



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	22-017
Appellant:	Rodney Jericho
Respondent (Assessment Manager):	Noosa Council ("Council")
Site Address:	2 Smiths Road, Tinbeerwah, formally described as Lot 28 on RP901389 ("the subject site")

Appeal

Appeal under section 229 and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1, of the *Planning Act 2016* ("the PA") against the assessment manager's decision to refuse the appellant's application for a building works development permit for a Class 10a building (garage/shed) on the subject site ("the application").

Date and time of hearing and site inspection:	Wednesday 3 August 2022 at 1.00pm
Tribunal:	Neil de Bruyn – Chairperson Catherine Baudet – Member
Present	Rodney Jericho – appellant Vicki Jericho – appellant's representative Angus McKinnon – appellant's representative Trevor Gerhardt, Sunshine Coast Building Approvals – appellant's representative Keith Bootland – appellant's representative Patrick Murphy – Council Representative Mark Lewis – Council Representative

Decision:

The Development Tribunal ("the tribunal"), in accordance with section 252(1)(a) of the PA, has decided that it has no jurisdiction for this appeal.

Background:

1. The subject site is a rural residential lot of 1.809ha, located in Tinbeerwah within the Noosa Council local government area. The subject site fronts onto Smiths Road to the east, and Sunrise Road to the north. The subject site is included within the Rural Residential Zone under the Noosa Plan 2020, being the current planning scheme for the subject site ("the planning scheme"). The site contains a substantial, detached dwelling house located towards the northern frontage of the subject site.

2. The subject site, and specifically that part of the subject site involved in this appeal, is affected by the following overlays under the planning scheme:
 - a) The Biodiversity, Waterways and Wetlands Overlay;
 - b) the Bushfire Hazard Overlay; and
 - c) the Landslide Hazard Overlay.
3. The subject site's main vehicular and pedestrian access to the dwelling house is located within Smiths Road, close to the intersection with Sunrise Road. At the site inspection, a secondary, informal vehicular access was noted a short distance to the south of the main access along Smiths Road.
4. The appellant proposes to construct a large Class 10a building, with its own vehicular access and internal driveway system, close to the south-eastern corner of the subject site. Somewhat rudimentary, mostly hand drawn, plans are included in the material provided to the tribunal. Based upon the provided material, the proposed building will have a floor area of approximately 540m² and a maximum height of approximately 9.5m. Given the rudimentary nature of the plans, these parameters are taken to be approximate only.
5. At the hearing, the appellant advised that the proposed building was to be used for vehicle and domestic equipment storage, as well as an indoor entertainment area. Also at the hearing, the tribunal was verbally advised that the proposed building was to be constructed of concrete panels manufactured on site and lifted into place with a crane.
6. The submitted plans show a setback to Smiths Road of 12.5m, although this dimension does not appear to be measured to the outermost projection of the awning at the front (northern façade) of the proposed building, as required, suggesting that the actual setback would be somewhat less than 12.5m. The plans show a setback of 7.5m to the southern boundary of the subject site.
7. Under the planning scheme, building works for a dwelling house or a Class 10 structure within the Rural Residential Zone, that are not associated with a material change of use, are categorised as accepted development subject to requirements (refer to Table 5.7.1). This table sets out the requirements that such building works are to comply with, which are particular acceptable outcomes (AOs) of the Rural Residential Code and of the Low-Density Housing Code. Sections 5.3.3(1) and 5.3.3(2) of the planning scheme, provide that accepted development must comply with the identified requirements and that, if one or more non-compliances apply, the relevant development becomes assessable development requiring code assessment.
8. It was accepted by both parties that the proposed development would not comply with certain AOs and therefore that the proposed development would constitute assessable development under the planning scheme, requiring code assessment.
9. Accordingly, and on the appellant's behalf, Sunshine Coast Building Approvals submitted the application to the assessment manager on or about 19 November 2021. The application material included a geotechnical engineer's report prepared by Geotech Engineering (dated 9 July 2020, some 16 months prior to the date upon which the application was made). Notably, this report was for a proposed residential dwelling at the subject site, and also does not clearly identify the specific location within the subject site, or the extent of the proposed works, it was concerned with.
10. The application also included a set of mostly hand-drawn plans, prepared by Scotty's Building Developments, varying in dates from 18 October 2021 to 9 November 2021. These plans also included a contour and detail plan prepared by Max Watterson and Associates, consulting surveyors and planners. Notably, this plan was dated 10 October 2018, over three years prior to the lodgement of the application.

11. It is apparent, from the material before the tribunal, that the application was accepted by the assessment manager as a properly made application under section 51(5) of the PA.
12. On or about 16 December 2021, the assessment manager issued an information request. The information request sought more information in relation to:
- a) How the proposed building is intended to be used, having regard to the need to not result in adverse changes to the local amenity;
 - b) justification for the size and scale of the proposed building;
 - c) an amendment to the proposed development to reduce its size and relocate it to another (unspecified) part of the subject site that would –
 - i. ensure compliance with minimum boundary setback requirements,
 - ii. not be subject to steep slopes, and
 - iii. not be constrained by the Biodiversity, Waterways and Wetlands Overlay or the Landslide Hazard Overlay;
 - d) updated plans drawn to a professional standard, including full details of the proposed earthworks, including for the access and driveway, proposed works external to the building itself, vegetation to be removed and details of colours and materials;
 - e) clarifying reported inconsistencies regarding the location of the proposed, new vehicular access and driveway;
 - f) vehicular swept path diagrams for the proposed new access and driveway;
 - g) full details of all proposed earthworks, including volumes;
 - h) a concept stormwater management plan; and
 - i) details of the proposed effluent disposal system, having regard to the submitted slope stability report and the nearby riparian buffer zone the subject of the Biodiversity, Waterways and Wetlands Overlay Code.
13. On or about 7 March 2022, Sunshine Coast Building Approvals issued a response to the assessment manager's information request. This response included a report responding to the information request items, a letter from Scotty's Building Developments, detailing some changes to the design and an updated set of (mostly still rudimentary, hand-drawn) plans, all dated 23 February 2022.
14. On 12 April 2022, the assessment manager decided to refuse the application and issued its decision notice of the same date. The grounds for refusal were stated to be as follows:
1. *The development does not comply with PO5 of the Rural Residential Zone Code as the building is not low rise, will present an appearance of bulk to adjacent properties and the road, and does not retain natural site characteristics in respect to the natural landform of the site.*
 2. *The development does not comply with PO6 of the Rural Residential Zone Code as the proposal has not been designed and sited to avoid visual impacts on amenity with adequate alternative areas on site that could ensure visual amenity is maintained.*
 3. *The proposal is not visually responsive to the natural topography and dominates the landscape (sic) the proposal is therefore not considered to comply with PO11 of the Rural Residential Zone Code.*

4. *Inadequate details of vegetation removal required by the earthworks and site entrance works for the driveway, along with the inadequate information regarding stormwater collection and discharge impacts on biodiversity values of the site have not demonstrated compliance with the Biodiversity Code (sic).*
5. *The application has been located within the Landslide Hazard Overlay mapped area and the application materially has not satisfactorily demonstrated that the recommendations of the submitted geotechnical report can be implemented.*
15. The appellant duly lodged this appeal on 5 May 2022. No specific grounds of appeal were included in the material attached to the appellant's Form 10 – Notice of Appeal.
16. Following the site inspection and on-site hearing for this appeal, the tribunal issued the following directions to the parties on 31 August 2022:

The tribunal appointed to hear and decide this appeal has undertaken a detailed assessment of all of the evidence before it, and is of a mind to conclude that the development application the subject of this appeal was incorrectly made, and that the tribunal does not have jurisdiction to determine this appeal.

In summary, the tribunal finds that the development application the subject of this appeal ("the application") sought a development permit for building works assessable against the Noosa Plan 2020 ("the planning scheme"). The tribunal is of a mind to conclude that the application was not the correct type of application for the proposed development, and that the proposed development instead required an application for a material change of use development permit under the planning scheme.

The following outlines the basis for this preliminary view:

- a) *The planning scheme definition for "dwelling house" includes any domestic outbuildings associated with the dwelling.*
- b) *Based on the evidence provided to the tribunal, the proposed building would be a domestic outbuilding, and would therefore form an integral part of the existing use of the subject site for a dwelling house.*
- c) *The significant scale of the proposed building (such as its proposed floor area of approximately 540m²) is such that it would undoubtedly constitute a material increase in the scale of the existing use of the subject site for a dwelling house (as defined), and would therefore constitute a material change of use as defined under the Planning Act 2016 ("the PA").*
- d) *Under the planning scheme, a material change of use for a dwelling house within the Rural Residential Zone constitutes accepted development subject to requirements (refer to Table 5.5.14).*
- e) *Table 5.5.14 of the planning scheme sets out the requirements that such a material change of use is to comply with, which are particular acceptable outcomes (AOs) of the Rural Residential Code and of the Low Density Housing Code.*
- f) *Sections 5.3.3(1) and 5.3.3(2) of the planning scheme provide that accepted development must comply with the identified requirements, and that if one or more non-compliances apply, the relevant development becomes assessable development requiring code assessment.*
- g) *The proposed material change of use (refer to (c) above) does not comply with certain of the requirements identified in Table 5.5.14, including (but not necessarily limited to) AOs 5.5, 6.4(d) and 11.4(a) of the Rural Residential Zone Code, and AOs 14.1, 21 and*

22.1 of the Low Density Housing Code, and, as such, constitutes an assessable material change of use requiring code assessment.

- h) As assessable development, the material change of use requires a material change of use development permit.*
- i) Under the planning scheme (refer to Table 5.7.1, together with Section 5.3.2(3)), building works within the Rural Residential Zone is accepted development where associated with a material change of use, meaning that the application only needed to seek a material change of use development permit for the proposed development.*

The tribunal has decided to request the parties to review the above and to seek their respective comments on both the above analysis, and the preliminary conclusion to the effect that the application sought approval for the incorrect category of development and was therefore incorrectly made.

The parties are therefore directed to provide any comments, in writing only, to be received by the Registrar by no later than 4pm on Wednesday 14 September 2022.

17. Council's response was received on 14 September 2022, stating that "... Council officers agree with the tribunals (sic) assessment regarding a Material Change of Use being required as detailed (in the tribunal's directions)."
18. In an email dated 14 September 2022, Sunshine Coast Building Approvals, representing the appellant, requested an extension of time, to 20 September 2022, to provide a response, which request was duly granted by the tribunal.
19. Sunshine Coast Building Approvals provided the appellant's response by way of an email dated 19 September 2022. This response, in essence, concludes that the tribunal "*must determine the appeal ...*" on the basis that its preliminary conclusion, outlined in its directions, was not considered to be correct, and that the proposed development constitutes building works, and does not involve a material change of use. This conclusion by the appellant is essentially based upon the following factors:
 - a) Council confirmed that the proposed shed does not constitute an increase or intensification of the use of the subject site, and the proposed shed is therefore not a material change of use. Council also accepted the application as having been properly made, and a confirmation notice was issued.
 - b) The explanatory notes to the Planning Bill 2015 confirm, in particular, in relation to the definition of 'material change of use, that the proposed shed is not a material change of use.
 - c) Schedule 6 of the Planning Regulation 2017, identifying development a local categorising instrument is prohibited from stating is assessable development, includes a material change of use for residential buildings for a residential purpose.
 - d) The proposed shed constitutes building work in accordance with the Building Act 1975, the assessment of which cannot be duplicated under the Planning Act 2016.

Material Considered:

20. The following material has been considered by the tribunal in this appeal:
 - a) 'Form 10 – Notice of Appeal' lodged by the appellant with the tribunal's registrar on 5 May 2022, including:
 - i. Sunshine Coast Building Approvals' attached letter of 4 May 2022; and

- ii. Document A, which re-states the assessment manager's grounds for refusal and requests the tribunal to approve the shed based upon the application, dated 19 November 2021, and the information request response dated 7 March 2022.
- b) A copy of the application, dated 19 November 2021, including:
 - i. DA Form 2 and referral checklist, identifying a referral to the local government for a design and siting assessment;
 - ii. Sunshine Coast Building Approvals *Request for Development Permit for Building Works (DBW)* (undated);
 - iii. a set of plans prepared by Scotty's Building Developments, dated between 18 October 2021 and 9 November 2021;
 - iv. a contour and detail survey plan prepared by Max Watterson and Associated, dated 10 October 2018; and
 - v. a report by Geotech Engineering dated 9 July 2020.
 - c) A copy of the assessment manager's information request dated 16 December 2021.
 - d) A copy of the response to the information request, dated 7 March 2022, and submitted on the appellant's behalf by Sunshine Coast Building Approvals, including:
 - i. Document A, detailing the response to the information request items;
 - ii. Scotty's Building Developments' letter of 23 February 2022; and
 - iii. An amended set of plans prepared by Scotty's Building Developments, dated 23 February 2022.
 - e) A copy of the assessment manager's decision notice dated 20 April 2022.
 - f) the *Planning Act 2016* and the *Planning Regulation 2017*.
 - g) the Noosa Plan 2020 (25 September 2020).
 - h) Council's and the appellant's respective responses of 14 and 19 September 2022 to the tribunal's directions of 31 August 2022, including the attachments to the appellant's response.

Decision Framework:

- 21. A tribunal may decide that it has no jurisdiction for tribunal proceedings, at any time before the proceedings are decided (section 252(1) of the PA). In the event of such a decision by a tribunal, a decision notice must be given (section 252(2) of the PA).
- 22. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
- 23. The tribunal is required to hear and decide an appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, 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 PA.
- 24. The tribunal is required to decide an appeal in one of the ways mentioned in section 254(2) of the PA, and the tribunal's decision takes the place of the decision appealed against (section 254(4)).

Findings:

- 25. The tribunal finds that the application sought a building works development permit for building works assessable under the planning scheme. The tribunal finds further that the application was incorrectly made, in that it should have sought a material change of use

development permit for the proposed development, instead of a development permit for building works assessable against the planning scheme. In this regard, the tribunal notes that:

- a) The planning scheme definition for “dwelling house” includes any domestic outbuildings associated with the dwelling;
 - b) based on the evidence provided to the tribunal, the proposed building would be a domestic outbuilding, and would therefore form an integral part of the existing use of the subject site for a dwelling house;
 - c) the significant scale of the proposed building (such as its proposed floor area of approximately 540m²) is such that it would undoubtedly constitute a material increase in the scale of the existing use of the subject site for a dwelling house, and would therefore constitute a material change of use as defined in the PA;
 - d) under the planning scheme, a material change of use for a dwelling house within the Rural Residential Zone constitutes accepted development subject to requirements (refer to Table 5.5.14);
 - e) Table 5.5.14 of the planning scheme sets out the requirements that such a material change of use is to comply with, which are particular acceptable outcomes (AOs) of the Rural Residential Code and of the Low density Housing Code;
 - f) Sections 5.3.3(1) and 5.3.3(2) of the planning scheme provide that accepted development must comply with the identified requirements, and that if one or more non-compliances apply, the relevant development becomes assessable development requiring code assessment;
 - g) the proposed material change of use does not comply with certain of the requirements identified in Table 5.5.14, including (but not necessarily limited to) AOs 5.5, 6.4(d) and 11.4(a) of the Rural Residential Zone Code, and AOs 14.1, 21 and 22.1 of the Low Density Housing Code, and, as such, constitutes an assessable material change of use requiring code assessment, and therefore requires a material change of use development permit; and that
 - h) under the planning scheme (refer to Table 5.7.1 together with Section 5.3.2(3)), building works within the Rural Residential Zone is accepted development, where associated with a material change of use, meaning that the application only needed to seek a material change of use development permit for the proposed development.
26. The tribunal finds that the Council is in agreement with the analysis and conclusion set out in Paragraph 25 above, based upon its response of 14 September 2022 to the tribunal’s directions of 31 August 2022.
27. The tribunal finds that the appellant’s response of 19 September 2022 to the tribunal’s directions does not change the tribunal’s preliminary conclusion, as set out in those directions. In this regard, the tribunal finds as follows in relation to the appellant’s response to the directions:
- a) Despite Council having accepted the application as having been properly made, and having assessed it as an application for building works assessable against the planning scheme, this does not alter the conclusion that this was erroneous on Council’s part, as now accepted by Council itself, in its response to the tribunal’s directions.
 - b) The explanatory notes to the Planning Bill 2015, in relation to the definition of a material change of use, do not preclude any particular development involving a material increase in the scale of an existing land use from constituting both a material change of use and building works.

- c) Schedule 6, Part 2, Sections 2(2) and 2(4) of the Planning Regulation 2017 only prohibit a material change of use for a residential purpose in a residential zone from being categorised in a planning scheme as assessable development, where no planning scheme overlay is applicable (or only a bushfire hazard overlay is applicable to premises less than 2,000m² in extent). The subject site, and specifically the location of the proposed shed, is affected by three overlays as mentioned in Paragraph 2 and, as such, the prohibition under the Regulation is not applicable in this case.

Jurisdiction:

28. Section 229(1) of the PA provides that Schedule 1 (“the schedule”) of the PA states the matters that may be appealed to a tribunal.
29. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule (“Table 1”) are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of the matters set out in section 1(2).
30. The matters listed under section 1(2)(a) to (f) and (h) to (l) are not applicable in this appeal. That is, this appeal does not involve a development application for a material change of use or for operational work, and does not relate to a development condition, a change application, an enforcement notice, an infrastructure charges notice, a conversion application, or any matter prescribed by regulation.
31. Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the Building Act 1975, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission. As the development the subject of this appeal has been found to constitute an assessable material change of use only, this matter is found not to relate to the Building Act 1975.
32. Section 1(5) of the schedule provides that matters stated in Table 3 of the schedule may be appealed only to a tribunal. The tribunal is satisfied that this appeal does not involve any of the matters in Table 3.
33. Accordingly, and for the reasons stated in Paragraphs 30 and 31, Table 1 is thus found not to apply to this appeal. Accordingly, the tribunal is satisfied that it does not have jurisdiction to hear and decide this appeal.

Reasons for the Decision:

34. The tribunal, in accordance with section 252(1)(a) of the PA, has decided that it has no jurisdiction for this appeal, for the reasons stated in Paragraphs 30 and 31 of this decision notice.
35. This decision notice is issued in accordance with the requirements of section 252(2) of the PA.

Neil de Bruyn

Development Tribunal Chair

Date: 20 October 2022

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
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