Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**20-034**
Appellant:	Jayme McNally
Respondent:	Noosa Shire Council
Site Address:	30 Moorhen Place, Noosaville in the State of Queensland and described as Lot 5 on SP190381 ─ the subject site

Appeal

This is an appeal under section 229, section 1 of Schedule 1 and item 2 of Table 1 of the *Planning Act 2016* (**PA**) against the Noosa Shire Council's (**Respondent**) decision to refuse a change application requesting a minor change to a development permit for a material change of use of premises – detached house, given by a Decision Notice dated 29 October 2020 (**change application**).

Date and time of hearing:	12pm, 1 March 2021
Place of hearing:	The subject site
Tribunal:	Samantha Hall – Chair Henk Mulder - Member
Present:	**Appellant** Jayme McNally – Appellant Josh McNally Don Grehan – Pacific BCQ **Noosa Shire Council** Patrick Murphy – Coordinator Planning, Council Conor Neville – Environment Officer, Council

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(b) of the PA **changes** the decision of the Respondent to approve the change application subject to conditions by changing the conditions the subject of the appeal as follows:

A. Condition 23 – no change.

B. Condition 24 – replace the condition with the following:

"*The new patio roof consisting of the barbeque and bench must be:*

(a) constructed to comply with AS3959:2018 "Construction of buildings in bushfire-prone areas" as if the work was in a Bushfire Attack Level – Fire Zone (BAL-FZ);
(b) setback in accordance with the following:
(i) from the rear/northern boundary, a minimum of:
(1) 8 metres to the outer most projection;
(2) 9 metres to the structural posts;
(3) 8.5 metres to the new bench (that incorporates the barbeque);
(ii) from the existing house wall, a minimum of 0.8 metres to the new bench (that incorporates the barbeque);
(c) constructed as a discontinuous roof from the main roof, as set out in the approved drawing A201 revision A10 by Collins Building Designs, dated 22/10/2020."

Background

1. On or about 2 September 2020, Mr Don Grehan of Pacific BCQ, on behalf of the Appellant, lodged the change application with the Respondent. The change application sought the Respondent's approval for a new rear patio and a detached pool house (comprising a gazebo, spa and seating area) to be located within a 10 metre fire protection zone (**FPZ**) at the rear of the subject site.

2. The 10 metre FPZ was required by a development permit for a material change of use of premises – detached house (Respondent's reference MCU 132010.105) dated 25 February 2010 (**Development Permit**) for the subject site. Specifically, the change application referenced condition 19 of the Development Permit which stated:

   "Flammable structures and landscaping materials, such as timber pergolas, timber decks and timber sleeper walls shall not be constructed within the 10 metre Fire Protection Zone."

3. The proposed detached pool house was to be constructed with a 0.0 metre setback from the rear boundary and extended almost the entire depth of the 10 metre FPZ. The new rear patio extended from the rear of the dwelling, as a continuous roof into the FPZ by 3.248 metres.

4. Accordingly, both the proposed pool house and rear patio were to be located within the FPZ in conflict with condition 19 of the Development Permit, thus necessitating the minor change application, seeking to change condition 19 of the Development Permit.

5. On or about 29 September 2020, the Respondent issued a letter titled "Further Advice – Development Application" in which it advised the Appellant as follows (**Further Advice Letter**):

   "<u>Issue – Fire Protection zone (FPZ)</u>

   The condition of approval and the Fire Management Plan for the original development (subdivision) seek that no structures are located in the FPZ except for minor non-flammable structures such as pools, BBQ's and pavement.

   It is considered the proposal for the patio roof and gazebo are not minor non-flammable structures and would place people and property at risk in a bushfire event. Therefore Council is not supportive of these structures within the FPZ, particularly when there is the opportunity to locate the structures to the east of the dwelling outside the FPZ.

   <u>Advice Required</u>

   1. Please provide amended plans with the structures outside the FPZ."

6. The Further Advice Letter required a response to the further advice by 29 November 2020.

7. On or about 22 October 2020, amended plans were provided to the Respondent, in which the proposed detached pool house was removed and replaced with a 3 metre x 3 metre garden shed that was located wholly within the FPZ. The width of the rear patio was reduced however it still extended into the FPZ by 1.504 metres.

8. By Decision Notice – Minor Change dated 29 October 2020, the Respondent decided to approve the requested changes and decided to amend condition 1 of the Development Permit and include additional conditions 23 – 25 in the Development Permit (**Change Approval**).

9. Condition 1 of the Change Approval listed the approved plans for the Development Permit and was amended to include the plans provided by the Appellant in response to the Further Advice Letter.

10. The new conditions 23 and 24 of the Change Approval were as follows:

    "23. The 3m x 3m shed is not approved and must not be constructed within the 10m fire Protection zone.

    24. The new patio roof consisting of the BBQ area and bench must be setback from the rear/northern boundary a minimum of 9m to the outer most projection."

11. On or about 29 October 2020, the Appellant filed the Form 10 – Appeal Notice with the Registry of the Building Tribunals.

12. The grounds of appeal identified by the Appellant were:

    "The Appellant is dissatisfied with Council imposition of Conditions 23 & 24 (Additional Conditions 26 October 2020) in the Decision Notice Ref No. 132010.105.01 dated 29 October 2020 on the basis that the requirements of the Conditions are Building Assessment Provisions pursuant to Section 30 of the Building Act 1975 (siting requirements and requirement for the construction of buildings in bushfire prone areas) and subject to Sections 31(3), 31(4) and 31(5) of the Building Act 1975, the Conditions have no effect."

13. The Tribunal understands that in a telephone conversation between Ms Kerri Coyle of the Respondent and the Tribunal's Registrar, Ms Coyle raised a concern that there might be a jurisdictional issue in this appeal.

14. By email dated 30 November 2020, the Tribunal's Registrar made the following directions to the Appellant and the Respondent, pursuant to section 250 of the PA (**Directions**):

    "1. that Noosa Shire Council provide a written submission (no more than three pages) to the Registry by 5pm on 11 December 2020, addressing any jurisdictional aspect or aspects it wishes to raise for the appeal;

    2. that the Appellant provide a submission in response within ten (10) business days of receiving a copy of the Council's submission."

15. By email dated 2 December 2020, Ms Coyle provided the Respondent's written submission in response to the Directions (**Respondent's Jurisdiction Submissions**).

16. By email dated 9 December 2020, Mr Grehan provided the Appellant's written submission in response to the Directions (**Appellant's Jurisdiction Submissions**).

17. By email dated 11 December 2020, the Tribunal's Registrar made the following further directions to the Appellant and the Respondent, pursuant to section 250 of the PA (**Further Directions**):

    "1. That the Noosa Shire Council provide a written submission to the Registry by 5:00pm on 24 December 2020 providing the Council's response to the Appellant's submissions dated 9 December 2020."

18. By email dated 18 December 2020, Ms Coyle provided the Respondent's written submission in response to the Further Directions (**Respondent's Further Jurisdiction Submissions**).

19. By email dated 22 December 2020, Mr Grehan provided further written submissions on behalf of the Appellant in response to the Respondent's further submissions (**Appellant's Further Jurisdiction Submissions**).

20. The Tribunal considered the parties' written submissions and by email dated 17 February 2021, the Tribunal's Registrar provided the following decision of the Tribunal to the parties:

    "The Tribunal has carefully considered the arguments of the Council directed to the jurisdiction of the Tribunal and is not persuaded that there is any jurisdictional impediment to its proceeding with the appeal. The Tribunal accordingly proposes to proceed to a hearing."

21. The hearing of the appeal was conducted at the subject site by the Tribunal on 15 March 2021.

22. At the hearing, the parties undertook to each take some further actions to attempt a resolution of the issues in dispute.

23. By email dated 17 March 2021, the Tribunal's Registrar made the following directions to the Appellant and the Respondent, pursuant to section 250 of the PA (**Final Directions**):

    "Can the Council confirm its willingness to provide a written response to new detailed information that seeks to utilise construction materials compliant with Bushfire Attack Level BAL-40 or higher, within the 10.0 metre FPZ.

    Can the Council also indicate an acceptable area for such an intrusion into the FPZ for the installation of a patio awning and a shed, to be identified as a percentage of the FPZ that is included in the area of the subject site.

    The response from Council should be provided to the Registrar, no later than 4pm on the 26 March 2021.

    The Tribunal will make further orders as necessary after the completion of these directions by the Council."

24. The Respondent provided the following response to the Final Directions by email dated 24 March 2021 from Mr Patrick Murphy of the Respondent to the Tribunal's Registrar (summarised as follows) (**Respondent's Final Submissions**):

    (a) Only a flyover roof was able to be supported in the FPZ if the encroachment was minor and built to AS3959. A 1 metre intrusion associated with the horizontal component of the new patio was considered minor if the posts and other structures were located outside of the FPZ, with only the overhang located within the FPZ.

    (b) An intrusion based on a volumetric measure was not supported.

(c) The 3 metre x 3 metre shed in the FPZ was not appropriate and was not a minor structure. As it was located in the FPZ and was a storage shed, it was beyond the Respondent's ability to regulate and monitor compliance with any conditions requiring non-flammable materials to be stored within it and would set a poor precedent for the management of the rest of the FPZ across the development. It was not considered a minor encroachment.

25. By email dated 8 April 2021, Mr Grehan on behalf of the Appellant to the Tribunal's Registrar, stated the following (**Appellant's Final Submissions**):

"In light of Council's non-compromise position reflected in their response of 24 March 2021, the owners of the premises at 30 Moorhen Place, Noosaville QLD 4566 feel that the additional expenditure in re-designing the building work to appease Councils concerns is unwarranted and request the Tribunal to decide the matter on the current design and their position expressed at the hearing to the effect that Bushfire Construction requirements are a Building Assessment Provision and accordingly, by virtue of Section 31 of the Building Act 1975 and Section 8 of the Planning Act 2016, Councils Planning Instrument has no effect."

Jurisdiction

26. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.[1]

27. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).

28. Section 1(2)(f) of Schedule 1 of the PA, relevantly refers to "a decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use of a classified building".

29. A "classified building" is defined in Schedule 2 of the PA to mean a "class 1 building".

30. The Building Code of Australia defines a "class 1 building" to include a single dwelling, being a detached house.

31. In this appeal, the change application was with respect to a development permit for a material change of use of premises – detached house.

32. So, Table 1 of Schedule 1 of the PA applies to the Tribunal.

33. Under item 2 of table 1 of Schedule 1 of the PA, an appeal may be made against the responsible entity's decision on the change application. The appeal is to be made by the applicant, who in this case was the Appellant and the respondent to the appeal is the "responsible entity", who in this case is the Respondent.

34. In circumstances where the Decision Notice was dated 29 October 2020 and was received on 30 October 2020[2], this appeal was to be filed on or before 27 November 2020.[3] This was satisfied.

35. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision framework

[1] Section 229(1)(a) of the PA.
[2] See Item 3 (Date written notice of decision received) of the Form 10 – Notice of Appeal / Application for Declaration of this appeal.
[3] Section 229 of the PA.

36. The Decision Notice was issued by the Respondent on or about 29 October 2020. At that time, the PA was in force.

37. The Appellant filed a Form 10 – Notice of Appeal / Application for Declaration on or about 9 November 2020.

38. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.

39. This is an appeal by the Appellant, the recipient of the Decision Notice and accordingly, the Appellant must establish that the appeal should be upheld.[4]

40. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Respondent which decided to give the Decision Notice the subject of this appeal.[5]

41. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal[6].

42. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and the Tribunal may seek the views of any person[7].

43. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.[8]

44. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:

    (d) confirming the decision; or

    (e) changing the decision; or

    (f) replacing the decision with another decision; or

    (g) setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or

    (h) for a deemed refusal of an application:

        (i) ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or

        (ii) deciding the application.

Material Considered

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

    (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on or about 29 October 2020.

[4] Section 253(2) of the PA.
[5] Section 253(4) of the PA.
[6] Section 253(5)(a) of the PA.
[7] Section 249 of the PA.
[8] Section 253 and section 246 of the PA.

(b) The Respondent's written submissions provided by email dated 2 December 2020, in response to the Directions (**Respondent's Jurisdiction Submissions**), including the following attachments:

(i) The Change Approval;

(ii) Doonella Noosa Plan of Development dated 29 July 2003)(**POD**);

(iii) Doonella Estate Residential Design Guidelines dated 29 August 2006; and

(iv) Fire Management Plan for Lake Doonella, Tewantin dated 21 April 2011 (**FMP**).

46. The Appellant's written submissions provided by email dated 9 December 2020, in response to the Directions (**Appellant's Jurisdiction Submissions**).

47. The Respondent's written submissions provided by email dated 18 December 2020, in response to the Further Directions (**Respondent's Further Jurisdiction Submissions**).

48. The Appellant's further written submissions provided by email dated 22 December 2020, in response to the Respondent's further submissions in paragraph (d) (**Appellant's Further Jurisdiction Submissions**).

49. The Respondent's response to the Final Directions provided by email dated 24 March 2021 (**Respondent's Final Submissions**).

50. An email dated 8 April 2021, from Mr Grehan on behalf of the Appellant to the Tribunal's Registrar (**Appellant's Final Submissions**).

51. *Noosa Plan 2020* (**Noosa Plan**).

52. *Planning Act 2016* (**PA**).

53. *Planning Regulation 2017* (**PR**).

54. *Building Act 1975* (**BA**).

55. *Building Code of Australia.*

56. *Queensland Development Code* (**QDC**).

Findings of Fact

The Tribunal makes the following findings of fact:

Jurisdiction issue

57. The Respondent's Jurisdiction Submissions provided a detailed planning background for the development of the subject site and indeed the broader Doonella Noosa Estate.

58. The Tribunal accepts the Respondent's Jurisdiction Submissions with respect to the planning background for the development of the subject site.

59. In particular, the Respondent identified the following:

(a) that a development approval for a material change of use to create the Doonella Noosa Estate (being Application No. 132003.22113.8 (23616 DA)) (**Earlier Approval**) continued in effect for the development of the subject site;

(b) the Earlier Approval established the POD that remained binding upon development within the Doonella Noosa Estate;

(c) a development approval for a material change of use was required for each lot within the Doonella Noosa Estate, the Development Permit being the approval for the dwelling on the subject site;

(d) pursuant to section 66(2) of the PA, the Respondent could not impose any conditions upon an approval of the change application that were inconsistent with a condition of the Earlier Approval; and

(e) the relevant condition of the Earlier Approval, as acknowledged by both parties, was condition 5.2, which provided as follows:

"All buildings (which does not include swimming pools or other structures that do not present a fire hazard) located on allotments adjoining either private open space or public open space shall be located in accordance with the setback requirements contained in the Fire Management Plan."

60. After setting out the planning background, the Respondent identified its jurisdiction issue as being that the Tribunal did not have the ability to decide the appeal because the Tribunal's decision could approve a development which would be inconsistent with the conditions of the Earlier Approval and that would be unlawful.

61. The Appellant's Jurisdiction Submissions took a different approach, taking issue with the lawfulness of condition 5.2 of the Earlier Approval, when considered within the context of sections 30 and 31 of the BA. Then, the Appellant's Further Jurisdiction Submissions considered the jurisdiction of the Tribunal pursuant to Schedule 1 of the PA.

62. The Tribunal considered the parties' jurisdiction submissions and decided that the Tribunal did have jurisdiction to hear the appeal. There were three reasons for the Tribunal's decision.

Reason 1

63. The first reason is that which is already set out in the Jurisdiction section of this Decision Notice.

64. The Tribunal considered that it has clear jurisdiction pursuant to Schedule 1 of the PA to hear this appeal.

Reason 2

65. The Appellant raised an overall argument about the lawfulness of condition 5.2 of the Earlier Approval within the context of sections 30 and 31 of the BA.

66. While those arguments did stray into the Appellant's grounds of appeal in this appeal, any question about the lawfulness of condition 5.2 of the Earlier Approval or the imposition of the residential design guidelines, is outside the scope of this appeal.

67. As set out above, the Tribunal's jurisdiction pursuant to the PA is limited to a consideration of "a decision for … a change application for a development approval that is only for a material change of use of a classified building".

68. The Tribunal's jurisdiction does not extend to a consideration of the development approval that is to be changed by the change application, in this case, that would be the Development Permit, or to another relevant development approval, in this case, the Earlier Approval.

69. Any challenge to the Development Permit or, as contended by the Appellant, to the Earlier Approval, would need to be started by a different process and most likely heard by the Planning and Environment Court.

70. For the purposes of this appeal, the Tribunal's jurisdiction extends only to a consideration of the conditions in dispute in the appeal, being conditions 23 and 24 of the Council's Decision Notice dated 29 October 2020.

Reason 3

71. Finally, while the Tribunal understands the concern raised by the Respondent about the potential for the Tribunal's decision to contravene section 66(2) of the PA, this concern is unfounded. As the Respondent is constrained by the operation of the PA, so too is the Tribunal.

72. It cannot be assumed that any decision made by the Tribunal would conflict with condition 5.2 of the Earlier Approval. Indeed, condition 5.2 of the Earlier Approval is broad in its wording, specifically excluding "other structures that do not present a fire hazard" so, by way of example, it would be available to the Tribunal to make a decision that a structure "does not present a fire hazard" if the Tribunal is properly satisfied by evidence given that a structure "does not present a fire hazard".

73. Accordingly, the Tribunal was satisfied that the Tribunal did have jurisdiction to hear the appeal.

Issues in dispute in appeal

74. Turning then to the issues in dispute in the appeal, there was no dispute between the parties that the change application was an application for a minor change pursuant to section 81 of the PA.

75. The Appellant's grounds of appeal, which it returned to in the Appellant's Final Submissions, raised issue with the imposition of conditions 23 and 24 of the Change Approval stating that they were unlawful because pursuant to sections 30, 31(3), 31(4) and 31(5) of the BA, as they were building assessment provisions.

76. Section 30 of the BA relevantly provides the meaning of "building assessment provisions" as being the following laws and other documents:

    (a) Chapters 3 and 4 of the BA;

    (b) the fire safety standard;

    (c) the fire safety standard (RCB);

    (d) any provisions of a regulation made under the BA relating to building assessment work or accepted building work;

    (e) any relevant local law, local planning instrument or resolution[9] made under section 32[10] of the BA or any relevant provision under section 33 of the BA[11];

    (f) the BCA; and

    (g) subject to section 33 of the BA, the QDC.

77. "Local planning instrument" is defined in the BA as being a local planning instrument under the PA. Section 8 of the PA defines a "local planning instrument" to be a planning

[9] Schedule 4 (Dictionary) of the *Local Government Act 2009* defines a resolution of a local government to mean the formal decision of the local government at a local government meeting.

[10] Section 32 of the BA relevantly provides that a local government may make or amend: a local planning instrument, local law, planning scheme or a resolution about building work or other matters related to the BCA or QDC prescribed under a regulation; or alternative provisions under section 33 of the BA.

[11] Section 33 of the BA relevantly provides that a planning scheme can include alternative provisions to the QDC's residential design and siting provisions for particular buildings and only if the provisions are a qualitative statement or quantifiable standard.

instrument made by a local government that is a planning scheme, a temporary local planning instrument or a planning scheme policy.

78. A "planning instrument" is also defined in section 8 of the PA to be an instrument that sets out policies for planning or development assessment.

79. Section 30 of the BA also refers to a resolution of the relevant local government. Development approvals can be granted by resolution of a local government or by delegated authority to an officer of the local government. While no evidence was presented to the Tribunal with respect to whether the Change Approval was given by the Respondent by delegated authority or at a local government meeting, the Tribunal has considered the Respondent's meeting agendas for 2020[12] and notes that no meeting was held on 26 October 2020, being the date the Respondent granted the Change Approval.[13] On this basis, conditions 23 and 24 of the Change Approval were not imposed pursuant to a resolution of the Respondent.

80. Conditions 23 and 24 of the Change Approval are clearly not a "local planning instrument", nor do they fall within any of the other laws or documents that are defined to be building assessment provisions in section 30 of the BA.

81. Accordingly, the Tribunal finds that conditions 23 and 24 of the Change Approval are not building assessment provisions as defined by section 30 of the BA.

82. Section 31(3) of the BA, relevantly provides that the effect of a building assessment provision mentioned in section 30(a) to (d), (f) or (g) can not be changed under a local law, local planning instrument or local government resolution.

83. Section 31(4) of the BA, relevantly provides that a local law, local planning instrument or local government resolution must not include provisions about building work, to the extent a building assessment provision mentioned in subsection (3) applies to the building work.

84. Section 31(5) of the BA, relevantly provides that to the extent a local law, local planning instrument or local government resolution does not comply with subsection (4), the local law, local planning instrument or local government resolution is of no effect.

85. Given that conditions 23 and 24 of the Change Approval are not a local law, local planning instrument or a local government resolution, nor are they building assessment provisions, the Tribunal is satisfied that section 31 of the BA does not apply to negate the effect of the conditions.

86. Finally, at the hearing, Mr Murphy, on behalf of the Respondent, made oral submissions that conditions 23 and 24 of the Change Approval met the conditions test in section 65 of the PA.

87. In the absence of evidence presented by the Appellant to the contrary, the Tribunal accepts Mr Murphy's evidence and is satisfied that conditions 23 and 24 of the Change Approval are lawfully imposed pursuant to the PA.

The structures within the FPZ

88. While the Appellant's grounds of appeal and the Appellant's Final Submissions turn on a legal interpretation of sections 30 and 31 of the BA, at the hearing of the appeal, the parties also considered at length, the location of the shed and the proposed new patio roof within the FPZ.

[12] Pursuant to section 249 of the PA, the Tribunal has broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding.
[13] See page 1 of the Decision Notice issued by the Respondent and dated 29 October 2020.

89. Given the evidence that was presented in this regard, the Tribunal considers it appropriate to continue to consider that evidence and make a decision in that regard.

The shed

90. Condition 23 of the Change Approval stated that the shed was not approved and could not be constructed within the 10 metre FPZ.

91. While nothing turns on it for the purposes of this appeal, the Tribunal and the Respondent observed at the site inspection of the subject site that the 3 metre x 3 metre garden shed had already been constructed. On the side of the shed facing the pool, a large mural had been painted which the Appellant identified as being of sentimental value.

92. The Appellant expressed an understanding that a garden shed was accepted development and didn't require a development approval. The Respondent considered that a development approval would be required because, as currently being considered in the appeal, the shed was located within the FPZ, thus not complying with the conditions of the Earlier Approval and the Change Approval.

93. It was agreed at the hearing that the construction of the shed was not a matter for this appeal and that the appeal would proceed on the basis that the change application was made seeking both the shed and the new patio roof.

Was the shed a "fire hazard"?

94. The parties agreed at the hearing that the use of the subject site continued to be subject to the conditions of the Earlier Approval, as well as those of the Change Approval (subject to the issues in dispute in this appeal raised by the Appellant).

95. The parties gave oral evidence at the hearing, with respect to condition 5.2 of the Earlier Approval and whether the location of the shed within the FPZ complied with that condition.

96. In particular, the discussion centre on the words in brackets in condition 5.2 of the Earlier Approval, which can be extracted as follows [underlining added for emphasis]:

"*All buildings (which does not include swimming pools or <u>other structures that do not present a fire hazard</u>) … shall be located in accordance with the setback requirements contained in the*" FMP.

97. The FMP relevantly provided the following:

(a) In Table 6 (Compliance checklist), in row 1, titled "Fire Protection Zones", the following:

"The Fire Protection Zones shown in the attached Figure 1 shall be provided and incorporated into the Fire Management Plan and other relevant management plans.

Within all Fire Protection Zones:

…

- Flammable structures and landscaping materials, such as timber fences, timber pergolas, timber decks and timber sleeper walls, are prohibited;

- non-flammable structures such as paved areas and swimming pools are permitted."

(b) Figure 1 identifies a FPZ of a width of 10 metres extending from the rear boundary fence;

(c) Table 11 (Residential Precincts Fire Protection Zones), in row 1, titled "Premium Residential Lots 1 – 17 & 24", the following:

- *"10 metre wide FPZ with no understorey vegetation (see figure 1)*
- *…*
- *Minor non-flammable structures such as paved areas, pools and BBQs are permitted to be located within the FPZ."*

98. While not the subject of the appeal, the parties also gave oral evidence about and discussed condition 19 of the Change Approval, which provided as follows:

    "Flammable structures and landscaping materials, such as timber pergolas, timber decks and timber sleeper walls shall not be constructed within the 10 metre Fire Protection Zone."

99. At the hearing, the Respondent's position was that the shed was a flammable structure, it couldn't be considered a minor non-flammable structure and therefore couldn't be located within the 10 metre FPZ. There were three main reasons for this:

    (a) the shed had not been constructed out of non-flammable materials;

    (b) the Respondent wouldn't be able to regulate what is stored within the shed in the future to ensure that only non-flammable substances are stored within it; and

    (c) approving the shed within the FPZ would establish a dangerous precedent for the local government area, in which there are many FPZ's of a similar nature.

100. The Appellant's position was that the shed didn't currently contain flammable materials or goods and there was no intent to store flammable materials or goods within the shed, so the Appellant would be prepared to accept a condition to regulate the contents of the shed.

101. The Appellant also alleged that many properties within the Lake Doonella Estate that had a 10 metre FPZ already had sheds constructed within the FPZ.

102. There was some discussion at the hearing as to whether the shed could be altered so as not to "present a fire hazard" and to meet the requirements of the FMP. The identity of the shed was also discussed as to whether it would be a "minor non-flammable structure" for the purposes of Table 11 of the FMP.

103. The Respondent's Final Submissions identified that it was the Respondent's view that the shed was not appropriate, was not a minor structure, and that the Respondent could not monitor compliance with any condition restricting storage of flammable substances. Again, the Respondent identified it would "set a poor precedent for the management of the rest of the FPZ across the development."

104. The Tribunal observed that the subject site was quite large and there was some grassed land to the eastern side of the dwelling house outside of the FPZ that could easily accommodate a shed.

105. The Tribunal understands that the mural painted on the shed was of sentimental value to the Appellant, however, the wall upon which that mural was painted could potentially be retained for aesthetic value and be reinforced to be a feature alongside the pool, while the remainder of the shed (with a new wall) could be relocated outside of the FPZ.

106. On balance, the Tribunal considers that while the shed itself might be able to be considered a minor structure, the Tribunal prefers the Respondent's submissions that the shed would "present a fire hazard" and that the shed, combined with its potential contents, could not be considered a "minor non-flammable structure".

107. As the Respondent contended at the hearing, even if a condition that limited the materials that could be stored in the shed was a lawful condition, which the Tribunal has some doubt about, the enforcement of such a condition would be almost impossible for the Respondent. Further, while the Respondent and the Tribunal didn't doubt the sincerity of the Appellant's assertions that the Appellant wouldn't store flammable substances within the shed, the Respondent wouldn't have such assurances from future owners.

108. The Tribunal was also sensitive to the Council's concerns about creating a poor precedent, when there are many homes in the area that are burdened by the FPZ.

109. Accordingly, the Tribunal confirms condition 23 of the Change Approval and makes no change to that condition.

The patio roof

110. Condition 24 of the Change Approval stated that the new patio roof (including the BBQ area and bench) must be setback from the rear boundary a minimum of 9 metres to the outer most projection. This effectively allowed a 1 metre relaxation into the 10 metre FPZ at the rear of the subject site for the new patio roof.

111. The patio proposed by the Appellant required a 1.504 metre relaxation into the 10 metre FPZ at the rear of the subject site.

112. During the hearing, the parties considered the patio roof within the context of condition 5.2 of the Earlier Approval and the FMP in the POD.

113. Some common ground was able to be reached between the parties with respect to the patio roof, on the basis that unlike the shed, the patio roof was an open structure and as it had not yet been constructed, its construction materials could be specified to be non-flammable and its design could be altered to reduce the footprint of the patio within the FPZ.

114. The Respondent's Final Submissions identified that the Respondent could consider a patio roof to be a "minor non-flammable structure" within the FPZ on the following basis:

    (a) with a flyover roof;

    (b) built to AS3959;

    (c) with only a 1 metre encroachment of the horizontal component of the patio roof into the FPZ with the posts and other structures located outside the FPZ.

115. The Tribunal respectfully notes that the "concessions" made in the Respondent's Final Submissions are actually more stringent than the requirements of condition 24 of the Change Approval, in that the concessions allow the same 1 metre encroachment into the FPZ but in addition require a flyover roof, that it be built to AS3959 and that the posts and other structures must be located outside the FPZ.

116. The Tribunal has considered the Respondent's Final Submissions, along with the requirements of AS3959, the FMP in the POD and the relevant conditions of the Change Approval and considers that a new patio roof can be a "minor non-flammable structure" and located within the FPZ.

117. The purpose of the FPZ created by the FMP in the POD was to minimise any hazard to life and property because of a catastrophic bushfire in the neighbouring bushland.

118. The Tribunal is satisfied that the additional requirements identified in the Respondent's Final Submissions are appropriate to meet the purpose of the FPZ, with the exception that the Respondent has not persuaded the Tribunal that the encroachment of the patio

roof (including the barbeque area and bench) of more than 1 metre into the FPZ would increase the hazard to life and property.

119. Accordingly, the Tribunal is satisfied that a patio roof would not present a fire hazard, if it was constructed in accordance with the following conditions:

    (a) constructed to comply with AS3959:2018 "Construction of buildings in bushfire-prone areas" as if the work was in a Bushfire Attack Level – Fire Zone (BAL-FZ);
    (b) setback in accordance with the following:
        (i) from the rear/northern boundary, a minimum of:
            (1) 8 metres to the outer most projection;
            (2) 9 metres to the structural posts;
            (3) 8.5 metres to the new bench (that incorporates the barbeque);
        (ii) from the existing house wall, a minimum of 0.8 metres to the new bench (that incorporates the barbeque);
    (c) constructed as a discontinuous roof from the main roof, as set out in the approved drawing A201 revision A10 by Collins Building Designs, dated 22/10/2020.

Reasons for the Decision

120. The appeal is against the imposition of conditions 23 and 24 of the Change Approval that were alleged to be unlawful because pursuant to sections 30, 31(3), 31(4) and 31(5) of the BA, they were building assessment provisions.

121. The Tribunal finds that conditions 23 and 24 of the Change Approval are not building assessment provisions as defined by section 30 of the BA.

122. Given that conditions 23 and 24 of the Change Approval are not a local law, local planning instrument or a local government resolution, nor are they building assessment provisions, the Tribunal is satisfied that section 31 of the BA does not apply to negate the effect of the conditions.

123. While the appeal turned on a legal interpretation of sections 30 and 31 of the BA, at the hearing of the appeal, the parties presented evidence with respect to the location of the shed and the proposed new patio roof within the FPZ. Given this, the Tribunal considered it appropriate to consider that evidence and make a decision in that regard.

124. It was agreed at the hearing that while the shed had already been constructed and the Respondent had no prior knowledge of that fact, the construction of the shed was not a matter for this appeal and the appeal would proceed on the basis that the change application was made seeking both the shed and the new patio roof.

125. On balance, the Tribunal prefers the Respondent's submissions that the shed would "present a fire hazard" and that the shed, combined with its potential contents, could not be considered a "minor non-flammable structure".

126. The Tribunal agrees with the Respondent that any condition restricting the content of the shed may not only be unlawful but also difficult to enforce and that any allowance of the shed within the FPZ would create a potentially dangerous precedent for the location of similar structures within the nearly FPZ areas.

127. The Tribunal notes that there is potential for the shed to be located elsewhere on the subject site outside of the FPZ and that if the Appellant so chose, the wall of the shed upon which the mural has been painted could be retained and reinforced as a feature wall alongside the pool.

128. With respect to the new patio roof (including the barbeque area and bench), the Tribunal understands the purpose of the FPZ created by the FMP in the POD was to minimise any

hazard to life and property because of a catastrophic bushfire in the neighbouring bushland.

129. The Tribunal is satisfied that the additional requirements identified in the Respondent's Final Submissions are appropriate to meet the purpose of the FPZ, with the exception that the Respondent has not persuaded the Tribunal that the encroachment of the patio roof (including the barbeque area and bench) of more than 1 metre into the FPZ would increase the hazard to life and property.

130. Accordingly, the Tribunal is satisfied that a patio roof would not present a fire hazard, if it was constructed in accordance with the following conditions:

    (a) constructed to comply with AS3959:2018 "Construction of buildings in bushfire-prone areas" as if the work was in a Bushfire Attack Level – Fire Zone (BAL-FZ);
    (b) setback in accordance with the following:
        (i) from the rear/northern boundary, a minimum of:
            (1) 8 metres to the outer most projection;
            (2) 9 metres to the structural posts;
            (3) 8.5 metres to the new bench (that incorporates the barbeque);
        (ii) from the existing house wall, a minimum of 0.8 metres to the new bench (that incorporates the barbeque);
    (c) constructed as a discontinuous roof from the main roof, as set out in the approved drawing A201 revision A10 by Collins Building Designs, dated 22/10/2020.

Samantha Hall

Development Tribunal Chair
Date:

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 Facsimile (07) 3237 1248
Email: registrar@hpw.qld.gov.au