Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**21-056**
Appellant:	Anthony Mascali
Respondent (Assessment Manager):	Brisbane City Council
Site Address:	77 Bayview Road, Brighton and described as Lots 210, 211, 237 and 238 on RP 29077 ─ the subject site

Appeal

Appeal under section 240 of the *Planning Act 2016* (Planning Act) seeking a declaration that a development application for preliminary approval of *building work* to demolish an existing house and build a new house was properly made.

Date and time of hearing:	Friday 1 April 2022 at 10 am
Place of hearing:	Registry office at level 10, 53 Albert Street, Brisbane
Tribunal:	Ain Kuru – Chair Kym Barry - Member Claire Lovejoy – Member Beth Winkle - Member
Present:	Anthony Mascali – Appellant Roger Greenway – Brisbane City Council Ann-Marie Kyranis – Brisbane City Council

Decision

The Development Tribunal (Tribunal), in accordance with section 240 of the Planning Act finds the development application made for preliminary approval of *building work* assessable under the *Brisbane City Plan 2014* (City Plan) was properly made.

Further, the Tribunal finds that the development application is not for building work assessable against the *Building Assessment Provisions* under the *Building Act 1975* (Building Act) and therefore not for a siting variation to the side boundary under the *Queensland Development Code MP 1.2.*

Background

Application Subject to Appeal

On 21 May 2021, the Appellant met with Council at a pre-lodgement meeting and was advised by officers that an earlier proposal:

- was considered to constitute a *material change of use* as defined under the Planning Act due to the bulk, height and scale of the proposed built form;
- would trigger assessment under City Plan due to the site being located in the *Biodiversity areas overlay*;
- would, to satisfy the *Biodiversity areas overlay code*, require a reduction in the encroachment along with an assessment under the Code; and
- Council has an interest in acquiring some of the land.

The Appellant subsequently redesigned the proposal reducing the site cover and gross floor area.

An application for *building work* as defined by the Planning Act was made on approved *DA Form 2* and submitted to Council and recorded as being lodged on 12 July 2021. Section 4 of the application form states the application is not for building work assessable against the *building assessment provisions* (as defined under the Building Act) and section 5 states the Brisbane City Council as the Assessment Manager. Section 16 states the application seeks preliminary approval to "*remove existing dwelling house, replace with similar new dwelling house on the premises*" and that the level of assessment is code assessment. In section 19 the applicant stated that a *material change of use* was not applicable and that relevant plans are attached.

The submitted drawings show:

- a site which comprises four contiguous lots with each pair of lots having street frontages to Bayview Road and High Street respectively;
- an existing 232 m^2 single storey four bedroom dwelling and garage sited on two lots having frontage to Bayview Road (the eastern lots) being demolished;
- a new 186.68 m^2 single storey two bedroom dwelling and one bedroom secondary dwelling on the two lots having frontage to High Street frontage (the western lots) at the rear of the site;
- the new dwelling containing a large covered deck and carport and higher than the existing dwelling so as to comply with undercroft requirements of Council's Flood Overlay Code; and
- access to the dwelling being maintained from Bayview Road (High Street is unmade).

The City Plan shows the eastern lots containing the existing house as being zoned *Low Density Residential* while the western lots at the rear of the existing house where the proposed house is to be located are zoned *Conservation Zone*. There are numerous overlays constraining the site, and those relevant to this appeal are the *Biodiversity areas overlay* and *Flood areas overlay* and *Waterway corridors overlay*.

On 13 July 2021 the Council deemed it a properly made application pursuant to section 51 of the Planning Act.

On 9 September 2021 Council advised the Appellant that it could not assess the *building work* application as it does not trigger assessment under the City Plan. The Council also advised the *material change of use* for a house is assessable and triggers impact assessment.

Declaration Sought

An application for declaration about whether the development application was properly made was lodged with the Tribunal on 7 October 2021. The declaration sought is that:

- A planning development application was properly made under s 51 of the Planning Act to carry out *building work* for a new house which is code assessable development as an "extension" under the Biodiversity Areas Overlay, with this application being determined as properly made by Council on 13 July 2021. An extract from the Council's website showing the application to carry out building work as properly made was attached to the application for declaration;
- The proposal does not involve a *material change of use* as it involves replacing an existing house with a new house of lesser area, but triggers *building work* assessment as an extension under the Biodiversity areas overlay and therefore assessment under the Biodiversity areas overlay code;
- The application also included a variation request to a side boundary alignment under the *Queensland Development Code MP 1.2*; and
- The Council as the Assessment Manager was not entitled to change its decision on a properly made application outside the statutory time allowed in the *Development Assessment Rules*.

The Appellant argues that while a new dwelling replacing an existing house may not be the same as extending an existing house, it must surely have the same effect as it involves extending the development footprint in the overlay. For any *building work* resulting in an existing development footprint extending into the Biodiversity areas overlay to be accepted development would go against the main purpose of the Biodiversity areas overlay code, and would be nonsensical. Council has therefore taken a narrow interpretation of how *building work* is triggered by the Overlay.

In support of whether the proposed house triggers a *material change of use*, the Appellant cited the following case law: *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor [2018] QPEC 52; KT Corporation Pty Ltd v Queensland Government Department of Main Roads & Anor [2004] QPEC 31; Parramatta City Council v Brickworks Ltd [1972] HCA 21; (1972) 128 CLR 1;* and *Gerhardt v Brisbane City Council [2017] QPEC 4*.

Tribunal Directions

The Tribunal was appointed on 14 December 2022. On 12 January 2022 the Tribunal issued orders requesting a written submission from Council responding to the Appellant's grounds for appeal and provided a further opportunity for the Appellant to respond to the Council's submission.

On 1 March the Tribunal, on reviewing the written submissions, advised the parties that it was of the view that pursuant to section 240 of the Planning Act, the jurisdiction of the Tribunal is limited to whether the development application for *building wo*rk made to Council is properly made. As the application subject of the appeal did not involve a

material change of use, it is the Tribunal's view this matter is outside its jurisdiction. The Tribunal therefore requested that at the upcoming hearing, submissions focus on whether the subject application was properly made.

Council Submission

The submission provided by Council makes the following points:

- The issue to be determined by the Tribunal is whether the development application for *building work* can be accepted as properly made. That is, whether Council has jurisdiction to decide the application as an Assessment Manager under the Planning Act;
- The City Plan does not identify *building work* for a new house in the Conservation Zone or Biodiversity Areas Overlay as assessable;
- Table 5.10.4 of City Plan does identify *building work* for an extension to an existing house as code assessable development in certain circumstances;
- The existing house is not being extended but is being demolished with a new house constructed on the western lots;
- Although planning schemes are to be construed in the same way as statutes, they must still be read in a way that is practical with *Zappala Family Co Pty Ltd v Brisbane City Council [2014] QCA 1471* being cited. Demolishing an existing house on the eastern lots and constructing a new house on the western lots cannot practically be considered to be an extension;
- The development is therefore accepted development under City Plan and not assessable;
- Whether the proposed house constitutes a *material change of use* under the Planning Act is irrelevant to deciding the declaration.

Appellant's Response

The submission provided by the Appellant makes the following points:

- The new carports attached to the proposed house are to be located on the western lots *i.e*. the proposal involves all four lots;
- The Council is asserting that as the site contains four lots, they are separate premises which is not consistent with the definition contained in the Planning Act and that the four lots should be considered as a single site;
- Irrespective of whether the Council believed the proposed house was accepted development under the Biodiversity areas overlay, the application was still assessable *building work* under the Queensland Development Code MP 1.2;
- A reasonable person would assume that if an existing house extends its development footprint into the Biodiversity areas overlay is assessable, then a "knockdown/rebuild" which has a similar impact is also assessable;
- In similar cases the Courts have looked beyond the narrow meaning of a planning scheme which may have lacked clarity;
- If a new house was envisaged to constitute a *material change of use*, it should have been made assessable in the Conservation Zone which instead provides conditional support for a house in its purpose statement;
- The application does not propose to materially increase the scale or use of the premises, and as Council is of the view that the application and declaration only relate to the application for *building work*, the declaration should be allowed; and

- Whether the proposed house also constitutes a *material change of use* has a bearing on whether the application was properly made.

The Hearing

At the hearing it emerged that the Tribunal had been provided with a copy of an earlier application form submitted to Council, but at the time of making the application the Council requested the Appellant change the form, which Council subsequently accepted as properly made on 13 July 2021. The Tribunal members downloaded the correct form from Council's website at the hearing.

The Appellant supported his written submissions with the following points:

- The Tribunal should determine whether the proposed house is assessable under City Plan. To determine whether it is properly made, the Tribunal must look at what is intended;
- The new house is located on higher ground due to flooding and flood free access via High Street;
- The Appellant provides full time care to his son who is vulnerable;
- The proposal will rehabilitate the site and non native vegetation removed. An ecological rehabilitation report was prepared;
- Council did not follow the Development Assessment Rules;
- Private certifiers do not want to accept the application as they have no clarity about whether it is assessable under City Plan;
- The argument about whether the proposed house is an extension under the Biodiversity areas overlay is pedantic. Purpose 2(e) of the Biodiversity areas overlay code states development can occur in a development footprint, and the purpose statement has been used by Courts where a planning scheme has not been clear; and
- The proposal is an extension as it involves an extension to the development footprint.

The Council supported their written submission with the following points:

- An extension needs to be linked to an existing house;
- When accepting an application as properly made, Council does not check whether the development is assessable as this is only done if a Confirmation Notice is issued;
- Deciding the application was properly made was a mistake, and in any case it is accepted development and not assessable under City Plan as *building work*;
- The application triggers a *material change of use* because the proposed development may compromise restoration of biodiversity on the land as identified by the Biodiversity areas overlay.

Post Hearing Submissions

On 7 April 2022 the Appellant provided a further written submission attaching correspondence to Council. The submission suggested how Council should have dealt with a mistake in deciding the application to be properly made, and reiterated earlier matters relating to whether Council was following the Development Assessment Rules.

On 22 April 2022 the Council reiterated its position that it does not have jurisdiction to accept and decide an application which is not assessable under City Plan.

On 9 May 2022 the Appellant provided a further submission to which Council responded to on 9 May 2022. Pursuant to section 253(5) of the Planning Act, the Tribunal decided not to consider these submissions as they were not relevant to the Tribunal's considerations.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar 7 October 2021;
2. DA Form 2 – Building work details being the approved form for development applications involving building work, downloaded from Council's website at the hearing on 1 April 2022;
3. Council's written submission dated 24 January 2022;
4. The Appellant's written response to the Council's submission dated 1 February 2022;
5. A further written submission from the Appellant dated 7 April 2022; and
6. A response from Council to the Appellant's further submission dated 22 April 2022.

Findings of Fact

The Tribunal makes the following findings of fact:

The Council on 12 July 2021 sent an email to the Applicant confirming that the application would be properly made once the application fee was paid. It is not in dispute that the fee was paid.

Following payment of the fee, the Council's website confirmed the application as properly made and described it as 'carry out building work' and the use as 'house – extension' on 13 July 2021.

The Council accepted the application as properly made and characterised it as *building work* for an extension. In the hearing, the Council accepted that there are no provisions available to it under the Planning Act to accept an application as properly made, and then determine some three months later that the application is not properly made.

The Tribunal finds that the Council accepted the application as properly made as an extension, which was assessable under the Biodiversity areas overlay and Waterway corridors overlay.

The declaration also sought to confirm that the application also included a variation request to a side boundary alignment under the Queensland Development Code MP 1.2. However as noted at the hearing, the DA Form 2 accepted by Council was for building work assessable under City Plan, and not against the Building Assessment Provisions under the Building Act.

Reasons for the Decision

The Council's written submission states that the Biodiversity areas overlay in City Plan does not identify *building work* for a new dwelling house as assessable development, and that provisions which trigger an "extension" of a house are not applicable, as "extension" as defined in the dictionary has quite a specific meaning.

The Appellant on the other hand, argued that the intent of the assessment triggers and overlay code needed to be considered, and in this context an "extension" of an existing dwelling is no different in its impact than the proposed development which involves demolition of an existing dwelling and construction of a new one.

A planning scheme is a statutory instrument and therefore subject to the *Acts Interpretation Act 1954*. Section 14A of the Act states that the interpretation of a provision in an Act, which includes statutory instruments, is the one that will best achieve the purpose of the Act, and that this is to be preferred to any other interpretation, for example a literal interpretation.

The Council accepted the application as properly made. This is uncontested. It characterised the application on its website as 'carry out building work' and the use as 'house – extension.' The Council utilised its discretion under section 51(4)(c) of the Planning Act. It does not have the opportunity to change its mind once the decision is made to accept it as properly made.

The Tribunal therefore finds that in accepting the application as properly made, the Council quite reasonably agreed with the Appellant's view that the proposed development should be assessed as building work, and an extension to an existing dwelling.

As Jones J stated in *Trinity Park Investments Pty Ltd & Anor v Cairns Regional Council & Anor*[1]:

> [*52] The approach adopted by Council misconstrues what constitutes a properly made development application…As to what is required to make a properly made development application is set out in s 51 of the Planning Act 2016.*
>
> *[53] Pursuant to s 51(4)(a), an assessment manager must accept an application that he is satisfied complies with subsections (1), (2) and (3) and, pursuant to subsection (4)(b), must not accept an application unless satisfied that the application complies with subsections (2) and (3). Provided subsections (2) and (3) are complied with, s5(4)(c) and (d) provides him a limited discretion to accept an otherwise non-compliant application. Pursuant to s 51(5), an application that complies with subsections (1), (2) and (3), or where the discretion is exercised to accept a non-compliant application, it is to be treated as being properly made.*

[1] [2019] QPEC 68

It is not necessary to consider the material change of use submissions in light of the facts determined by the Tribunal.

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Ain Kuru

Development Tribunal Chair
Date: 24 May 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:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833
Email: registrar@epw.qld.gov.au