



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number: 23-060

Appellant: Sally Cheetham / David Cheetham

Assessment manager: Gerard Van Eyk

**Co-respondent
(concurrence agency) (if
applicable):** Council of the City of Gold Coast (**Council**)

Site Address: 1376 Tallebudgera Creek Road, Tallebudgera Valley and
described as Lot 4 on RP 171491 — the subject site

Appeal

The Appellants appeal under section 299 of the *Planning Act 2016* (**Planning Act**) against a building development application refused by the Assessment manager. The appeal proceeds in the Tribunal under schedule 1, section 1, table 1, item 1(a) of the Planning Act.

By decision notice dated 9 November 2023, the Assessment manager refused the building development application described as '*Construction of a new dwelling house and conversion of existing cottage to a secondary dwelling/Class 1a*' (**decision notice**).

Date and time of hearing: 24 January 2024 10:00am

Place of hearing: The subject site

Tribunal: Nick Lichti — Chair
Christopher Finch — Member
Victoria Jones — Member

Present: Sally Cheetham — Appellant
David Cheetham — Appellant
Robert Patrick — Appellant's agent
Justin Collofello — Appellant's agent

Gerard Van Eyk — Respondent
Roger Sharpe — Council representative
Shane Weterings — Council representative
Wiremu Cherrington — Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (**Planning Act**), decides the appeal by confirming the decision of the Assessment manager to refuse the building development application.

Background

1. By decision notice dated 9 November 2023, the Assessment manager refused the building development application (**decision notice**).
2. The decision notice lists the proposed development as ‘*Construction of a new dwelling house and conversion of existing cottage to a secondary dwelling/Class 1a*’.
3. The decision notice’s statement of reasons is short and can be reproduced in full here—

Design drawings for the project were referred to the Gold Coast City Council as a referral agency. The Council be declining to respond to the referral, through provisions of the Planning Act 2016 S 58 (2) (c) and Planning Regulation 2017 S24, directed the assessment manager for building works to refuse the application. For Planning Act S 63 (f) (i) & (ii) this application is refused as directed by the Council as a referral agency and, also for other reasons.

The other reasons for refusal are the application does not establish compliance with relevant assessment benchmarks and other normal prerequisites. Design drawings are at design development stage. They are not working drawings intended for construction purposes. Referral to the Council was made on preliminary design documents prior to the building application being made. The development application involving building work was made to not enable construction but to enable appeal process via tribunal as explained in the Council’s correspondence of 22 August 2023 to Tactica Planning (attached). The application is refused summarily as directed by the Council as a referral agency.

4. The decision notice includes an attached email dated 22 August 2023¹ from a Council officer that relevantly states—

...

In response, Council considers the existing Dwelling house is intended to remain on site to be used as a separate dwelling.

As such, Council further considers the development will constitute assessable development under the City Plan for a material change of use for a Dwelling house (secondary dwelling) and subsequently will not be providing a referral agency response.

Please be further advised that for section 58(2)(c) of the Planning Act 2016, the effect of Council not providing a referral agency response is to be taken as direction for the assessment manager for building to refuse the referral agency assessment application, as prescribed by section 24 of the Planning Regulation 2017.

...

¹ Note the email attached to the decision notice was undated, but the full email is reproduced as part of the Appellants’ lodgement material at page 49.

5. The Appellants seek to change the Assessment manager's decision from a refusal to an approval.

Jurisdiction

6. As stated above, the appeal proceeds under schedule 1, section 1, table 1, item 1(a) of the Planning Act to the extent the building development application relates to the *Building Act 1975 (Building Act)*.
7. No issue relating to jurisdiction was raised by the parties and the Tribunal proceeds on the basis that it has jurisdiction to hear and decide the appeal.

Decision framework and reasons for the decision

8. The Tribunal is a creature of statute under the Planning Act, where referees are appointed² by the Minister or chief executive administering the Planning Act and the chief executive may at any time establish a tribunal for tribunal proceedings³. The Tribunal, therefore, has no inherent jurisdiction and has no power other than what has been given to it by the Planning Act. Those powers are generally confined to what is in chapter 6, part 2 of the Planning Act.
9. As the proceedings relate to a development application, the Tribunal must decide the proceedings based on the laws in effect when the application was properly made.⁴ However, it may give the weight it considers appropriate to any new laws.⁵
10. The onus rests on the Appellant to establish that the appeal should be upheld.⁶
11. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.⁷ The Tribunal stands in the shoes of the Assessment manager. Unlike the Planning and Environment Court, an appeal to the Tribunal is not a hearing anew.⁸
12. The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings).
13. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the Planning Act, relevantly, 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.
14. The Assessment manager for these proceedings is a building certifier under the Building Act who decided a building development application for proposed development, namely

² *Planning Act 2016* s 233.

³ *Ibid.* s 235.

⁴ *Planning Act 2016* s 251(2).

⁵ *Ibid.* s 251(3).

⁶ *Ibid.* s 253(2).

⁷ *Ibid.* s 253(4).

⁸ *Planning and Environment Court Act 2016* s 43.

'Construction of a new dwelling house and conversion of existing cottage to a secondary dwelling/Class 1a'.

15. The Assessment manager was required pursuant to schedule 9, part 3, division 2, table 3—Design and siting of the *Planning Regulation 2017* (**Planning Regulation**) to refer the building development application to the local government, being Council of the City of Gold Coast (**Council**), as a referral agency. The statement of reasons for the decision notice states this occurred in accordance with section 54 of the Planning Act.
16. The Tribunal notes the Council's referral agency powers were not limited, for example as giving advice only, under table 3—Design and siting of the Planning Regulation.
17. Council, in accordance with sections 55 and 56 of the Planning Act, was required to assess the building development application against the relevant matters in schedule 9, part 3, division 2, table 3—Design and siting of the Planning Regulation and give a referral agency response about the referral agency's decision to the Appellants and the Assessment manager. On the material before the Tribunal, this did not occur.
18. Instead, by way of an email dated 22 August 2023 from a Council officer, the Council stated it *'will not be providing a referral agency response'*.
19. Section 58 of the Planning Act dictates what must happen in circumstances where Council, as a referral agency, does not give a referral agency response. Section 58(2)(c) states no response from the referral agency has the effect prescribed under a regulation for a matter.
20. Section 24 of the Planning Regulation applies to a development application for building work under the Building Act, if—
 - (a) The local government is a referral agency for the application; and
 - (b) The local government is assessing a matter other than the amenity and aesthetic impact of a building or structure; and
 - (c) The local government does not comply with section 56(4) of the Planning Act before the end of the period stated in the development assessment rules for complying with the section, including any extension of that period under the rules.
21. Here, the building development application was for building work under the Building Act and the above three prerequisites were also met. As such, section 24 of the Planning Regulation applied.
22. On the basis of section 24 of the Planning Regulation applying, subsection (2) dictated the Council was taken to have directed the Assessment manager to refuse the development application. This was stated in the email from the Council officer and in the statement of reasons of the decision notice from the Assessment manager—
 - (a) 22 August 2023 email from Council officer—

...

Please be further advised that for section 58(2)(c) of the Planning Act 2016, the effect of Council not providing a referral agency response is to be taken as direction for the assessment manager for building to refuse the referral agency assessment application, as prescribed by section 24 of the Planning Regulation 2017.

...
 - (b) Decision notice—

...

The Council by declining to respond to the referral, through the provisions of the Planning Act 2016 S 58 (2) (c) and Planning Regulation 2017 S24, directed the assessment manager for building works to refuse the application. For Planning Act S 63 (f) (i) & (ii) this application is refused as directed by the Council as a referral agency and, also for the other reasons.

...

The application is refused summarily as directed by the Council as a referral agency.

23. By definition under the Planning Act, the direction to refuse the building development application pursuant to section 24(2) of the Planning Regulation was not a *deemed refusal*.
24. Through the operation of section 24(2) of the Planning Regulation and section 58(2)(c) of the Planning Act, the Assessment manager was required to refuse the building development application.
25. As outlined above—
 - (a) the Tribunal is established under the Planning Act;
 - (b) the Tribunal has no powers other than those given to it under the Planning Act;
 - (c) the Tribunal stands in the shoes of the decision maker;
 - (d) The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the Planning Act; and
 - (e) 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.
26. Standing in the shoes of the Assessment manager, and based on the evidence before the Tribunal, the Tribunal appears similarly required by virtue of section 24(2) of the Planning Regulation and section 58(2)(c) of the Planning Act to refuse the building development application.
27. Unless given to it by statute, the Tribunal does not have powers greater than the Assessment manager who considered the building development application.
28. The current appeal to the Tribunal is different to an appeal to the Planning and Environment Court. The Court has, under section 46(5) of the *Planning and Environment Court Act 2016*, power to consider and make a decision about a ground of appeal in circumstances where the Planning Act required the assessment manager to refuse the development application—

...

- (5) *The P&E Court is not prevented from considering and making a decision about a ground of appeal (based on a referral agency response under the Planning Act) merely because that Act required the assessment manager to refuse the development application or approve it subject to conditions.*

...

The Court is not bound by the referral agency response.⁹ No such power or ability to consider and make a decision about a referral agency response (or lack thereof) is found in the Planning Act for the Tribunal.

29. As such, the Tribunal cannot decide to approve a building development application if the Assessment manager was required by law to refuse it. To decide the appeal otherwise would mean the Tribunal would give itself additional powers not found in the Planning Act. There is no ability for the Tribunal to go behind a direction from a referral agency in circumstances where the original Assessment manager could not. Had that been intended, the Planning Act would need to explicitly give the Tribunal that power and the legislature has chosen not to do so.
30. For completeness, it is further noted that section 229(5) of the Planning Act states—
 - (5) *If an appeal is only about a referral agency's response, the assessment manager may apply to the tribunal or P&E Court to withdraw from the appeal.*and that schedule 1, section 1, table 1, item 1, column 3 states—
 - If the appeal is about a concurrence agency's referral response—the concurrence agency.*
31. Section 229(5) and column 3 in table 1, may indicate that it is possible for the Tribunal to consider and make a decision in relation to a '*referral agency's response*' (despite not expressly providing for it).
32. However, as outlined above in paragraph 18, the Council stated it '*will not be providing a referral agency response*'. This is true when one looks at the definition of *referral agency's response* in section 56(4) of the Planning Act and the requirements for a notice under subsection (7). The correspondence from the Council does not meet the requirements for or the definition of a *referral agency's response*. As such, no referral agency response was given.
33. A conclusion on whether the Tribunal does have the ability to consider and make a decision about a referral agency response is not necessary to dispose of this appeal because the response from Council was not a referral agency response.
34. For the above reasons, the Tribunal is required to decide the appeal by confirming the decision of the Assessment manager, that is to refuse the building development application.

Material considered

35. The material considered in arriving at this decision was:
 - (a) Form 10 Notice of appeal, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunal dated 14 November 2023;
 - (b) Rendered drawings of the propose dwelling provided to the Tribunal by the Appellants' representatives by email dated 15 January 2024;
 - (c) Written submissions provided to the Tribunal by the Appellants' representatives by email dated 2 February 2024;
 - (d) Email submissions provided to the Tribunal by the Council's representatives on 7 February 2024; and

⁹ *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2018] QPEC 32 at [193].

- (e) Further written submissions provided to the Tribunal by the Appellants' representatives by email dated 12 February 2024.

Findings of fact

36. The tribunal makes the following findings of fact:

- (a) At some point prior to 22 August 2023, the Appellants made a building development application to the Assessment manager to carry out building on the Property.
- (b) The Assessment manager referred the building development application to the Council as a referral agency for a referral agency response.
- (c) On 22 August 2023, by email, a Council officer wrote to the Assessment manager to say Council would not be providing a referral agency response in accordance with the requirements of the Planning Act.
- (d) On 9 November 2023, the Assessment manager gave a decision notice in relation to a building development application. The Assessment manager, as directed by the Council, refused the application.

Nick Lichti
Development Tribunal Chair

Date: 25 October 2024

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 Housing, Local Government, Planning and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au