



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	24-044
Appellant:	James Coll
Respondent (Assessment manager):	Cairns Regional Council (The “Council”)
Site address:	114 Hillview Crescent, Whitfield Qld 4870, described as Lot 1 on RP 726716 (the “Subject Site”)

Appeal

Appeal under section 229 and item 1(c), table 1, section 1 of schedule 1 (Appeals) of the *Planning Act 2016* ('PA') against stated development conditions imposed by Cairns Regional Council ('Council') on its decision to approve a material change of use ('MCU') for a dwelling house (the 'Development Permit'), given by a Decision Notice dated 19 August 2024 ('Decision Notice').

Date and time of hearing:	14 November 2024 at 2:00pm
Place of hearing:	114 Hillview Crescent, Whitfield
Tribunal:	Professor Victor Feros OAM – Chair Michael Yau – Member George James – Member Heath Bussell – Member
Present:	James Coll – Appellant John Eylander – for the Appellant Chris Demarco – for the Appellant Gary Warner – Council representative Dylan Thomas – Council representative Sam Leggerini – Council representative

Decision:

The Development Tribunal ('Tribunal'), in accordance with section 254(2)(a) of the PA **confirms** the decision of the Council to approve the application subject to the development conditions of the Development Permit.

Background

1. The subject site is situated at 114 Hillview Crescent, Whitfield, Cairns, described as Lot 1 on RP 726716. The subject site has an area of 8,314m² and is a 'battle-axe' type allotment, with a narrow rectangular corridor section ("handle") forming a 5.025m street

frontage to the western alignment of Hillview Crescent, with the “head” of the allotment being an irregular pentagon shape extending to the north-west.

2. Street access to the subject site is via a common driveway located on an easement parcel to the south of the allotment, running immediately adjacent to the allotment’s rectangular corridor section in a westerly direction. After approximately 30m from the kerb the driveway begins to branch in various directions, with a northern driveway branch located approximately 45m from the kerb entering and providing access to the subject site.
3. The subject site slopes upwards from the street frontage, with an approximate maximum difference in elevation of 60m between the eastern (front / street frontage) boundary, being the lowest point, and the western (rear) boundary, being the highest point. Gradients may generally be described as ‘moderate’ to the eastern third of the allotment, ‘steep’ to the western third, and ‘moderate in part’ to the central third, due to the inclusion of a large, benched building platform in this section.
4. Improvements to the subject site include a class 1a two-storey dwelling, a class 10b swimming pool, a class 10a storage shed, a number of class 10b retaining walls / structures and a long, winding concrete driveway. The majority of these improvements are situated in the central third of the allotment, with the storage shed being situated within the eastern third.
5. The subject site is zoned ‘Environmental Management; Precinct 1 – Residential’ under the CairnsPlan 2016 v3.1 (‘planning scheme’). Further, a number of planning scheme overlay codes are applicable to the subject site, including Airport Environs, Hillslopes, Natural Areas, Potential Landslip and Transport Network.
6. A Private Building Certifier, on behalf of the Appellant, submitted to Council 13 February 2024, a Building Certifier’s Request for Referral Agency Response (Building Work) form and associated documentation, including an MCU application for the proposed works comprising ‘dwelling and garage’ at the subject site (collectively the ‘Development Application’). Specifically, the Development Application proposed:
 - (a) demolition of the existing dwelling and storage shed;
 - (b) construction of a new class 1a three-storey dwelling and a (detached) class 10a two-storey garage and storage area, generally at the same locations of the “to be demolished” buildings and structures;
 - (c) reshaping and recontouring of the existing driveway; and
 - (d) retention and continued use of existing retaining walls and pool, as modified.
7. It is noted that the Development Application is for code assessable development (“Code Assessment”) under the Planning Scheme (“Cairns Plan”).
8. Council issued an Information Request to the Appellant (via the Private Building Certifier) dated 20 March 2024 in relation to aspects of the Development Application, including height, geotechnical requirements and driveway, vegetation removal, and scenic and landscape character (‘Information Request’).
9. The Appellant provided a considered response to the Information Request, (‘Response to Information Request’).
10. Council, by letter dated 20 August 2024, advised the Appellant its Decision Notice (approving the Development Application in full, subject to conditions) and issued a Development Permit.
11. The Development Permit included nineteen conditions imposed by Council as Assessment Manager, and four conditions imposed by Council as Referral Agency under section 57 of the PA. The Development Permit also noted the requirement for three further Development Permits to be obtained, including:

- (a) Development Permit for Building Works
 - (b) Permit for Plumbing Works
 - (c) Development Permit for Operational Work
12. An Appeal to the Tribunal was lodged by the Appellant, dated 10 September 2024 (the subject Appeal), referring to certain conditions outlined in the Decision Notice, being "...inconsistent, unnecessary, and excessive in comparison to the standard requirements."
13. The Appellant provided the following reasons as to why the conditions should be reconsidered:

(a) Excessive Conditions Not Justified by Compliance

The conditions listed in the decision are required to be completed prior to the issuance of a Development Permit for Operational Works. Specifically, these conditions include:

- (i) *Earthworks requiring detailed earthworks plans [Condition 10]*
- (ii) *A revised geotechnical assessment report for slope stability [Condition 11]*
- (iii) *A site plan demonstrating vegetation damage and replacement [Condition 15]*
- (iv) *Written confirmation from Cairns Airport regarding operational airspace encroachments [Condition 19]*

Despite the fact that the decision notice asserts these conditions are met, they are disproportionately higher than standard requirement and are not adequately justified in the Statement of Reasons.

(b) Inconsistencies and Improper Reasoning in the Decision Notice

The conditions as listed in the decision notice are not only inconsistent with the stated reasons but also display an improper application of assessment benchmarks, as explained below:

(i) Environmental Management Code

The decision claims compliance with exception to AO1.1 and AO1.2, yet concludes that the proposed development does not conflict with the relevant benchmarks. However, the dwelling complies with Performance Outcomes PO1 and PO2, and the development is situated on existing dwelling footprints. Therefore, the imposition of additional conditions is unjustified.

(ii) Airport Environs Overlay Code

The proposal was referred to Cairns Airport, which confirmed that no issues were raised. Despite this, the decision-maker introduces speculative concerns regarding operational airspace encroachments. Such reasoning is improper, as the decision should rely solely on the official response from the relevant authority.

(iii) Hillslopes Overlay Code

The decision states non-compliance with AO1.2, AO2.1, and AO3.4, yet acknowledges that the proposed development complies with Performance Outcomes PO1, PO2, and PO3. Given this compliance, the additional conditions regarding slope stability and earthworks are unnecessary and reflect a lack of clear reasoning.

(iv) *Dwelling House Code and Excavation and Filling Code*

The decision-maker confirms compliance with the higher order Performance Outcomes but seeks to impose additional conditions based on speculative concerns. The demonstrates an improper use of discretion.

(c) *Improper Use of Discretion and Voidable Decision*

The conditions imposed prior to the commencement of operational works are inconsistent and non-sensical. As such, they are embarrassing, voidable, and should be reconsidered.

14. The Appeal outcome sought by the Appellant was for the decision to be reconsidered, "...with the conditions brought into alignment with standard requirements and the actual performance outcomes of the development."
15. A site inspection and Hearing of the Appeal were held on the subject site 14 November 2024, commencing 2:00pm.
16. On 18 November 2024, Council (at the request of the Tribunal) provided the Tribunal with a copy of their Information Request and the associated Response to Information Request documents.
17. Following review of the Appeal lodgement documents submitted by the Appellant, and pursuant to the site inspection and Hearing held on 14 November 2024, the Tribunal confirmed the following development conditions, imposed by Council as Assessment Manager, as the grounds, the subject of this Appeal:

(a) **Condition 10 – Earthworks**

Timing: *Prior to the issue of a Development Permit for Operational Works*

Condition: *The applicant must provide Detailed Earthworks Plans for Council approval that must include, but not be limited to, the follow information:*

- (i) *A legend;*
- (ii) *Total volume of material required to be excavated;*
- (iii) *Total volume of material to be utilised as fill;*
- (iv) *Finished surface contours;*
- (v) *An earthworks plan which clearly identifies the changes level to the site such as a heatmap / colour map of the differences between existing levels and proposed finished levels;*
- (vi) *The limits and extent of proposed cut and fill, distinguished by hatching;*
- (vii) *The location and height of all proposed retaining walls, including the existing retaining walls proposed to be maintained (if any). Including longitudinal sections and cross sections.*

The above is to be undertaken for the entirety of the site inclusive of the driveway and proposed garage.

(b) **Condition 11 – Slope stability**

Timing: *Prior to Operational Works Approval and at all times*

Condition: *A revised geotechnical assessment report must be provided for the development which specifically includes the effects of the secondary*

structure as well as proposed earthworks and retaining walls for the proposed development.

The development must be undertaken in accordance with the recommendations of the revised geotechnical assessment.

The works must be supervised by a Registered Professional Engineer Queensland (RPEQ) with all work details on a certificate of supervision and a copy of the supervision certificate provided to Council upon completion.

(c) **Condition 15 – Vegetation Damage**

Timing: Prior to the issue of a Development Permit for Operational Works

Condition: Any vegetations clearing must not commence until a Development Permit for Operational Works (Vegetation Clearing) has been obtained. The following documents should be submitted in conjunction with an application for Operational Works:

- i. Site Plan demonstrating:
 - a. Location, Species, Approx. Age of vegetation proposed to be removed;
 - b. Location of vegetation proposed to be retained and the Tree Protection and Structural Root Zone; and
 - c. Locations of replacement species.

Note: The subject lot is affected by Hillslopes. No vegetation damage is permitted without obtaining an Operational Work Development Permit. Refer to the definition of Vegetation damage contained in Schedule 1.2 CairnsPlan2016v3.1.

(d) **Condition 19 – Encroachments into Operational Airspace**

Timing: Prior to Commencement of Work

Condition: Provide a copy of written confirmation that any encroachments into the Operational Airspace (OLS or PANS-OPS) of the Cairns Airport as a result of construction activities have regulatory approval, including cranes and other construction plant.

(e) **Condition 20 – Airport Obstacle Limitation Surface**

Timing: Prior to Commencement of Use

Condition: Provide certification from a licensed surveyor to Council and the Cairns Airport that all buildings, structures, plant, equipment, lift shafts, aerials, lightning rods, antennae, poles, posts or other obstacles have been constructed to ensure they do not exceed the height in accordance with the approved plans.

Jurisdiction

18. 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.
19. Section 1(1) 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 applies to a tribunal only if the matter involves one of a list of matters set out in section 1(2).

20. Section 1(2)(b)(i) of the schedule provides that Table 1 applies to a tribunal if the matter involves a **provision** of a development approval for a MCU for a **classified building**. Schedule 2 of the PA defines:
 - (a) a **provision** of a development approval to include a development condition (or conditions); and
 - (b) a **classified building** to include a class 1 building or a class 10 building (other than a building that is incidental or subordinate to the use, or proposed use, of a class 2 to 9 building) under the Building Code of Australia.
21. Relevantly, the subject development approval (i.e. the Development Permit) is for a MCU for a dwelling house (class 1 building) and garage and storage area (class 10 building).
22. Item 1(c) of Table 1 provides that an appeal may be made to a tribunal against a provision of a development approval which, as stated above, includes development conditions (as is the subject of this appeal).
23. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision framework

24. The onus rests on the Appellant to establish that the appeal should be upheld (section 253(2) of the PA).
25. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decisions appealed against (section 253(4) of the PA).
26. The Tribunal may nevertheless (but not need to) consider other evidence presented by a party with leave of the Tribunal or any information provided under section 246 of the PA.
27. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Material considered

28. The material considered in arriving at this decision comprises:
 - (a) Development Application
 - (b) Information Request
 - (c) Response to Information Request
 - (d) Decision Notice
 - (e) Council's Statement of Reasons ('SOR') accompanying the Decision Notice
 - (f) Development Permit
 - (g) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 10 September 2024
 - (h) PA
 - (i) Planning Regulation 2017
 - (j) Queensland Development Code
 - (k) CairnsPlan 2016 v3.1
 - (l) Development Assessment Rules v1.3 (under the PA, section 68)
 - (m) FNQROC Regional Development Manual v9

- (n) Building Code of Australia 2022 Volume 2
- (o) Photographs of the subject site

Findings of fact

29. Under the planning scheme, the subject site is zoned Environmental Management; Precinct 1 – Residential, with a number of overlay codes also applicable, including, Airport Environs, Hillslopes, Natural Areas, Potential Landslip and Transport Network.
30. In accordance with Table 5.5.e.2 (Environmental management precinct 1 – Residential) of the planning scheme, the Development Application (a MCU for a dwelling house) for the subject site is code assessable against the following assessment benchmarks:
 - (a) Environmental management zone code
 - (b) Airport environs overlay code
 - (c) Hillslopes overlay code
 - (d) Natural areas overlay code
 - (e) Potential landslip hazard overlay code
 - (f) Transport network overlay code
 - (g) Dwelling house code
 - (h) Excavation and filling code
 - (i) Infrastructure works code
 - (j) Parking and access code
 - (k) Vegetation management code
31. Council, in its SOR accompanying the Decision Notice, noted the following matters of relevance to the Appeal:
 - (a) The proposed development has been assessed in accordance with the planning scheme in consideration of its compliance with the applicable assessment benchmarks of the applicable codes.
 - (b) Conditions have been imposed to ensure compliance with the assessment benchmarks of the planning scheme.
32. With respect to 31(a) and (b), above, Council, in its role as Assessment Manager, has decided the application in accordance with the requirements of the PA, insofar as it has:
 - (a) approved the application to the extent the development complies with assessment benchmarks (section 60(2)(a) of the PA); and
 - (b) imposed development conditions on the approval (section 60(2)(c) of the PA).
33. While the imposition of development conditions is allowable under the PA, these conditions must be 'permitted development conditions' and must not be 'prohibited development conditions' under sections 65 and 66, respectively, of the PA.
34. Following review of the five development conditions referenced in 17, above, the Tribunal does not consider that any of these conditions are 'prohibited' under section 66 of the PA. The role of the Tribunal, therefore, in this Appeal, is to decide whether or not these five development conditions are 'permitted' under section 65 of the PA. Relevantly, section 65 provides that a development condition must, amongst other things:

- (a) be relevant to, but not be an unreasonable imposition on, the development or the use of the premises as a consequence of the development (section 65(1)(a) of the PA); or
 - (b) be reasonably required in relation to the development or the use of the premises as a consequence of the development (section 65(1)(b) of the PA).
35. Effectively, for the five development conditions referenced in 17, above, and summarised below, the Tribunal must decide whether each condition is (a) relevant to the development or premises use, but not an unreasonable imposition on the development or premises use; and / or (b) reasonably required in relation to the development or premises use as a consequence of the development.
36. The Tribunal, having regard to the facts to the presented and considered facts and circumstances with particular reference to certain of the conditions of approval attached to the subject development permit, listed as follows

Condition 10 – Earthworks

Condition 11 – Slope Stability

Condition 15 – Vegetation Damage

Condition 19 – Encroachments into Operational Airspace, and

Condition 20 – Airport Obstacle Limitation Surface

determines that each and every above-listed Condition is relevant to the development and use of the premises for the subject purpose, is not an unreasonable imposition of the development and use as sought, is reasonably required for the development and use of the premises, and is a necessary imposition by Council upon the development in order to ensure compliance with assessment benchmark performance outcomes as stated in the following Codes in Cairns Plan 2016 V3.1, listed in Paragraph 30 above.

37. Matters taken into account in making this determination include, but are not necessarily limited to site development constraints, namely height of land, slope, geotechnical stability, landslip, site geometry, vegetation, scenic and landscape character, infrastructure site access transport and airport proximity, each of which are matters requiring address with reference to the above-referred Codes.
38. For clarity, the Tribunal determines that
- (a) with reference to **Condition 10 – Earthworks**, the Applicant is required to submit detailed earthwork plans to Council for approval for the whole of the site, prior to the issuance of a Development Permit for Operational Works;
 - (b) with reference to **Condition 11 – Slope Stability**, the Applicant is required to submit and to undertake the development in accordance with a revised geotechnical report. Further, a Registered Professional Engineer Queensland (RPEQ) must supervise the works, with a Supervisor Certificate to be provided to Council upon completion prior Operational Works approval and at all times;
 - (c) with reference to **Condition 15 – Vegetation Damage**, the Applicant is required not to commence any vegetation clearing prior to the issuance of a Development Permit for Operational Works. Further a site plan identifying vegetation details is required to be submitted in conjunction with the Application for Operational Works, prior to the issuance of a Development Permit for Operational Works;
 - (d) with reference to **Condition 19 – Encroachments into Operational Airspace**, the Applicant is required to provide to Council written confirmation that any encroachments, as a consequence of construction activities (including cranes and

other plant) in the Operational Airspace of the Cairns Airport have regulatory approval, prior to the Commencement of Work; and

- (e) with reference to **Condition 20 – Airport Obstacle Limitation Surface**, the Applicant is required to provide Council and the relevant Airport Authority, certification from a licensed surveyor that buildings, structures, plant or other obstacles and the like have been constructed so as not to exceed heights in accordance with the approved plans, prior to Commencement of Use.

Reasons for the decision

- 39. The Tribunal has determined that the noted development conditions (10, 11, 15, 19 and 20), being the subject of the Appeal, are 'permitted' development conditions under section 65 of the PA, because they are (a) relevant to the development or premises use, but not an unreasonable imposition on the development or premises use; and (b) reasonably required in relation to the development or premises use as a consequence of the development.
- 40. Accordingly, the Tribunal concurs with the decision of Council to approve the application subject to the development conditions of the Development Permit.

Professor Victor Feros OAM BA MUS MPIA (Life Fellow) CMILT LGTP (Q)
Development Tribunal Chair
Date: 14 February 2025

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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