



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-036
Appellant:	John Cacciola and Samantha Cacciola
Respondent (Assessment Manager):	Sunshine Coast Regional Council
Site Address:	9 Jirrima Court, Buderim QLD 4556 and described as Lot 13 on SP248289— the subject site

Appeal

Appeal under section 229 and sections 1(2)(a) and (2)(g) and item 1(a) of table 1 of section 1 of schedule 1 of the *Planning Act 2016* against the decision to refuse a development permit for building work associated with a dwelling house (Class 10a shed).

Date and time of hearing:	Initially scheduled for 10.30am on Friday 1 October 2021 but adjourned by Notice to the parties sent on 29 September 2021, while a jurisdiction question was resolved. The hearing was rescheduled to 12.30pm on 24 November 2021.
Place of hearing:	A carport at 8 Jirrima Court on land adjoining the subject site and overlooking the proposed building site, at the invitation of the owner of those premises who was also an observer at the Appeal by agreement of the parties.
Tribunal:	John O’Dwyer– Chair Rebecca Moore – Member Derek Kemp- Member
Present:	John Cacciola – Appellant Tracey Douglas - Council representative Jessica McKauge - Council representative Rob Sewell - Council representative William Lowe - Council representative Will Johnson for Building Suncoast Green consultant to the Appellant Terry Crick – Observer (Owner of 8 Jirrima Court)

Decision:

- 1 The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **replaces** the original Refusal with an Approval subject to the following conditions:

The development application is approved subject to the following conditions A, B, C 1-8 and D and noting the Advisory Notes 1 and 2 attached to Condition C:

A. The development of the shed, hardstand and driveway is to be generally in accordance with following revised plans submitted to the Tribunal by the Appellant on 31 January 2022:

- 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 03 OF 03 – SECTION
- 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 02 OF 03 - SITE WITH IMAGE
- 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 01 OF 03 - SITE - FLOOR PLAN.

B. The balance of the cleared area of the site is to be landscaped as shown on plan 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 01 OF 03 - SITE - FLOOR PLAN dated 4 April 2022 as annotated by Sunshine Coast Regional Council (Council) and submitted to the Tribunal on 6 June 2022 and accepted by the Appellant on 14 June 2022 and as described in Conditions – C Ecology and Landscaping Land Rehabilitation 6-8 below.

C. **ENGINEERING**

Geotechnical Stability

1. All works must be carried out in accordance with a geotechnical report which addresses the Acceptable Outcomes of the *Landslide hazard and steep land overlay code*.
2. Certification must be submitted to Council from a qualified person*. The certification must certify that the earthworks and construction have been undertaken in accordance with the geotechnical report for the development.
* (Refer to Advisory Note)

Earthworks and Retaining Walls

3. All fill and associated batters must be contained entirely within the subject site, in accordance with the works, services and infrastructure code. All earthworks must be undertaken in accordance with the provisions of *AS 3798 - Guidelines on earthworks for commercial and residential developments*.
4. All retaining walls must be designed and constructed in accordance with the planning scheme and must be certified by a Registered Professional Engineer of Queensland (RPEQ) where exceeding 1m in height.
5. Safety barriers must be implemented where steep slope or fall hazards exist naturally or are created by the design. The barrier type must be assessed and designed by a RPEQ as being appropriate for each location and the anticipated risks during construction, establishment, maintenance and end use, in accordance with the following criteria and standards:
 - (a) Where located adjacent to vehicle manoeuvring areas, vehicle barriers must be designed in accordance with *AS 2890.1 – Off-street Parking*
 - (b) All barriers must be certified to the appropriate load conditions from *AS 1170 - Structural Design Actions* by either the manufacturer or engineering calculations.

ECOLOGY & LANDSCAPING

Land Rehabilitation

6. The development site must be revegetated and rehabilitated and include the following:
 - (a) The works shown on the Sunshine Coast Council annotated plan
 - (b) Screening landscaping strip along the eastern driveway associated with the shed driveway consisting of a range of species found within regional ecosystem 12.9-10.7a
 - (c) *Lomandra hystrix* planted at 1 metre centres for soil stabilisation within the clearing setback surrounding the shed
 - (d) Control of all weed species listed in the following standards and legislation:
 - (i) Ensure Invasive plants listed in the Biosecurity Act 2014, and Sunshine Coast Local Government Area, Biosecurity Plan 2017 are prevented from spreading.
 - (ii) Oversee management techniques that minimise regrowth, prevent damage to non-target species, retain conservation values and maintain site stability.

7. Rehabilitation works must be supervised, undertaken and certified by qualified persons*. All works must be completed and certified in accordance with these conditions prior to the commencement of use.
 *(Refer to Advisory Notes)

8. All rehabilitation works must be established and maintained in accordance with the approved design for the life of the development, and in a manner that ensures healthy, sustained and vigorous plant growth. All plant material must be allowed to grow to full form and be refurbished when its life expectancy is reached.

ADVISORY NOTES

ENGINEERING

Qualified Person

1. For the purpose of preparing a geotechnical report, and for certifying geotechnical stability for the development, a qualified person is considered to be a person who:
 - (a) Is a Registered Professional Engineer of Queensland (RPEQ).
 - (b) Has a degree in civil engineering or engineering geology.
 - (c) Has a minimum of five (5) years' experience in the field of geotechnical engineering or engineering geology.

ECOLOGY & LANDSCAPING

Qualified Person

2. For the purpose of preparing a rehabilitation plan, and for certifying compliance with the rehabilitation requirements of this decision notice, a qualified person is considered to be a landscape architect or ecologist with a minimum of three (3) years current experience in the field of landscape design.

- D. The certifications required in Conditions C Engineering 2 and Land Rehabilitation 7 are to be submitted to Council for acceptance prior to commencement of the use

Background

- 2 The subject land is an irregularly shaped lot with a stream in a gully along its northern boundary and another stream in a gully along its southern boundary with a spur sloping

down to the east between the streams. The shed is proposed to be located on the lower slopes of the spur with a turnaround area and driveway adjacent to the adjoining premises Lot 15 on SP248289 at 8 Jirrima Court.

- 3 The owners wish to use the shed for the storage of a trailer, a boat, a caravan and a workshop.
- 4 Due to the slope of the land the structure as proposed involved a retaining wall up to 2.8 m high at the north-eastern end of the driveway. The shed is partly on fill and partly on cut rising 4 m above the driveway level.
- 5 A large area around the proposed site for the structure had been cleared before the appeal was heard. The appellant in the development application stated there were clearing exemptions enabling the clearing to occur.
- 6 The site is in the Limited Development (Landscape Residential) Zone.
- 7 The adjoining properties to the north, north-east and east contain detached dwellings. The property to the north is not visible from the proposed shed site. The property to the north-east is across the stream and because of the clearing extent, the full height of the shed and retaining wall will be highly visible from that site although the dwelling is not focussed in the direction of the proposed shed. The shed and the retaining wall will be highly visible from parts of the adjoining property at 8 Jirrima Court although the dwelling is not focussed on that direction.
- 8 In late 2020, the Appellant submitted an application to Sunshine Coast Regional Council (Council) for a development permit for Building Works associated with a dwelling house (shed) that included a new internal driveway to give access to the shed. The application included a town planning report including assessments against the relevant codes in Sunshine Coast Planning Scheme 2014 (SCPS2014) from Building Suncoast Green dated November 2020 that was supported by a Slope Stability Assessment by Tectonic Geotechnical Pty Ltd dated 20 August 2020, a Vegetation Clearing Report by North Coast Environmental Services dated September 2020.
- 9 On 5 January 2021, Council issued an Information Request identifying shed location and extent of cut and fill as the key issues and requesting amended design drawings that:
 - Demonstrate compliance with PO1 of the Biodiversity, wetlands and waterways overlay code
 - Demonstrate compliance with PO3 of the Landslide hazard and steep land overlay code
 - Are certified by an RPEQ as incorporating the recommendations listed in the Slope Stability Assessment section 4.5.
- 10 On 6 May Building Suncoast Green submitted a response to the Information Request that addressed the issues raised in the Information Request and requested the RPEQ certification be required as a condition of approval.
- 11 On 18 June 2021, Council issued a Decision Notice advising refusal of the application giving the reasons:
 - The proposal does not comply with Performance Outcome PO1 of the Biodiversity, waterways and wetlands overlay code as the shed is not sited such that the clearing of native vegetation is avoided or minimised.
 - The proposal does not comply with the Purpose (8.2.3.2 (1)) and Overall Outcomes (8.2.3.2 (2)(a), (b), (d) or (e)) of the Biodiversity, waterways and wetlands overlay code as the proposal will not protect or enhance an ecologically important area native vegetation nor will it improve ecological connectivity. The development does not protect or establish an appropriate buffer to native vegetation, nor is the shed located or designed to avoid or minimise adverse direct or indirect impacts on ecological systems or processes. Further, the shed will be situated within a mapped core koala habitat area.

The development will therefore not avoid or minimise adverse impacts on koalas and koala habitat.

- The existing dwelling has a double garage and an uncovered car parking space which satisfies the requirements for parking in the Dwelling house code. As such council sees no reason to depart from the planning scheme for the shed.
- The proposal cannot be conditioned to comply with the assessment benchmarks.

12 On 14 July 2021, an appeal was lodged by the appellant with the Development Tribunal Registry.

Jurisdiction

13 This Tribunal has jurisdiction to hear this appeal under the PA section 229(1)(a)(i) and Schedule 1, sections 1(2)(a) and 1(2)(g) and Table 1 item 1(a) being an appeal by the Appellant against the refusal of the development application by the Assessment Manager on the direction of the Referral Agency.

14 The appeal was made in time, thus enlivening the Tribunal's jurisdiction.

15 The Tribunal had queried its jurisdiction with the parties on 29 September 2021 because the vegetation on site comprised an "**Of concern**" regional ecosystem and was koala habitat. Responses from the parties were received on 20 October 2021 and referred to advice from SARA. The advice from SARA given on 14 October 2021 was that the clearing was exempt clearing. On those responses received, a decision was made that the Tribunal did have jurisdiction and this was communicated to the parties on 17 November 2021.

16 During the Appeal, the Tribunal determined that the application as proposed would be an overdevelopment of the site and requested the Appellant to consider a change to the scale of the development. The Appellant agreed to change the application by reducing the size of the development and relocating the building further to the west.

17 The Tribunal considered this change substantially reduced the impact of the development on the amenity of surrounding residents. The Tribunal then considered whether the change would be a minor change as it only has a power to consider a minor change under the PA section 254(3).

18 The PA defines a minor change as follows:

minor change means a change that—

(a) for a development application—

- (i) does not result in substantially different development; and
- (ii) if the application, including the change, were made when the change is made—would not cause—
 - (A) the inclusion of prohibited development in the application; or
 - (B) referral to a referral agency if there were no referral agencies for the development application; or
 - (C) referral to extra referral agencies; or
 - (D) a referral agency, in assessing the application under [section 55\(2\)](#), to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application was made; or
 - (E) public notification if public notification was not required for the development application;

19 The Tribunal has determined that the change as agreed by the Appellant is a minor change in that:

- a. The development will remain substantially the same as the development as proposed in the application
 - b. The change does not involve the inclusion of prohibited development
 - c. The change does not include the need for referral to any existing or additional referral agency
 - d. The change would not require assessment against additional matters by a referral agency
 - e. The change would not require public notification as the development remains code assessable.
- 20 The Tribunal initially issued a decision on 10 May 2022 that required Council to include conditions on engineering and landscape matters. On 12 May 2022 Council advised it considered that it did not have the power to impose and enforce such conditions. As a result, the decision of the Tribunal was revoked on 23 May 2022 and Council was requested to provide a package of conditions for consideration by the Appellant and the Tribunal to address this concern over the ability of Council's power to impose and give effect to conditions. On 6 June 2022, Council provided a draft package of conditions. On 14 June, the Appellant accepted the Council's draft package of conditions and annotated plan. The conditions and annotated plan reflect the intent of the Tribunal set out in its initial decision and are considered reasonable and relevant to the revised development proposal.
- 21 On the basis of the above determinations, the Tribunal has the jurisdiction to address the proposed change to the application and has the power to impose conditions on the revised development proposal.

Decision framework

- 22 This is an appeal against a refusal of a development application, the onus rests on the Appellant to establish that the appeal should be upheld.
- 23 The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Assessment Manager who made the decision appealed against (PA section 253(4)) and for an appeal about a development application, this may mean addressing matters which an assessment manager did not expressly rely on in refusing the application and matters raised at the hearing by any party.
- 24 Under the PA section 254, 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.
- 25 In this appeal, the Tribunal considered the appeal documentation, the SCPS2014, the PA, the submissions by the parties at the hearing and the additional material submitted after the appeal as a response to Directions to the parties after the hearing.
- 26 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 replace the decision of the Assessment Manager as set out above for the reasons set out below.
- 27 The Tribunal faced a difficult balance between the clearing exemption provisions of the Planning Regulations and the constraints imposed by SCPS2014 - in particular the Limited Development (Landscape Residential) Zone code and the Biodiversity wetlands and waterways overlay code and the need to consider the impact of the proposed development on adjoining and nearby premises.

Material Considered

28 The following is a list of the material considered by the Tribunal

- A. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 17 July 2021, comprising the following documents:
- Form 10 - Notice of Appeal dated 17 July 2021
 - Council's Decision Notice – Refusal - DBW20/0200 dated 18 June 2021 2021 including a Statement of Reasons
 - Letter dated 6 May 2021 from Building Suncoast Green, providing a response to the Council's Information Request
 - Letter dated 5 January 2021 from Council to Building Suncoast Green providing an Information Request
 - Drawings dated 18 September 2020 by Kunkel Building Design detailing the design of the carport
 - A town planning report including assessments against the relevant codes in Sunshine Coast Planning Scheme 2014 (SCPS2014) from Building Suncoast Green dated November 2020 that was supported by a Slope Stability Assessment by Tectonic Geotechnical Pty Ltd dated 20 August 2020, and a Vegetation Clearing Report by North Coast Environmental Services dated September 2020.
- B. Sunshine Coast Planning Scheme 2014
- C. Department of Resources – Queensland Globe mapping;
- D. The Planning Act 2016 (PA);
- E. The Planning Regulation 2017 (PR);
- F. The Development Assessment Rules 2017;
- G. The Building Act 1975 (BA);
- H. The Building Regulation 2006 (BR);
- I. The Queensland Development Code (QDC) Part MP 1.2; and
- J. The verbal submissions made by the parties at the hearing and during the site inspection as referred to in the body of the decision.
- K. The responses to Directions regarding jurisdiction mentioned above in para 16.
- L. Email trail. Direction to the Appellant dated 17 November 2021 seeking reconsideration of design to minimise impacts, request for clarification from Appellant dated 14 December 2021, request for additional time from Appellant dated 17 December 2021, clarification and agreement to extension of time from Tribunal dated 17 December 2021, Response to Direction from Appellant dated 31 January 2022 that included the following revised plans for the development:
- 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 03 OF 03 – SECTION
 - 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 02 OF 03 - SITE WITH IMAGE
 - 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 01 OF 03 - SITE - FLOOR PLAN.
- M. Email trail. Advice to the parties dated 23 May 2022, advising the original decision notice of 10 May 2022 had been revoked and requesting Council to provide a draft conditions package for the revised development and to send it to the appellant. On

6 June Council submitted a conditions package and an annotated plan to support the Ecological and Landscaping conditions - drawing 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 01 OF 03 - SITE - FLOOR PLAN dated 4 April 2022 as annotated by Council. On 6 June the Registry forwarded the draft conditions package and annotated plan to the Appellant for consideration. On 14 June, the Appellant advised the Registry that is accepted the package of conditions and annotated plan. The annotated plan is included as Condition B and the package of conditions is included as Condition C above. The certification requirements identified in the conditions package are confirmed in Condition D above.

- 29 The Tribunal in reaching this decision has considered all the above material but only identifies in this decision the material on which it has specifically relied to reach its decision.

Findings of Fact

- 30 The clearing exemptions available to the Appellant under the PA have limited the application of the SCPS2014 Biodiversity, wetlands and waterways code.
- 31 There would be an adverse visual impact on the amenity of the dwellings to the north-east and east from the development as originally proposed.
- 32 The development as originally proposed could not be conditioned to comply with the assessment benchmarks.
- 33 The part of the site not covered by the exemption for clearing along a boundary was cleared without Council approval prior to the approval of the development application.
- 34 The development as revised will not have an adverse impact on the amenity of the dwellings to the north-east and east from the development as the shed is further away and will be cut into the hillside when viewed from the north-east and has a lesser length when viewed from the dwelling to the east and will be screened by vegetation.

Reasons for the Decision

- 35 The Tribunal considered the development as originally proposed to be an overdevelopment of the site and in the location proposed and the position up the slope had an adverse visual impact on the amenity of properties to the east and north-east.
- 36 The Tribunal considered it was appropriate to request the appellant to reconsider the size and position of the proposed shed.
- 37 The appellant submitted a revised site plan showing a shed reduced from 24 metres to 16.8 metres in length and moved further from the northern boundary and pivoted to be almost parallel to the eastern boundary. The height of the retaining wall at the north-east corner of the hardstand was reduced from 2.8 to 2.2 m and the top of the shed is at a lower elevation and will be cut into the hillside thus limiting the visual impact of the shed.
- 38 The Tribunal considered the revised site plan reduces the impacts on the amenity of the properties to the east and north-east to an acceptable level. The shed is now more above the carport on the property to the east rather than dominating the view to the north-west from that property. The shed is now further from the property to the north-east and the hardstand retaining wall is lower in height.
- 39 The revised site plan would have generated a reduced exempt clearing footprint and would have been more in accordance with PO1 of the Biodiversity, waterways and wetlands overlay code. Because clearing was undertaken on site before any approval was in place, the extent of that clearing is in excess of what is available as exempt clearing to the revised design. Accordingly, it is appropriate to impose conditions on the development for revegetation of a large part of the cleared area as shown on the Site Plan as annotated by Council.

- 40 The following drawings dated 28 January 2022 and submitted to the Tribunal on 31 January 2022 are approved as the basis for detailed design of the shed, hardstand and driveway:
- 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 03 OF 03 – SECTION
 - 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 02 OF 03 - SITE WITH IMAGE
 - 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 01 OF 03 - SITE - FLOOR PLAN.
- 41 The drawing 2020-18 JOHN CACCIOLA JIRRIMA CT BUDERIM ISSUE M - Sheet - 01 OF 03 - SITE - FLOOR PLAN dated 4 April 2022 as annotated by Council and submitted to the Tribunal on 6 June 2022 and accepted by the Appellant on 14 June 2022 is accepted and approved as the basis for addressing the Ecology and Landscaping conditions in Council's package of conditions.
- 42 The Council's draft package of conditions and annotated plan are considered reasonable and relevant to the revised development proposal.
- 43 The Appellant has requested the shed to protect their boat and caravan from damage by the weather - sun, rain, wind or hail damage. The Tribunal considers this is not an unreasonable expectation of an owner. However, this was only given minor weight by the Tribunal.
- 44 For the above reasons, the Tribunal considers the Appellant has satisfied the onus to demonstrate the appeal should be upheld.

John O'Dwyer

Development Tribunal Chair
Date: 4 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:

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Department of Energy and Public Works
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Telephone (07) 1800 804 833

Email: registrar@epw.qld.gov.au