



Development Tribunal – Decision Notice

Planning Act 2016, section 255

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| Appeal Number: | 20-030 |
| Appellant: | Sarah Anne Cutting |
| Respondent (Assessment Manager): | Douglas Shire Council |
| Site Address: | Lot 74 Forest Creek Road, Forest Creek and described as Lot 74 on RP 733654 – the subject site |

Appeal

Appeal under section 229 and item 1 of table 1 of section 1 of schedule 1 (Appeals) of the *Planning Act 2016* (“PA”) against a condition of a Negotiated Decision Notice dated 7 September 2020 providing for access through an existing creek crossing at the subject site.

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| Date and time of hearing: | 11:30 am on 27 November 2020 |
| Place of hearing: | The subject site and the Douglas Shire Council (“DSC”) offices |
| Tribunal: | Professor Victor Feros OAM – Chair Alan McPherson OAM – Member John Eylander, Barrister-at-Law – Member |
| Present: | Sarah Cutting – Appellant Jenny Elphinstone and Neil Beck – Respondent (Douglas Shire Council) |

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the *Planning Act 2016* (PA) **changes** condition 4 of the Negotiated Decision such that Condition 4 be deleted and replaced by a condition stating -

- a. *Upon occupancy of the constructed dwelling, vehicular crossing of the waterway will be prohibited. Any future owner of the site will be at liberty to seek a change to this condition of the approval; and*
- b. *Footway access in the form of a walkway across the waterway is to be installed by the property owner for practical, safety reasons and for convenience. This access is to be located within the existing cutting, to be constructed of timber or synthetic, long-life, unobtrusive material with the walkway one (1) metre above the creek-bed. Both approaches to the walkway deck are to be accessed by steps constructed from stone to match the surrounding area, fixed into the bank to avoid dislodgement by waterflow.”*

Background:

1. Forest Creek is located just north of the Daintree Ferry crossing in the Douglas Shire Council locality in Tropical North Queensland where the rainforest meets the reef. It is named after the creek drainage from the north of the Daintree River and west of Cape Tribulation Road. There is acreage rainforest lots along Forest Creek Road with cattle being grazed at the lower section closer to the river.
2. The land, the subject of the Appeal, is situated at Forest Creek Road, Forest Creek, and is described as Lot 74 on RP33654, having an area of 4.029ha, with a frontage of 109.3m to Forest Creek Road.
3. The proposed use is a Class 1a single dwelling (Building Code of Australia). The site is zoned "*Environmental Management*" in the Douglas Shire Planning Scheme 2018 within which zone a dwelling house is a Code Assessable use.
4. The proposed siting of the house is setback some 120m from the road frontage and is more or less equidistant from the side boundaries.
5. A creek line traverses the site, with the southern high bank a minimum 22m forward of the house site.
6. The Development Application was lodged on 30 July 2020. The Respondent Application No. is MCUC.2020_3662.1.
7. The Respondent issued a Decision Notice on 25 August 2020 approving the Application subject to conditions.
8. The Applicant lodged a Request – Change Representations with Council on 31 August 2020, seeking the deletion or amendment of a certain stated condition.
9. The Respondent by letter dated 7 September 2020 issued a Negotiated Decision Notice.
10. An Appeal to the Development Tribunals – the subject Appeal was duly instituted on 2 October 2020.
11. Condition 4 states:

"4. Onsite Access

- a. *where the dwelling house is to be sited south of the waterway on the land the developer must:*
 - i. *Provide a vehicle access and culvert crossover from the car park area, through the existing cleared creek crossing path, to the new house location. The access and crossing must be designed by a RPEQ (Registered Practising Engineer Queensland) and;*
 - ii. *The creek crossing must be constructed and certified as having been appropriately constructed by a RPEQ prior to the commencement of use;*

OR

- b. *The dwelling house is sited in the existing clearing area north of the waterway on the land in a position to the satisfaction of the Chief Executive Officer having suitable regard to the setback from the adjacent road, the setback from the top of bank of the waterway, and requirements for onsite wastewater infrastructure."*

12. The Negotiated Decision Notice references the Respondent's environmental management zone code and the natural areas overlay code.
13. The purpose of the environmental management zone code "*is to recognise environmentally sensitive areas and provide for houses and lots and other low impact activities where suitable*". The relative criteria for assessment are PO6 or AO6.2 that provides –

PO6

Buildings and structures are responsive to steep slope through innovative construction techniques so as to:

- (a) maintain the geotechnical stability of slopes;*
- (b) minimise cut and/or fill;*
- (c) minimise the overall height of development.*

AO6.2

Access and vehicle manoeuvring and parking areas are constructed and maintained to:

- (a) minimise erosion;*
- (b) minimise cut and fill;*
- (c) follow the natural contours of the site.*

14. The natural areas overlay code "*enables an assessment of whether development is suitable on land within the Biodiversity area overlay sub-categories*". The relevant criteria are PO9 or AO9 that provides –

PO 9

Development is set back from waterways to protect and maintain:

- (a) water quality;*
- (b) hydrological functions;*
- (c) ecological processes;*
- (d) biodiversity values;*
- (e) riparian and in-stream habitat values and connectivity;*
- (f) in-stream migration.*

AO9

Development does not occur on that part of the site affected by a waterway corridor.

Note – Waterway corridors are identified within Table 8.2.7.3.b.

Jurisdiction:

15. The Tribunal's jurisdiction has been invoked pursuant to section 229 of the PA together with schedule 1, section 1, table 1, item 1(c). The 'provision' mentioned in item 1(c) is, in this instance, condition 4 of the negotiated decision notice of the Respondent dated 7 September 2020. The precondition imposed by section 1(2) of schedule 1 for the application of table 1 to the Tribunal is satisfied in this instance as paragraph (b) of that section applies. This is because the appeal involves a provision of a development approval for a material change of use for a classified building.

Decision Framework:

16. The onus rests on the Appellant to establish that the appeal should be upheld (s. 253(2) of the PA).

17. 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 decision appealed against (s. 253(4) of the PA).
18. The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under s.246 of the PA.
19. The Tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

Material Considered:

The material considered in arriving at this decision comprises:

- (i) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 2 October 2020
- (ii) Negotiated Decision Notice dated 7 September 2020 for the Development Application for Material Change of Use (Dwelling House)
- (iii) Photographs of the subject site
- (iv) Appellant's written submissions provided to the Tribunal on the day of the hearing, and the Appellant's further Post-Hearing submissions filed 30 November 2020
- (v) Respondent Response Submissions filed 1 December 2020

Note: the Tribunal conducted a site inspection on 27 November 2020 to assist it in understanding the evidence.

Findings of Fact:

20. The Appellant is the owner of the subject site who has lodged an application for a development permit for a material change of use to construct a dwelling house. The proposed house is 7 metres long and 6 metres in width comprising a studio bedroom, separate wet area and a veranda.
21. The Respondent has approved the application subject to a condition 4 that was amended to either require a vehicle access and culvert crossover through the existing creek or re-site the house to the northern part of the property near Forest Creek Road.
22. The Appellant is growing tropical fruit trees and is desirous of a peaceful life surrounded by nature and the ability to supplement her income with the sale of organic fruits. She does not want to construct a bridge capable of supporting a vehicle. She currently lives in a large tent on-site.
23. The Appellant submitted "*I currently walk across the creek to access the south side of the land on a regular basis because that is the part where my fruit trees are located and where I prefer to spend my time on the land... I would continue to walk across the creek to access the south side of the land on a regular basis even if the dwelling was constructed on the north side of the land.*"
24. The Appellant's evidence is that she would not be allowing a vehicle to cross the creek and the "*existing state of things would change little if the dwelling were constructed on the south side.*"

25. The Appellant submits, under these circumstances, condition 4 is not reasonably required in relation to the development because she would still be crossing the creek by foot. The Applicant relied on the decisions of *Bryant v Caloundra City Council* [2005] QPEC 113, *Proctor v BCC* (1993) 81 LGERA 398, and *Wooton v Woongara Shire Council* (1993) 81 LGERA 398.
26. There is side access to the property through land owned by the Respondent. The Respondent indicated an arrangement can be had to allow the builder to access the southern portion of the land through the Respondent's land. This would avoid crossing the creek.
27. The Appellant said the builder has re-quoted for the work to setup a pulley system to move the materials to the site.
28. The Respondent submitted the creek needed protection from vehicles crossing to the southern side under the environmental overlay. The access and crossing condition provided for the works to be designed and certified by a RPEQ engineer. Neither party provided a design or scope of works that would meet the condition.
29. The Respondent was concerned with pedestrian access to the house and the risks of negotiating the path and creek crossing, including any risk for first responders having to cross the creek to reach the house.
30. The parties discussed alternative foot crossing with the possibility of constructing a footbridge across the creek.
31. The Tribunal members viewed the site and the creek. Access to the property is through a gate from Forest Creek Road. There is a cleared grassed area where vehicles can park. There is a short walk to the bank of the creek. The creek crossing has at some stage in the past, been cleared by earthmoving machinery including the cutting of the southern bank. The creek is rocky/gravel with a pool to the east. The Applicant said there is a resident eel. The creek flows to the west and the substrate is very rocky.
32. The erosion to the banks of the creek indicate the volume of water would rise during rain events. Forest Creek Road has 1m flood indicators at the creek crossing.
33. Approximately 800m along the road to the west, the road transitions to gravel for more than 1 kilometre. Some of the creek crossings have been improved by Respondent. Water and silt runoff from the road flows into the creek.
34. The Appellant, in further post-Hearing submissions has sought the removal of Condition 3 of the Respondent Council's Decision. This is not a stated Ground for Appeal and is accordingly outside the jurisdiction of the hearing of the Appeal

Reasons for the Decision:

35. The Applicant submitted condition 4 was not a reasonable condition and that the concern about onsite access by vehicles could be dealt with by conditions that "*where the dwelling house is to be sited south of the waterway on the land and it is intended that a vehicle or vehicles cross the creek to the dwelling house, the developer must provide a vehicle-access creek crossover from the car park area ... prior to the commencement of use.*"
36. The Respondent submitted –

"A crossing was bulldozed/ excavated through the waterway by the previous owner. The Applicant advised that this was to encourage purchasers and to make

the land more accessible and more saleable. The Applicant admitted she purchased the property after the crossing was bulldozed / excavated through the creek. The Applicant has not undertaken any works to revegetate and rectify the damage created by the unauthorised creek crossing and clearing.”

37. The Tribunal considers the fact that the Applicant has not undertaken restoration works since purchase is irrelevant to the outcome of the Appeal.
38. The Respondent submitted “*the Applicant intends to produce and harvest fruit from the land*”, which gives the impression of a large undertaking. The evidence was really the opposite – that this was a low-key domestic-scale activity only, for her personal consumption and for incidental (surplus) sale at community markets.
39. The Respondent “*takes issue with the path of travel across the creek. The access should be over and not through the waterway. It is important that the access creates a minimal disturbance and impact and provide for the protection to the waterway. Specifically, AO6.2 of the Environmental management zone code requires access to minimise erosion. Further, AO9 of the Natural Areas code states development is not to occur on that part of the land affected by the waterway corridor. The approval runs with the land and considerations are beyond the current landowner. Reasonable use by a future landowner needs to be considered.*”
40. The Tribunal finds AO6 of the Environmental Management Zone Code has no application here – the land is not steeply sloping. The Benchmark reference to AO9 of the Natural Areas Overlay Code “*that development does not occur on that part of the site affected by a Waterway Corridor*” also has no application here.
41. The Respondent raised concerns with the unauthorised earthworks and submitted:
- “In the event the Tribunal considers vehicle access is not required, the area of the unauthorised earthworks that facilitates a vehicle access and crossing of the creek needs to be rehabilitated.*
- A fit for purpose pedestrian crossing that provides for a safe passage across the creek will need to be provided. The structure will need to be designed and structurally certified.*
- ...
- Finally, it is unreasonable for emergency services to haul equipment and provision of services through a waterway on foot on the basis that this is the current Applicant’s preference. The basis of settlement in a community is that there is sufficiency in the dwelling construction such that it does not place an unreasonable load on the economic, social and environmental considerations of that community. Development in the Shire, in particular areas north of the Daintree River, is reliant on new development applying at least, minimum standards for domesticity.”*
43. The Appellant does not wish to disturb the land by constructing a vehicular bridge to access the southern side of the creek. The Respondent proposed a foot bridge to meet the objectives of the overlays to avoid damage to the creek and also to allow emergency services readily to access the proposed residence, even in times of high water levels. The Appellant identified two (2) places where this could be constructed.
44. The Appellant’s builder has priced the delivery of materials without the need for vehicles to cross the creek. The Respondent is prepared to allow the builder to access the

southern side of the creek by travelling on council land. The dwelling can therefore be constructed without disturbing the creek.

45. The Tribunal has accordingly decided to replace condition 4 with the condition set out under the heading 'Decision' at the start of this Decision Notice.

Professor Victor Feros OAM

Development Tribunal Chair

Date: 5 January 2021

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

Email: registrar@hpw.qld.gov.au