



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>22-003</b>
<b>Appellant:</b>	Leeward Management Pty Ltd ACN 600 189 099 atf LE Trust trading as Project BA
<b>Respondent (Assessment Manager):</b>	Sunshine Coast Regional Council
<b>Site Address:</b>	213 Palmview Forest Drive, Palmview (otherwise described as Lot 282 on SP292038) <b>(the Land)</b>

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### **Appeal/Application**

This dispute primarily concerns condition 4 in the Respondent's decision notice dated 10 January 2022, being a purported decision notice (approval) for building works assessable against the Council's planning scheme: namely, works associated with a Dwelling House – Shed.

The Appellant says this is a deemed refusal appeal on the basis that condition 4 leaves the height and floor area of the shed, undecided.

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### **Date and time of hearing:**

**Place of hearing:** Teams Meeting, 10:00am, 24 June 2022  
Site inspection, 11:00am, 11 July 2022

**Tribunal:** Wendy Evans – Chair  
Neil de Bruyn – Member

**Present:** Luke Neller  
Sean Elvines  
Tracey Douglas  
Marc Cornell  
Christopher Cunningham

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### **Decision:**

The Tribunal finds that the work the subject of this dispute, does not arise as a consequence of, or otherwise relates to the *Building Act 1975*. It is instead, a matter wholly contained and dealt with under the *Planning Act 2016* regime.

In accordance with section 252(1)(b) of the *Planning Act 2016*, the Tribunal decides it has no jurisdiction in relation to these proceedings. The following constitutes the decision notice about this decision, for the purposes of section 252(2) of the *Planning Act 2016*.

## Background:

1. The Land the subject of these proceedings, is part of a subdivision, allowed by the Planning and Environment Court in the matter of *Palmview Enterprises Pty Ltd v Sunshine Coast Regional Council* (201 of 2013), under final Order of the Court dated 13 December 2013. Where Council refers to Development Approval 2002/520039, it is a reference to the development approval the subject of that final Court Order. Condition 4 of that Order, required the preparation of design guidelines for each lot within each stage of the development, and for development on individual lots to comply with those guidelines.
2. The parties agree that the 'Palmview Forest Design Guidelines – Stage 9 for lots 49, 200-214, 230, 271-288' (approved stamp dated 22 December 2017) (**'the Guidelines'**), are the guidelines which apply to the Land, and apply pursuant to the Court Order.
3. According to the Guidelines (in amongst other things):
  - Buildings and structures are to be setback a minimum of 6m from the road frontage boundaries;
  - Other setback and development criteria are to be in accordance with the Queensland Development Code;
  - 'Minor variations to the approved plan of development for individual lots to suit site specific conditions (associated with the building) are to be assessed as alternative provisions for design and siting under the *Building Act 1975*, section 33';
  - At section 12 of the Guidelines, there is a relaxation discretion which states (in amongst other things) "*the Sunshine Coast Regional Council may in its absolute discretion modify, waive, release, and relax any of the obligations in these design guidelines where deemed appropriate and considered not to be detrimental to the overall desired outcomes for the land*";
  - At section 15 of the Guidelines (which concerns sheds), it is noted that "*any sheds or detached buildings (such as outbuildings, garages and garden sheds) shall have a total maximum floor area not exceeding 100 square metres. The building shall have a maximum height at the eaves of 3.6 metres and shall be located behind the residence to the rear of the site*".
4. A shed/carport has been erected on the Land. Due to a series of admitted errors, the shed/carport was erected without approval.
5. Project BA was subsequently engaged to lodge a development application for code assessable building works, with the Sunshine Coast Regional Council, to obtain the proper approval for the already constructed shed/carport (see paragraph 11 of the Project BA letter to the Registrar (forming part of the Form 10 material), dated 16 February 2022).
6. Project BA submitted a development application for building work (Storage Shed and Awning – class 10a structure), to the Sunshine Coast Regional Council on or about 25 June 2021. The cover letter to that application indicated the submission to Council was as 'Concurrence Agency referral'. Despite this, DA Form 2 – Building work details accompanying that application, at question 12, advised that there was no building work aspects to the application that had any referral requirements.
7. By letter dated 12 July 2021, the Council provided an information request to the application it described as "*Development Permit for Building Works associated with a Dwelling House (Storage Shed and Awning)*".
8. A response to the information request was provided by Project BA under cover of letter dated 11 November 2022.
9. Council produced a 'decision notice' dated 10 January 2022, advising that it had issued a '*Development Permit for Building Works Assessable against the Planning Scheme (works associated with a Dwelling*

House – Shed) (**‘the Approval’**). The Statement of Reasons which accompanied the Approval confirmed the assessment benchmarks against which the Council’s assessment was done, were the Dwelling House Code and the Landslide Hazard and Steep Land Overlay Code.

10. The parties agreed that more specifically, PO5 and A05 of the Dwelling House Code applied (going to setbacks in the Rural residential zone), and AO1 of the Landslide Hazard and Steep Land Overlay Code (going to risk of harm) applied.
11. The appellant does not take issue with condition 5 in the Approval, which concerned setbacks (requiring the *“development authorised by this approval must be setback from site boundaries generally in accordance with the Approved Plans listed within this development approval”*).
12. The appellant did not take issue with condition 6 in the Approval, which concerned Landslide Hazard and Steep Land (requiring *“the development must be certified, sited and constructed in accordance with the acceptable outcome requirements for accepted development outlined in Table 8.2.10.3.1 of the Landslide hazard and steep land overlay code”*).
13. The appellant takes issue with condition 4 in the Approval, which concerns the size and height of the shed. Condition 4 appears as follows:

**Condition 4**

*The size and height of the shed must comply with the Plan of Development and Design Control requirements for the lot, as identified in Reconfiguring a Lot Approval 2002/520039.*

14. In the Approval, under the heading ‘Further Development Permits Required’, Council says the following:
  - a. Minor Change to Development Approval 2002/520039 pursuant to Clause 78 of the *Planning Act 2016*.
  - b. Development Permit for Building Works assessable against the *Building Act 1975* (Building Certifier).
15. In the Approval, under the heading ‘Advisory Notes – Further Development Application required prior to Building Work’, Council says the following:

*The proposal also requires a further development application for a Minor Change to the original application in order for Council to process the matters pertaining to the non-compliances with the Plan of Development. This Development Permit for Building Work is for development assessable against the Planning Scheme only. This application for a Development Permit for Building Work does not include an assessment of those aspects of the proposal requiring a further development application for a minor change to the original application. You are required to obtain a separate Minor Change Application from Council prior to the issue of a development permit for building work by the private building certifier.*

16. In its oral submissions, the Appellant said that by virtue of condition 4, there has been no ‘decision’ by the Council in relation to the height and size of the shed (such that this appeal constitutes a deemed refusal appeal). The Appellant further said that in the alternative, if a decision has been made by the Council, the decision is wrong, and the shed should and could have been conditioned to simply be in accordance with the submitted plans.
17. The Joint Submissions further details that the Appellant says:
  - a. That the proposed development is the same development for the purpose of section 66(2) of the *Planning Act 2016*, such that Council cannot adopt the Guidelines in their assessment, and the conditions of Development Approval 2002/520039 cannot be imposed on this application;
  - b. Where Council has done this – the Appellant says Council did not assess and decide the size and height aspects of the proposed development, such that these aspects are deemed to have been refused.

18. In terms of what has been built (and therefore reflected on the submitted plans), going to size and height, versus what the Guidelines required, the following table provides a summary:

	<b>Guideline requirement</b>	<b>What has been built</b>
Shed/outbuildings/garages etc Height	Maximum height at the eaves of 3.6 metres	4.3 metres (measured from the 100mm slab)
Shed/outbuildings/garages etc Size	Total maximum floor area not exceeding 100 m <sup>2</sup>	127m <sup>2</sup>

### **Material Considered**

19. 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 21 February 2022;
- b) Oral submissions made by the parties at the hearing on 24 June 2022; and
- c) The submissions made jointly to the Registry, undated but provided on 4 August 2022 (the Joint Submissions).

### **Findings of Fact**

20. The Shed/carport has been constructed.

21. The application the subject of this dispute is a development application for building works. Council considers the works assessable against its planning scheme, and imposed conditions as 'assessment manager'.

22. Table 5.7.1 of the Council's planning scheme advises when building work is assessable against its planning scheme. The building work triggered in that table, will be assessable by the Council as assessment manager.

23. There is no suggestion that this work is accepted development, or accepted subject to requirements. In accordance with Table 5.7.1 of the Council's planning scheme, any building work that is not accepted or accepted subject to requirements, is code assessable against the following assessment benchmarks:

- a. The use code applicable to the use for which the building work is to be undertaken;
- b. The local plan code applicable to the site on which the building work is to be undertaken;
- c. Transport and parking code.

24. The size and height of the Shed/carport exceed the maximum specifications set in the Guideline.

25. The Guideline does not form part of an assessment benchmark identified in the Council's planning scheme, which Council assessed this application against (i.e. the Dwelling House Code or the Landslide Hazard and Steep Land Overlay Code).

### **Jurisdiction of the Tribunal**

26. It was assumed by both parties to this appeal, that the Tribunal has jurisdiction to hear and decide this matter.

27. Schedule 1 of the *Planning Act 2016* advises appeal rights and parties to appeals.
28. This appeal does not concern a material change of use, operational work, plumbing or drainage matter, infrastructure charges, a conversion application, an enforcement notice or a matter prescribed by regulation. Where this is the case, the potential heads of power for this appeal, therefore, can only arise under either Schedule 1, section 2(g) of the *Planning Act 2016*, or Schedule 1, Table 3, Item 1 of the *Planning Act 2016*.
29. The building work the subject of this matter, is made assessable under the Respondent Council's planning scheme. There is no material before the Tribunal to demonstrate that the building assessment provisions (as defined under the *Building Act 1975*) formed part of the development assessment, such that Schedule 1, Table 3, Item 1 of the *Planning Act 2016* does not apply here.
30. Accordingly, the only remaining possible head of power for this appeal is Schedule 1, section 2(g) of the *Planning Act 2016*, which contemplates "a matter under this Act, to the extent the matter relates to the *Building Act*, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission".
31. This Tribunal considers these words to be somewhat unhelpful in their constitution but notes in the context of this appeal – that there is no material which demonstrates how or any extent to which the decision about the building work, made assessable under the Respondent Council's planning scheme, relates to the *Building Act 1975*. The Respondent Council was the assessment manager in receipt of the application, and there is no indication in the appeal or submissions before the Tribunal, that Council's assessment should have or did include an assessment against the building assessment provisions (or varied forms of these, to the extent a planning scheme is allowed to make variations, under the *Building Act 1975*).
32. The material before the Tribunal is such that the building work the subject of this dispute, was assessable because of, and against the Respondent Council's planning scheme. It will also (and quite separately) require a building development application to be made to a private certifier, for 'building assessment work' as defined under the *Building Act 1975*. That is not the application in consideration here.
33. The Tribunal is not satisfied that just because the work is 'building work', Schedule 1, section 2(g) of the *Planning Act 2016* ought to be enlivened. The assessable work here is 'building work' (being a term defined under the *Planning Act 2016*, without recourse back to the *Building Act 1975*). The work is made assessable by virtue of the local planning instrument, and was received by the Respondent Council as assessment manager – again, with no recourse back to the *Building Act 1975*.
34. The Tribunal is of the opinion that the work the subject of this dispute, does not arise as a consequence of, or otherwise relates to the *Building Act 1975*. It is instead, a matter wholly contained and dealt with under the *Planning Act 2016* regime.
35. For this reason, the Tribunal finds it has no jurisdiction under Schedule 1 of the *Planning Act 2016*, to hear this appeal.

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**Wendy Evans**

**Development Tribunal Chair**  
**Date: 5 September 2022**

## **Section 252(3) of the Planning Act 2016**

The parties should be advised that section 252(3) of the *Planning Act 2016* states that “any period for starting proceedings in the Planning and Environment Court, of the matter that is the subject of the tribunal proceedings, starts again when the tribunal gives the decision notice to the party who started the proceedings”.

Whilst independent legal advice ought to be obtained in relation to the above, the effect of section 252(3) of the *Planning Act 2016* is such that from the date the tribunal gives this notice to the Appellant, the appeal period provisions in section 229 of the *Planning Act 2016*, start again from that 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 Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone 1800 804 833**

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