Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**19-049**
Appellant:	Leeward Management Pty Ltd ABN 12 119 712 501 Trading as Project BA
Respondent (Assessment Manager):	Noosa Shire Council
Site Address:	52-78 Coachwood Terrace Qld 4563 and described as Lot 14 on SP248179 ─ the subject site

Appeal

Appeal under section 229 and item 1(c) of table 1 of section 1 of schedule 1 of the *Planning Act 2016* (PA) against a condition requiring a shade structure over an equestrian training area to be set back a minimum of 10 metres from the property side boundary.

Date and time of hearing:	17 January 2020 at 3.00pm
Place of hearing:	The subject site
Tribunal:	John O'Dwyer – Chair Elisa Knowlman – Member
Present:	APPELLANT - Project BA represented by Daniel Eichhorn and Luke Neller as agent for the owners Ms Michelle Norton and Mr Geoff Hutson – Appellant RESPONDENT - Kerri Coyle, Billy Glover, Mark Lewis and Conor Neville – Noosa Shire Council representatives

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **changes** the decision of the Assessment Manager to the extent that condition 3 (as well as the heading 'Setbacks') and conditions 6 and 7 (as well as the heading 'Landscaping') are omitted and the annotation on the layout plan regarding the requirement for a setback from the site boundary is omitted and a new condition 3 is inserted as follows:

> " 3 Lighting within the structure is to be designed and installed to achieve compliance with Probable Solution S19.4 of the Building Works Code, except that the Lux limit is to be measured 5 metres beyond the boundary opposite the middle of the shed, not 1.5 metres as set out in Probable Solution S.19.4 given the site is in a rural area and the nearest vegetation is about 10 metres from the site boundary."

Background:

1. The owners of the property use the property for stabling horses that they train for Western riding competitions. They have established a dwelling, a barn, a stables complex and a round yard and training arena in which they have trained the horses for approximately four years.

2. An application was made by the applicant to Noosa Shire Council (NSC) – the Assessment Manager, for approval to erect a shelter over the training arena to protect horses and riders from the impact of the weather during training. Due to the location of the training arena, the eastern corner of the shelter would be 0.5 m from the eastern property boundary and the northern corner of the shelter would be 8.57 m from the eastern boundary and 9.03 m from the north-eastern boundary of the subject site.

3. The application accepted the development could not meet the Acceptable Solutions S1.1 and so was Code Assessable against the relevant part of the Detached Housing Code Building Works Code, and purported to demonstrate how the proposed development addressed the specific outcomes O1 of the Detached Housing Code Building Works Code.

4. The Assessment Manager made an information request referring to:

   - a "Building and Effluent envelope" requiring a 10m boundary setback;
   - a minimum required setback under Noosa Plan of 20m due to the adjoining land being in the Open Space and Conservation Zone;
   - concerns with insufficient separation clearance between the proposed structure and the adjoining open space land;
   - concerns with the impact of flooding on the stability of the structure and the protection of the adjacent creek formation and vegetation.

5. The Information request specifically requested:

   - A vegetation assessment of the conservation land adjacent to the proposed shed and include minimum setbacks for the proposed structure prepared by a qualified arborist; and
   - A site specific flood hazard assessment and recommendation from a qualified RPEQ addressing the shed foundations, arena material stormwater runoff and its impact on the nearby creek and vegetation (including erosion and water quality).

6. The Applicant provided a response dated 14 August 2019 to the information request. It included an arborist report, marked "draft", that concluded that two trees near the site were of low risk of impacting on the proposed structure, and that they did not justify any additional setback. The response also addressed flooding, noting the site is not in the Flood Hazard Overlay on the Noosa Plan maps. The response noted the application is for a roof supported on posts, without any walls so that any flood water could flow through the site. Accordingly, no amended plans were provided.

7. On 23 September 2019, the Assessment Manager approved the application subject to eight conditions. Condition 3 requires the structure be set back 10 metres from the property boundary.

8. The Appellants filed this appeal on 18 October 2019 and seek to have Condition 3 deleted and have the reduced boundary setbacks approved to have the full arena covered for the protection of the horse and rider.

9. The Respondent argued that under Noosa Plan 2006, a 20m setback from a site boundary abutting the Open Space Conservation Zone was required to maintain environmental values and that the lesser distance of 10m was being conceded as that would have applied at the time of the original creation of the land parcel, prior to Noosa Plan 206 coming into effect.

Jurisdiction:

10. This hearing is for an appeal under section 229 and item 1(c) of table 1 of section 1 of schedule 1 of PA against the condition requiring a shade structure over an equestrian training area to be set back a minimum of 10 metres from the property side boundary.

11. The precondition in schedule 1, section 1(2)(g) for the application of table 1 for a Development Tribunal is met in this case.

12. At the end of the hearing, the Respondent queried the jurisdiction of the Tribunal to make a decision on Condition 3 of the Decision Notice that was not consistent with an earlier approval applying to the land under the PA section 66(2). Section 66(2) and (3) state:

    "(2) A development condition must not be inconsistent with a development condition of an earlier development approval in effect for the development, unless-

    (a) both conditions are imposed by the same person; and
    (b) the applicant agrees in writing to the later condition applying; and
    (c) if the development application for the later development approval was required to be accompanied by the consent of the owner of the premises – the owner of the premises agrees in writing to the later condition applying.

    (3) A development condition that complies with subsection (2) applies instead of the earlier condition."

13. The Respondent advised there was an earlier decision of the Planning and Environment Court (PEC) that approved building envelopes on the lots in the subdivision that created the subject site and the proposed works were outside the building envelope. The Respondent did not have a copy of the decision to provide to the Tribunal at the hearing.

14. The Tribunal decided that as the parties were not in a position to consider the argument in the absence of a copy of the PEC decision, the Tribunal would continue the hearing and inspection, on the basis that the Tribunal did have jurisdiction and make a determination of the facts and a finding, pending NSC providing a copy of the PEC decision to the Registry for distribution to the parties for further consideration.

Third Party Advice:

15. On Monday 20 January 2020, the Respondent provided a copy of the PEC decision D138 of 2005 to the Tribunal.

16. Once the PEC Decision was received and reviewed, it became apparent that the PEC Decision dealt with defining house sites and on-site sewage treatment plant sites, not other structures. As a result, the Tribunal considered that any decision on this appeal would not be inconsistent with the earlier PEC Decision and this formed the basis of the preliminary view reached by the Tribunal and forwarded in the Directions to the parties to the appeal for written submissions on the Tribunal's view.

17. On 6 February 2020, NSC responded by email advising:

    In response to the tribunals request below, Council is referring to condition 30 of the court decision. Council will leave this for the consideration of the tribunal as to how this relates to the structure the subject of this appeal and s 66(2) of The Planning Act.

    I confirm there are no other development permit(s) issued by Noosa Shire Council applicable to the land the subject of this appeal that address boundary setbacks or development footprints.

18. The Tribunal forwarded the NSC response to the Appellant on 7 February 2020, providing an opportunity to respond to the PEC Decision, Tribunal's preliminary view and the NSC response. The appellant responded as follows in an email dated 13 February 2020:

> *The Court decision of the earlier subdivision approval was an appeal process replacing a decision by Noosa Council. Noosa Council remained the 'assessment manager'.*
>
> *The current decision being appealed is an appeal process seeking to replace the decision by Noosa Council (the assessment manager), which has already varied the earlier subdivision approval.*
>
> 1. *It is our opinion that Condition 30, which references 'House Site Areas', was intended to stipulate mandatory building areas for Dwellings and Class 1 buildings only, excluding class 10 outbuildings such as this shade structure over a horse arena. Therefore the earlier decision notice, specifically condition 30, is not being varied.*
>
>   *Sub-conditions of condition 30 includes requirements that would only be relevant to a dwelling, demonstrating the intention of capturing only 'dwellings' in this condition.*
>
>   *These sub conditions include minimum floor levels, which are not applicable to non-habitable buildings, and excluding areas that can not be 'served by a driveway that complies with ASINZA2890.1:2004'. Where as there are several types of outbuildings that do not require driveway access such as a shade structure.*
>
> 2. *If the Tribunal determine that Condition 30 of the earlier approval is relevant to the siting of the proposed shade structure, then the Tribunal have the jurisdiction to approve the requested appeal with respect to S66(2) of the Planning Act 2016.*
>
>   *The Tribunal has the same decision making powers that was available to Noosa Council at the time the original decision was made. The Council had already agreed to a reduced setback of 10m under the Condition 3 of their Development Permit, inconsistent with the earlier approval. Council had therefore decided they had the jurisdiction to vary the earlier condition using PA s66(2).*
>
>   *The Tribunal therefore have the jurisdiction to make a decision, that would vary Condition 3 of DBW19/0012, without being in contradiction of s66(2) of the Act.*
>
> 3. *If the Tribunal decides they cannot further vary the inconsistency with the earlier approval since they did not make the original decision, it is in the tribunals decision making powers to direct the original decision maker to remake their decision. However, Council is unlikely to remake a decision that would be suitable to the land owner and therefore this would likely result in the decision being further appealed.*

19. The Tribunal has considered these submissions from the parties and has confirmed its preliminary view that it does have jurisdiction to hear and determine the Appeal and that its decision would not be inconsistent with the earlier PEC Decision as this appeal is about siting a Class 10 structure, not a house.

Decision Framework:

20. Under the PA s 253:

    a) The Appellant has the onus to establish that the appeal should be upheld;

    b) The Tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against. However, the Tribunal may, but need not, consider other evidence presented by a party to the appeal (with leave of the tribunal); or any information requested by the Tribunal and provided under section 246.

21. By s 254 PA, the Tribunal must decide the appeal by—

    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.

22. In this appeal, the Tribunal considers the appellant has satisfied the onus to demonstrate the appeal should be upheld. Therefore the Tribunal has determined to change the decision of the Assessment Manager as set out below and for the reasons set out below.

Material Considered:

23. 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 Tribunals Registrar on 18 October 2019. The fee for the appeal was lodged on 23 October 2019, This was one day after the end of the appeal period and the PA requires the Form 10 to be accompanied by the required fee.

    B. Excusal of Noncompliant Form 10 by the delegate of the Chief Executive dated 2 December 2019.

    C. Development Application lodged 15 May 2019 by Project BA on behalf of the owners.

    D. Email from Amanda Budd the owner of 84 Coachwood Terrace dated 1 May 2019, advising no objection to the application for a boundary relaxation.

    E. Confirmation Notice issued by NSC on 29 May 2019 to the applicant.

    F. Information Request to the applicants made by NSC dated 19 June 2019.

    G. Response to the Information Request made by the applicant to NSC dated 14 August 2019. This included as an attachment an *Arborist's Report* from Australian Tree Contractors and Arboricultural Consultants.

    H. Decision Notice from the Assessment Manager to the applicant dated 23 September 2019.

    I. *Development Tribunal – Council Report* dated 16 September 2019, (the NSC report) relied on by the Assessment Manager in making its decision. This report was tabled at the Hearing by NSC.

    J. Email from NSC to Development Tribunal dated 20 January 2020 providing a copy of PEC Decision D138 of 2005.

    K. Email to NSC dated 30 January 2020 from Development Tribunal Registry on behalf of the Tribunal advising that the Tribunal has formed a preliminary view that nothing in the PEC Decision sets limits on construction of a shed and accordingly there is no potential for any relevant 'inconsistency' under the PA section 66(2). The email directed NSC to provide the Tribunal with a copy of any other approval that addresses boundary setbacks

or development footprints applicable to the subject site; and giving NSC a week to make a submission on the Tribunal's view.

L. Email from NSC dated 6 February 2020 to Tribunal responding to Tribunal's Directions email of 30 January 2020 and advising there were no other development permits imposing boundary setbacks and building envelopes on the subject site.

M. Email to the Appellant dated 7 February 2020 from Development Tribunal Registry on behalf of the Tribunal advising the response from Council and directing the Appellant to respond to the material provided within a week so the Tribunal could then make its decision.

N. Email from Appellant dated 13 February 2020 responding to the Tribunals Direction, supporting the Tribunals preliminary view.

O. Email to the Appellant dated 7 May 2020 from the Development Tribunal Registry on behalf of the Tribunal seeking clarification of the identity of the applicant for the development application and the appellant for the Appeal.

P. Email from Appellant dated 7 May 2020 responding to the Tribunal's Direction advising the legal name of Project BA.

The Application and Noosa Planning Scheme 2006:

24. The development application the subject of the appeal was made to the local authority as Assessment Manager on 15 May 2019, and was code assessable under the PA.

25. Under the PA section 45(3) code assessment is an assessment that must be carried out against the assessment benchmarks in a categorising instrument and having regard to any matter prescribed by regulation. For this application the Building Works Code in Noosa Plan 2006 is the assessment benchmark.

26. The PA section 60(2)(c) provides that the assessment manager's power (and this Tribunal's power on appeal) includes the power to impose development conditions on a development. The PA section 65(1) provides the conditions must:

    a) be relevant to, but not be an unreasonable imposition on, the development or the use of premises as a consequence of the development; or
    b) be reasonably required in relation to the development or the use of premises as a consequence of the development.

27. The original application accepted the development could not meet the Acceptable Solutions S1.1 of the Building Works Code, and so the application was code assessable against the relevant part of the Building Works Code, The application demonstrated how the proposed development addressed the specific outcomes O1 of the Detached Housing Code.

28. The Assessment Manager made an information request as noted in paragraphs 4 and 5 above and the Appellant (then applicant) responded as set out in paragraph 6 above.

Issues to be Determined:

29. The questions before the Tribunal in relation to the challenged condition are therefore:

    a) is the condition lawfully imposed;
    b) if so, in exercising its discretion, should the Assessment Manager have imposed the condition;
    c) if not, whether no condition should be imposed or an alternative condition be imposed?

The Hearing:

30. The Appellant seeks to have the boundary setbacks approved as originally applied for, to have the full arena covered for the protection of the riders and horses.

31. Following the inspection, the Tribunal estimated that compliance with Condition 3 would result in approximately 20% of the arena being uncovered.

32. The Appellant restated the need for protecting the riders and horses from the weather and referred to the information in the application and information request response, including the draft Arborist's Report included in that response. The Appellant focussed on the need to provide amenity for the users and horses when riding their horses in the arena where it is already located. They advised stormwater from the shed would be directed to the existing dam adjacent to the arena. They also pointed out there was a cleared area between the site boundary and the nearest riparian vegetation.

33. The Respondent submitted that it had relied on the NSC report in making its decision and continued to rely on that report and submitted that:

    - The proposed location of the shed failed to comply with the setbacks required by the Acceptable Probable Solution S1.1 of the Building Work Code, which calls up the setbacks specified for the Rural Zone in Schedule 1 of the Planning Scheme;
    - It has concerns over vegetation along a nearby creek falling on the shelter if erected, as part of the reason for the 20m boundary setbacks in Schedule 1;
    - There is a need for a riparian buffer along the creek;
    - It has concerns over the potential for nearby major trees to fall due to being undercut by the creek during a flood; and
    - It is concerned about potential impacts on natural cycles of accretion and erosion of watercourses.

34. During the hearing, the Respondent advised a 10m setback would be acceptable given there is a cleared area between the property boundary and the the vegetation along the nearby creek and the building envelope provisions for the land required a 10m setback (which was consistent with the previous planning scheme that applied when the lot was created under the PEC decision). The Respondent indicated it would be amenable to an amended application involving the relocation of the horse arena to enable the 10m setbacks.

35. The Respondent also raised the need to avoid exposing Council to costs of compensation for impacts of vegetation falling from Council land onto properties such as the subject site, noting there is a current legal case before the Courts at the moment.

36. In response to the Respondent's suggestion that the arena could be moved, the Appellant argued that it would be economically unreasonable either due to the cost of the erection of a retaining wall to enable a move of the arena slightly to the south-west, or due to the impact on overall operations if it were to be moved to the area occupied by the horse yards.

37. The Respondent also raised the issue of lighting impacts beyond the site.

38. The NSC Report argued that the proposal does not present sufficient setbacks to a trail proposed in the cleared area between the site boundary and the riparian vegetation and subsequently limits the ability to provide vegetation between the building and site boundary to screen the built form contrary to Specific Outcome O1a) and c) of the Building Works Code. As a result, the Assessment Manager applied conditions 6 and 7 regarding Landscaping. However, at the hearing, the Respondent advised the section of the public trail between the subject site and the riparian vegetation was not included in the adopted Noosa Plan 2006.

39. The relevance of O1a) was justified at the hearing in that the native fauna in the Open Space and Conservation Zone should not be adversely affected by development. This argument justifies concerns over lighting which was not addressed in the NSC Report but raised at the hearing. However, ignoring the lighting aspect, the Respondent did not present any

evidence as to how the erection of a roof over the arena changes the impact of the existing use on fauna.

40. The NSC Report appears to misrepresent Specific Outcome O1c). This outcome refers to landscaping between buildings not between a building and a site boundary where there is no building beyond the boundary (and no likelihood of a building given the Respondent's submissions about retaining the natural values of the area).

41. The Respondent raised issues about vegetation instability in the riparian vegetation due to undercutting of the creek. The Tribunal was specifically invited to inspect the undercutting. There is definitely severe undercutting occurring, but the line of undercutting was not directed towards the subject site in the vicinity of the arena, but further to the north=east and if the undercutting continues in the current direction any new course of the creek is considered unlikely to impact on the subject land before it re-joins the existing creek.

Findings of Fact:

42. The Tribunal has determined that it is to assess the application as submitted and not alternative locations for the arena proposed by the Respondent at the hearing, as the applicant has not agreed to the proposals from the Respondent.

43. The Tribunal has determined:

- There is an existing horse arena. A roof over the arena is necessary for the health and safety of the riders and horses in the Queensland climate.
- The Respondent accepts a roof over the arena is a reasonable outcome subject to setbacks from the boundaries. Compliance with the setback would not provide full protection for the horses and riders and would impact on the utility of the existing arena.
- The building envelope for house sites and effluent treatment areas set out in Condition 30 of the PEC Decision D138 of 2005 does not apply to the construction of a roof over the horse arena.
- The application was made because the boundary setbacks in the Acceptable Solutions of the Building Work Code could not be met, and so the development's status as accepted development subject to conditions defaulted to code assessable development against the Building Work Code.

44. Conditions 6 and 7 of the Decision Notice are not relevant to the application as there is no proposal to remove vegetation from the road reserve or the area in the Open Space and Conservation Zone adjacent to the subject site, and there is no vegetation to be cleared from the area of the works.

45. The decision is a bound decision and the Tribunal is satisfied that with the addition of a proposed lighting condition, the development will be consistent with the specific outcomes of the Building Works Code.

Reasons for the Decision:

46. In coming to this decision considered all the information provided and all the submissions made at the hearing and in response to the Tribunal Directions, and has mentioned the material upon which its decision is based.

47. If a code assessable proposal complies with all relevant assessment benchmarks, it must be approved.

48. If there is some non-compliance with assessment benchmarks, the application cannot be refused if compliance could be achieved by imposing conditions on the approval.

49. Any conditions imposed must comply with the PA section 65.

Relevant Assessment Benchmarks

50. The *Planning Regulation 2017* section 26 and schedules 9 and 10 set out the assessment benchmarks relevant to the application. As it would appear that neither the Regional Plan nor the State Planning Policy is identified in the planning scheme as being appropriately integrated in the planning scheme, they are considered separately here.

State Planning Policy 2017

51. No non-compliance with the State Planning Policy is evident, nor is any alleged by the Respondent.

South East Queensland Regional Plan 2017

52. No non-compliance with the South East Queensland Regional Plan 2017 is evident, nor is any alleged by the Respondent.

Local Planning Scheme Noosa Plan 2006

Building Works Code - Specific Outcome O1

53. The only provision of the Noosa Plan specifically raised on by the Respondent in support of the Condition was Specific Outcome O1 (**SO1**) of the Building Works Code section 14.94 Siting.

54. It was common ground that the structure as proposed would not comply with the Probable Solution set out in the Code for that Specific Outcome, which refers to setbacks set out in Schedule 1 of the Noosa Plan (a 20m setback would be required to comply with the Probable solution).

55. The proposed development could nevertheless comply still comply with the Specific Outcome, by complying with the criteria set out in subsections (a) to (g) of the Specific Outcome. Those subsections are:

a) provide amenity for users of the premises as well as preserve the visual and acoustic privacy of adjoining and nearby land uses;
b) preserve any existing vegetation that will buffer the proposed building from adjoining uses;
c) allow for landscaping to be provided between buildings;
d) maintain the visual continuity and pattern of buildings and landscape elements within the street;
e) for class 10a buildings, do not visually dominate the street;
f) avoid any significant adverse impacts on the natural values of watercourses and their foreshores, including those of the Noosa River and its lakes; and
g) do not interrupt the natural cycles of erosion and accretion of watercourses and foreshore areas.

56. Pursuant to section 14.90 of the Code, the proposal need only be “consistent with” the Specific Outcomes of the Code to comply with the Code. This would seem to accept a standard somewhat less than strict compliance.

57. Compliance with sub-criteria b) to e) inclusive of S01 was not in issue. The Tribunal finds that these sub-criteria are complied with.

58. The question of the impact of the structure on watercourse erosion and accretion was raised, which bears on sub-criterion g). In the absence of expert evidence in relation to this impact, the Tribunal formed its own view, noting that the structure is open on all sides and that roofwater is to be directed to an adjacent dam. It finds that the structure as proposed is sufficiently removed from the watercourse as to have no effect on watercourse erosion and accretion, that there is no need for an expert report to confirm what is quite obvious, and that the sub-criterion is complied with.

59. The question of the impact of artificial lighting on the neighbouring conservation zone was raised. This issue bears on sub-criteria a) and f). In the absence of expert evidence in relation to this effect the Tribunal has formed its own view and finds that a condition imposing a reasonable limit on light spillage is appropriate to achieve compliance with these sub-criteria. A reasonable condition would be to use Probable solution 19.4 of the Building Works Code as the basis for the condition, but with the point at which light spillage is to be measured, modified to be 5m outside the boundary, being approximately half way across the mown strip in the Open Space and Conservation Zone land. (The Tribunal notes the 1.5m measurement point is applied in residential areas where light spillage onto adjoining windows can have a critical impact on the amenity of adjoining residents. Here the nearest significant natural habitat is over 10m from the structure).

60. In summary, subject to the imposition of a condition limiting light spillage from the structure into the conservation zone, the Tribunal finds that Specific Outcome O1 is complied with. This condition will also achieve compliance with Specific Outcome O19

61. As compliance with the other Specific Outcomes of the Building Works Code was not put in issue, the Tribunal finds that, subject to the imposition of an appropriate condition limiting light spillage, the Building Works Code as a whole is complied with.

Building Works Code – Overall Outcome

62. The Tribunal notes that the Proposal could also comply with the Code as a whole by complying with the overall outcomes of the Code, pursuant to section 2.6.4 of the Noosa Plan: *d) Code assessable development: iii. that complies with: a. the overall outcomes of the code complies with the code*... .

63. Those overall outcomes are quite brief, and are contained in section 14.91.2:

> *The overall outcomes sought by the Building Works Code are to ensure that building works—*
> *a) offer high levels of amenity and safety for users;*
> *b) are sited to minimise risk to users; and*
> *c) are sited and have a built form consistent with other buildings and structures in the vicinity.*

64. The Tribunal, having considered all the evidence and submissions of both parties and inspected the site in detail, finds that outcomes a) and c) are complied with.

65. In relation to outcome b), it is appropriate to construe the desired outcome with a "reasonableness" qualification, such as "to the extent reasonable in all the circumstances". If not, all building works in the Noosa area would have to be clustered in the middle of each block to absolutely minimise the risk of falling trees and tree limbs from adjacent Council lands and roads. Further, where would one stop - if moving 5m away reduces risk, 10m would reduce it more, and so on. The Appellants are now aware of the risk and can take the action they consider appropriate to address the matter. The Tribunal is also aware that this is a Building Works Code in which the focus of safety would be expected to be primarily on the safety of the building work.

66. Here, the horse arena has been in use for approximately four years with no protection from falling limbs and trees at all, and no protection from the sun. The proposed structure would, on the Tribunal's assessment, provide protection from both risks.

Draft Noosa Planning Scheme:

67. The Respondent made reference to a provision for a "riparian buffer" in the draft Noosa Planning Scheme. The scheme has been on two rounds of public display but has not been finalised. This application was lodged during the second period of public display. Unfortunately links to maps showing riparian buffers were not available on the NSC website when inspected by the Tribunal, so it was not clear in which zone the works were located or whether there was any overlay or riparian buffer applicable to the land.

68. Under the PA section 45(7) the application is to be assessed against or having regard to the statutory instrument, or other document, as in effect when the development application was properly made. Under section 45(8) regard may be had to statutory instruments (which encompasses planning schemes) that are changed after the application was made, but before the application is decided. However, the draft planning scheme is only that, a draft, and the planning scheme has not yet been changed. Therefore, under this provision, the Tribunal has not given regard to the draft scheme.

69. There may be common law authority or previous planning legislation where it was possible to give weight to draft planning schemes. However, the Tribunal doubts, considering the decision of the Court of Appeal in *Klinkert*[1] and changed *Planning Act 2016* provisions, that the authority is still good law. If that is wrong, the Tribunal in all the circumstances considers approval would not unduly "cut across" the draft planning scheme and exercises its discretion to give minimal weight to it.

Other Matters Raised by the Respondent:

70. The Respondent raised concerns about:

a. its potential liability in negligence or otherwise, should trees from the conservation zone fall on the shelter;

b. the risk that it might be asked to remove vegetation within the conservation area;

c. the risk to the structure of flooding and possible erosion;

d. the risk that the structure might be subject to leaves clogging gutters, bird and bat droppings, and other nuisances; and

e. the risk to the structure of bushfire.

71. In relation to flooding, the Tribunal notes the applicant's submission that the site is not mapped as a flood hazard area in the planning scheme maps, and that this was not disputed by the Respondent. To the extent that the area does flood, the Tribunal accepts the Appellant's submissions that:

a. such flooding is minor, short term and infrequent (in compliance with Building Works Code O2(b), although the Tribunal was not taken to this provision by the Respondent);

b. the proposed structure, being completely open, will not affect such flooding that might occur in the absence of the proposed structure in any measurable way;

[1] *Brisbane City Council v Klinkert* [2019] QCA 40, . in which, for code assessment, the importance of assessment only against assessment benchmarks in place at the time of application was made was emphasised. Note that s 45 PA subsections have been renumbered since this judgment was handed down.

c. moving the proposed structure to a 10m boundary clearance would not affect that flooding in any measurable way; and

d. Potential flood loads and other effects such as erosion on the structure are structural issues, to be dealt with during assessment against the Building Act.

Accordingly, the Tribunal finds that there is no non-compliance with any assessment benchmark associated with the question of flooding.

72. The Respondent raised issues about vegetation instability in the riparian vegetation due to undercutting of the creek. The Tribunal was specifically invited to inspect the undercutting. There is definitely severe undercutting occurring, but the line of undercutting was not directed towards the subject site in the vicinity of the arena, but further to the east away from the subject land. The Tribunal does not consider the undercutting of a creek downstream of, and away from the site, is a relevant consideration. The Tribunal noted the Arborist's report submitted in response to the Assessment Manager's information Request. That report and the comments at the hearing by the Respondent's horticultural advisor and engineer did not have any significant weight in the deliberations of the Tribunal.

73. Otherwise, none of these issues appear to bear directly on any of the assessment benchmark(s) to which the Tribunal was taken. To the extent that they are (however indirectly) relevant, they have been taken into account.

74. The Tribunal notes that a Respondent has no entitlement to express random "thought bubbles" to applicants in the guise of actual planning requirements. Code assessment involves assessment against and having regard to specified and limited assessment benchmarks, and if compliance deficiencies are to be alleged by the Respondent, the assessment benchmark relevant to the alleged deficiency should also be identified.

Irrelevant Conditions

75. The Tribunal in making its decision is standing in the place of the Assessment Manager. Therefore, it cannot impose conditions that are not reasonable or relevant to the application. Therefore, as there are no works to be undertaken in the road reserve or in the Environmental Park (land in the adjacent Open Space and Conservation Zone) to the east of the site, Condition 6 is irrelevant to the application. Similarly, as the area where works are to be undertaken is already cleared of vegetation, there are no trees to be retained and so Condition 7 is not relevant to the application.

Confirmation of Appellant

76. Late in the preparation of the decision, the correctness of the description of the Appellant was raised. Accordingly, the Tribunal requested the Registry to seek advice from the Appellant as to the legal name of the Appellant. The Appellant advised the legal name of the Appellant which is listed as the Appellant in the heading of the decision. The Appellant advised that the Director of the firm was present at the hearing and that any error in the making of the application should have been resolved by NSC before issuing its Confirmation Notice that the application was properly made.

Conclusion:

77. The onus is on the Appellant to show that the appeal should be allowed.

78. The Tribunal finds, in respect of the Shade Structure in its original position, that the proposal in fact complies with all assessment benchmarks alleged by the Respondent not to be complied with, with one exception (in relation to light spillage) which can be remedied by the imposition of an appropriate condition.

79. In these circumstances, the Tribunal finds that, pursuant to s 65(1) Planning Act, the Condition 3 would be an unreasonable imposition on the development, and it is not reasonably required in relation to the development. It is therefore unlawfully imposed.

80. If that conclusion is found to be incorrect, the Tribunal nevertheless finds that the Condition 3, if imposed, would not have been imposed for a proper planning purpose, and it exercises its discretion not to impose the condition.

81. The Applicant has discharged its onus. The appeal should be allowed.

82. In the course of the appeal, it became apparent that a condition regarding lighting should be imposed and that certain conditions are not appropriate to be retained as they are not relevant to the application.

83. In the course of the appeal the correctness of the description of the appellant was raised and was resolved.

84. In the circumstances, the Tribunal makes the orders as set out under the heading 'Decision' at the beginning of this notice.

John O'Dwyer BTRP, JP (Qual), RPIA

Development Tribunal Chair
Date: 18 May 2020

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.

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 Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833
Email: registrar@hpw.qld.gov.au