7. Council Confirmation Notice dated 22 February 2018, to Appellant for Development Permit for Operational Works – Clearing Vegetation under planning scheme, Vehicle Crossover;
8. Council Information Request dated 6 March 2018, to Applicant;
9. Letter to Council dated 5/4/2018 from Appellants representative responding to the Council Information Request dated 6 March 2018;
10. Form 15 (Compliance certificate for building design or specification) for the structural design of proposed new garage, signed by Troy Steven Casswell, Casswell Consulting Pty Ltd, RPEQ 07685, dated 31/5/2018;
11. Letter to Council dated 31/5/2018 from Appellants representative requesting under section 75 of the *Planning Act 2016* to suspend the appeal period and make a change representation
12. Email from Council to Appellants representative dated 5 June 2018, requesting updated Form 15 from Casswell Consulting that address the stormwater conveyance under the driveway;
13. Letter to Council dated 8/6/2018 from Appellants representative responding to Council email dated 5/6/2018 regarding proposed stormwater design;
14. Email from Appellants representative to Council dated 27/6/2018 with attached amended Form 15 from Casswell Consulting dated 27/6/2018;
15. Form 15 (Compliance certificate for building design or specification) for the structural design of proposed new garage & stormwater drainage infrastructure, signed by Troy Steven Casswell, Casswell Consulting Pty Ltd, RPEQ 07685, dated 26/6/2018;
16. Letter dated 26 July 2018 from the Appellant to the Development Tribunal Registrar stating: *'I, Cheryl Mair hereby authorise Duncan Mair to act on my behalf in representing my interests in this Appeal'*.
17. Email dated 27 July 2018 from Mr Duncan Mair to the Development Tribunal Registrar stating: *'I have been authorised by Cheryl Mair to act on behalf of Cheryl Mair in representing her interests in this appeal'*;
18. Letter dated 27 July 2018, signed by the Appellant detailing the grounds for the Appeal;
19. Letter from Wakefield Sykes Solicitor (Acting for Noosa Council) to the Development Tribunal Registrar dated 9 August 2018, regarding the Tribunals jurisdiction to hear the Appeal;

20. Letter from Wakefield Sykes Solicitor (Acting for Noosa Council) to the Appellant dated 9 August 2018, regarding the Tribunals jurisdiction to hear the Appeal;
21. Email from Appellants representative dated 14 August 2018 to the Development Tribunal Registrar responding the Wakefield Sykes Solicitor's letter of 9 August 2018;
22. Survey Plan 299952, Dated 1 September 2017;
23. Verbal submissions at the hearing from all parties to the appeal;
24. The Noosa Plan 2006;
25. The *Planning Act 2016*;
26. The *Building Act 1975*; and
27. Queensland Urban Drainage Manual (QUDM).

### **Findings of Fact**

The Tribunal makes the following findings of fact:

#### **Subject Site**

1. The subject site is a 1039 m<sup>2</sup> allotment located at 26 Dolphin Bay Drive, Sunshine Beach and is zoned Open Space Conservation Detached Housing under the Noosa Plan 2006;
2. The allotment is a rectangular corner allotment, which fronts Dolphin Bay Drive to the south and Enterprise Street to the west, with a total street frontage of 76.984 m;
3. The allotment is constrained by a number of easements that crisscross the middle portion of the site, one containing a Unitywater sewer main and two containing Council stormwater infrastructure;
4. The existing dwelling at the site was approved in 1998 without an allowance for off street covered parking, or vehicle crossover;
5. The existing allotment was created on 1 September 2017 (Cancelling Lot 1 RP913609 and part of USL being closed Road);
6. The following building and structure were noted onsite at the Hearing:
  - A detached dwelling; and
  - A swimming pool.

#### **Application Process**

1. On 8 February 2018, the Appellant lodged a Development Application for Operational Works – Clearing Vegetation under planning scheme, Vehicle Crossover.

Under the Noosa Plan 2006, an application for code assessment was required, as the location of the driveway/crossover did not comply with Acceptable Solutions S9.3 of Detached House Driveway Code, as the driveway was within 1.5m of the Council stormwater infrastructure service point, namely:

##### ***Acceptable Solution S9.3***

*S9.3 Driveways are located not less than 1.5m from infrastructure service points including sewerage access points, stormwater pits, hydrants, valves or telephone pits.*

***Editor's note:*** *If the driveway covers or is within 1.5m of an infrastructure service point, an application to Council will be required. Contact Council's Engineering Section.*

Further, the proposed location of the driveway/crossover was within the Environmental Enhancement area under the Biodiversity Overlay Map (OM4.1) of the Noosa Plan.

As per Table 13.1 (Categories of development and assessment for the Biodiversity Overlay—All Development) of the Noosa Plan, the removal of vegetation on this part of the subject site triggered a Code Assessment, Operational Work;

2. On 22 February 2018, the Council issued a Confirmation Notice to the Appellant;
3. On 6 March 2018, the Council issued an Information Request to the Appellant:
4. On 5 April 2018, the Appellant responded to the Council Information Request of 6 March 2018;
5. On 21 May 2018, the Council issued a conditional, Preliminary Approval for Operational Works – Clearing and Vehicle Crossover;
6. On 31 May 2018, the Appellant requested the Council under section 75 of the PA, to suspend the appeal period and make a change representation;
7. On 2 July 2018, the Council issued a Negotiated Decision Notice, Development Permit for Operational Work – Vehicle Crossover & Clearing Veg. The Negotiated Decision Notice, deleted condition 1 from the Preliminary Approval of 21 May 2018 and included 31 new conditions;
8. The Tribunal Registry received the application for appeal, Form 10 from the Appellant on 27 July 2018.

#### **Potential claim in nuisance**

The Appellant's representative raised in written and oral submissions (that is, a written response to the Council's written submissions dated 9 November 2018 and oral submissions at the Hearing) that condition 6 of the DP for Operational Work is inappropriate, unreasonable and/or unlawful because, in summary, the storm water runoff flowing onto the subject site gives rise to an action in nuisance against the Council.

As discussed above, the works the subject of the DP for Operational Work (including the vehicle crossover) are code assessable.

In assessing a development approval, an assessment manager is not required under the *Planning Act 2016* to consider a potential action in nuisance. The Tribunal, in making its decision, has not given any weight to the Appellant's representative's submission in respect to the potential action in nuisance against the Council as it does not believe it is relevant.



## Reasons for the Decision

The Tribunal, confirms the conditions of approval imposed on the Negotiated Decision Notice, (Development Permit for Operational work - Vehicle Crossover & Clearing Veg), for the following reasons:

The Tribunal is of the opinion that the conditions of the permit are reasonable and relevant as:

### Condition 3

It is reasonable and relevant, given the extent of the proposed work within the Council road reserve, that a pre-start meeting is held to finalise the location of the proposed crossover and the extent and type of vegetation clearing required i.e. complete tree removal versus tree pruning etc.

### Conditions 5

The proposed driveway does have a significant impact on the Council stormwater infrastructure (Easement H) for the subject site and the surrounding area, namely: the allotments to the north of the subject site and road infrastructure in Dolphin Bay Drive, all of which drain to this one location.

It is therefore reasonable that the proposed alteration and extension of this infrastructure is designed and certified, by suitably qualified Registered Professional Engineer of Queensland (RPEQ).

This is also in line with the Council Planning Scheme Policy 5 (Engineering Design Standards – Roads, Drainage and Earthworks), which states:

#### *1.3 Interpretation*

- a) *Where reference is made to the consultant, the consultant shall be a registered professional Civil Engineer Queensland (RPEQ) experienced in the design, construction and supervision of civil works and services related to reconfiguring a lot and other development works.*

### Condition 6

It is reasonable and relevant that the proposed stormwater infrastructure drainage work, which is a community asset, is contained within an easement, in order to protect the asset and allow access for Council staff/contractors to conduct maintenance when required.

This is also in line with the Council Planning Scheme Policy 5 (Engineering Design Standards – Roads, Drainage and Earthworks), which states:

#### *4.11 Stormwater Drainage Easements*

- a) *For all normal stormwater drainage placed through allotments, an easement is required to be created in favour of Council. The minimum width of these easements is 4m but the actual size shall depend on the size, depth of pipes and type of soil.*
- b) *In the case of property drains, the easement can be reduced to 1.5m width.*
- c) *Further, the extent of the pipe drain on associated easement shall be considered in each situation. However, the discharge point should desirably be located in a natural watercourse or depression in a manner to minimise scour problems.*

### Conditions 7, 8, 9, 10 and 29

Conditions 7, 8, 9, 10 and 29 are reasonable and relevant conditions given the extensive work being carried out within the Council road reserve.

As such, it is reasonable that the Council ensures all the required documentation/information namely: condition report, appropriate insurance and public liability documentation, traffic management plan and compliance bond, are lodged and assessed by Council prior to any work commencing onsite.

It is therefore reasonable and relevant for Council to collate this documentation/information via a pre-start meeting before providing notification to the Applicant that work onsite can commence.

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**Richard Prout**  
**Chair, Development Tribunal**  
**Date: 6 December 2018**

### **Appeal Rights**

Schedule 1, Table 2 (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.

### **Enquiries**

All correspondence should be addressed to:

The Registrar of Development Tribunals  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001

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