# Development Tribunal – Decision Notice

***Planning Act 2016, section 255***

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| **Appeal Number:** | **22-006** |
| **Appellant:** | Barry and Sallyann Lehmann |
| **Respondent (Assessment Manager):** | Sunshine Coast Regional Council |
| **Site Address:** | 54 – 62 Upper Rosemount Road, Rosemount (otherwise described as Lots 3 and 4 on RP865601) (**the Land**) |

**Appeal/Application**

Despite being identified on Form 10 as being an 'appeal about whether a development application is properly made', the true nature of these proceedings is as an application for declaration, in terms of whether or not a development application made to the Sunshine Coast Council, for a development permit to reconfigure 2 lots, into 2 lots, is properly made or not.

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| **Date and time of hearing:** | |
| **Place of hearing:** | Zoom, 1pm, 31 May 2022 |
| **Tribunal:** | Wendy Evans – Chair<br>Derek Kemp – Member |
| **Present:** | Wendy Evans<br>Derek Kemp<br>Cameron Adams<br>Barry Lehmann<br>Sally Lehmann<br>Marcia Thompson<br>Katrina Patey |

**Decision:**

The Tribunal agrees with and therefore confirms/declares the Respondent's Action Notice dated 1 March 2022, as valid.

**Background:**

1. By letter dated 15 February 2022, the Applicants, care of Adams and Sparkes Town Planning, made an application to the Sunshine Coast Council, with respect to the Land.

2. The Applicants are the registered owners (as joint tenants) of the Land.

3. The development application sought a development permit to reconfigure the Land, in the following configuration:

| **Existing Lot 3 on RP865601** | **Changed proposed Lot 2** | **Existing Lot 4 on RP865601** | **Changed proposed Lot 1** |
|---|---|---|---|
| Community Facilities Zone | Community Facilities Zone &<br><br>Rural Residential Zone | Rural Residential Zone | Rural Residential Zone |
| 411m2 | 2,946m2 | 5,589m2 | 3,053m2 |
| No current buildings | Will include existing sheds | Includes current dwelling house and sheds | Will only include current dwelling house |

4. As detailed in the table above, the Land is included in both the Rural Residential Zone (Lot 4 on RP865601) and the Community Facilities Zone (Lot 3 on RP865601).

5. Table 5.6.1 of the Sunshine Coast Planning Scheme 2014 advises the categories of development and assessment, for reconfiguring a lot. The following are the relevant extracts for the purposes of this matter:

| **Zone** | **Category of development and category of assessment** | **Assessment benchmarks for assessable development and requirements for accepted development** |
|---|---|---|
| Rural Residential Zone | Impact assessment if:<br><br>(a) Creating one or more additional lots in the Rural residential zone; and<br><br>(b) Not complying with the minimum lot size specified in:<br>i. The applicable local plan code; or<br>ii. Column 2A of Table 9.4.4.3.2 (Minimum lot size and dimensions) of the Reconfiguring a lot code, where not otherwise specified in the applicable local plan code. | The planning scheme |
| All zones | Code assessment if:<br><br>(a) Involving the subdivision of an existing or approved building or | - Applicable local plan code;<br>- Applicable zone code;<br>- Reconfiguring a lot code |

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|---|---|---|
| | structure that subdivides land and/or airspace; or<br>(b) Not otherwise specified in this table as being assessable development requiring impact assessment. | - Prescribed other development codes |

6. The Applicants and their town planners maintain that the development application is subject to code assessment.

7. The Respondent has advised by Action Notice dated 1 March 2022, that it believes the application has not been properly made, and needs to be structured as an impact assessable development (being the creation of an additional lot in the Rural Residential Zone, which does not meet the minimum lot size).

**Material Considered**

8. 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 and dated 1 March 2022;

   b) Oral submissions made by the parties at the hearing on 31 May 2022;

   c) Letter to the Registrar from Adam + Sparkes Town Planning, dated 10 June 2022;

   d) Letter to the Tribunal from Sunshine Coast Regional Council, dated 23 June 2022;

   e) Letter to the Registrar from Adam + Sparkes Town Planning, dated 1 July 2022; and

   f) *Johnston v Cardwell Shire Council* [2008] QPEC 58.

**Findings of Fact**

9. The parties accept that the result of this development is intended to be two allotments which will not comply with the minimum lot size specified in Table 9.4.4.3.2 of the Reconfiguring a lot code (which specifies a 6,000m2 (minimum average 1 hectare) lot size, where within the rural residential growth management boundary).

10. Where this is the case, the only factual question to be determined in this matter is whether or not the proposed development constitutes "*creating one or more additional lots in the Rural residential zone*" for the purposes of Table 5.6.1 of the Respondent's planning scheme.

**Reconfiguration and "creating one or more additional lots"**

11. In order to arrive at a decision in the above regard, the Tribunal considers that it is first necessary to establish that there is in fact 'reconfiguring a lot' proposed, in order to arrive in Table 5.6.1 of the Respondent's planning scheme.

12. 'Development' under the *Planning Act 2016*, is defined as meaning:

   *(a) carrying out:*

      *i. building work; or*

      *ii. plumbing or drainage work; or*

*iii. operational work; or*

*(b) reconfiguring a lot; or*

*(c) making a material change of use.*

13. 'Reconfiguring a lot' is then separately defined in the *Planning Act 2016* as meaning:

*(a) creating lots by subdividing another lot; or*

*(b) amalgamating 2 or more lots; or*

*(c) rearranging the boundaries of a lot by registering a plan of subdivision under the Land Act or Land Title Act; or*

*(d) dividing land into parts by agreement rendering different parts of a lot immediately available for separate disposition or separate occupation, other than by an agreement that is—*

*(i) a lease for a term, including renewal options, not exceeding 10 years; or*

*(ii) an agreement for the exclusive use of part of the common property for a community titles scheme under the Body Corporate and Community Management Act 1997; or*

*(e) creating an easement giving access to a lot from a constructed road.*

14. It is common ground that the reconfiguration here is not (b) an amalgamation; (d) diving land into parts by agreement; or (e) creating an easement.

15. Accordingly, the question is narrowed further to whether the amendment of the 2 existing lots, into 2 changed lots, constitutes either (a) creating lots by subdividing another; or (c) rearranging the boundaries of a lot by registering a plan of subdivision under the Land Act or Land Title Act.

16. The Tribunal is aware of the decision by the Planning and Environment Court in the matter of *Johnston v Cardwell Shire Council* [2008] QPEC 58, which was decided with respect to the superseded *Integrated Planning Act 1997*. In that case, the Court was required to determine whether the development application to "rearrange boundaries", triggered referral to the Chief Executive (not an issue before this Tribunal).

17. Before the Planning and Environment Court however, could make that decision, it had to be satisfied that the development application was in fact for the creation of lots (as opposed to the rearrangement of boundaries). The reconfiguration proposed in that was described as a boundary realignment of Lots 1 & 2 on RP715238, which covered 5.06 hectares in total. Lot 1 was the small lot in the first instance, covering a dwelling and curtilage. Lot 2 was the balance of the area, containing agricultural land and two dwellings.

18. The reconfiguration was to enable "*proposed Lot 101 will contain all three dwellings and no agricultural land. Proposed Lot 102 will contain only the agricultural land*". Proposed Lot 101 was to be 3,520m2 and proposed Lot 102, 4.7 hectares.

19. Without much deliberation, the Court in that case was satisfied that the application was properly classified as reconfiguration of a lot where two lots are created, because:

a. "*so much is evident by the use of the terminology, Proposed Lot 101 and Proposed Lot 102 in the planning report submitted in support of the application*"; and

b. "*the difference in size between Lot 1 and Proposed Lot 101 goes well beyond what could reasonably be contemplated by 'rearranging the boundaries of a lot'*"; and

c. "*the application effectively seeks to create two materially different lots from those which exist at present*".

20. At pages 2 and 3 of the Adams + Sparkes Town Planning letter addressed to the Respondent dated 15 February 2022, it is said that Lot 3 is presently an "unusable site", being "*a small pocket of Community Facilities Zoned land in an area dominated by Rural Residential Zoned lots*", such that the "*application seeks to rectify this zoning anomaly by creating two (2) suitably sized lots that can be utilised for rural residential purposes*".

21. The Tribunal is satisfied, for the same reasons identified by the Planning and Environment Court in *Johnston v Cardwell Shire Council* ([2008] QPEC 58, that the proposed development here represents the **creation of (two) new lots**, as opposed to the rearrangement of boundaries.

22. The Respondent does not consider it necessary to delve into the Planning Act's definition of 'reconfiguring a lot'. On its view, simply the fact that at present, there is only one allotment (Lot 4 on RP865601) in the Rural Residential Zone, but what is proposed – is for two lots to be in the Rural Residential Zone:

    a. proposed Lot 2 having an area of 411m2 in the Community Facilities Zone and its balance of 2,535m2 in the Rural Residential Zone; and

    b. proposed Lot 1 having an area of 3,053m2 in the Rural Residential Zone,

    was enough for the Respondent to know a reconfiguration is intended, such that Table 5.6.1 of its planning scheme could be applied (see Council's letter dated 23 June 2022).

23. The Tribunal is satisfied that the proposed development will mean 86% of a 'new lot' is to be created in the Rural Residential Zone. However, the Tribunal initially considers it important to establish a 'reconfiguring a lot' is being undertaken (per the proceeding paragraphs), before a simple reading of Table 5.6.1 of the planning scheme is attended to.

24. The Tribunal, satisfied that there is 'reconfiguring a lot' in the form of creating lots by subdividing another, which will result in 2,535m2 of a 'new lot' ("proposed Lot 2") in the Rural Residential Zone, is of the view that the development application as presently drafted:

    a. Is for a development permit for reconfiguring a lot;

    b. Will create one additional lot in the Rural residential zone (which will also partially be in the Community Facilities Zone), which does not comply with the minimum lot size specified in Table 9.4.4.3.2 of the Reconfiguring a lot code under the Respondent's planning scheme;

    c. Is therefore impact assessable development per Table 5.6.1 of the Respondent's planning scheme.

25. It follows that the Tribunal agrees with and therefore confirms/declares the Respondent's Action Notice dated 1 March 2022, as valid.

***Jurisdiction***

26. Section 239 of the *Planning Act 2016* confirms that a person may start proceedings for a declaration by a tribunal by filing an application, in the approved form, with the registrar.

27. More specifically, section 240 of the *Planning Act 2016* states:

    a. The applicant (as well as the assessment manager), may start proceedings for a declaration about whether a development application is properly made (section 240(1));

    b. No declaration can be sought without the written consent of the owner of the premises to the application (section 240(2));

    c. The proceedings must be started by the applicant, within 20 business days after receiving notice from the assessment manager, under the development assessment rules, that the development application is not properly made (section 240(3));

    d. The registrar must, within 10 business days after the proceedings start, give notice of the proceedings to the Respondent (section 240(4)).

28. Whilst the notice of appeal at section 3, indicated the description of the appeal was "*appeal about whether a development application is properly made*", the parties do not take issue in terms of compliance with section 240 of the *Planning Act 2016*, and agreed the proceedings were declaratory in nature. The Tribunal is also satisfied section 240 of the *Planning Act 2016* has been complied with.

**Wendy Evans**

**Development Tribunal Chair**
**Date: 25 July 2022**

**Appeal Rights**

Schedule 1, Table 2, item 1 of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

(a) an error or mistake in law on the part of the Tribunal; or
(b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.
http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court

**Enquiries**

All correspondence should be addressed to:

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

**Telephone (07) 1800 804 833**
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