



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal number:</b>	23-043
<b>Appellant:</b>	Benjamin Joseph Jasch
<b>Respondent:</b>	Sunshine Coast Regional Council
<b>Site Address:</b>	2239 Old Gympie Road, Glass House Mountains and described as Lot 6 on RP 835945 – the subject site

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### **Appeal**

Appeal under section 229 and schedule 1, section 1(2)(a) of the *Planning Act 2016* (**Planning Act**) against the refusal of a development application for material change of use for a dwelling house and shed (**Development Application**).

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<b>Date and time of hearing:</b>	11 December 2023 at 10am
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Stafford Hopewell—Chair Kym Barry—Member Neal Charlton—Member
<b>Present:</b>	Ben Jasch (Owner), John Gillespie and Elise Wilton—Appellant Zana Larikka and Tiani Tydd—Respondent

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### **Decision:**

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(a) of the Planning Act confirms the decision to refuse the Development Application.

### **Background**

1. This is an appeal against the decision of Sunshine Coast Regional Council (**Council**) to refuse a development application for a development permit for a material change of use for a dwelling house and shed on the subject site under the Planning Act.
2. The subject site is a rural lot with an area of about 8.009ha with frontage to Old Gympie Road. The subject site is wedge shaped with a relatively narrow frontage to Old Gympie Road and a wider rear western boundary which adjoins Mount Coonowrin, a Queensland

State Heritage Place located within the Glass House Mountains National Park. Rural lots adjoin to the north and south.

3. The subject site is in the Rural zone of the Sunshine Coast Planning Scheme 2014 (**Planning Scheme**). The Biodiversity, wetlands and waterways overlay code (**Biodiversity overlay code**) of the Planning Scheme applies to the subject site due to the presence of native vegetation and waterways mapped under the Biodiversity overlay.
4. The subject site is also included within a State designated Koala Priority Area (**KPA**) and contains mapped Koala Habitat Area (**KHA**).
5. The subject site is generally vegetated and slopes up from the road frontage to the rear western boundary and is located on the eastern lower slopes of Mount Coonowrin. The elevation ranges from about 65m AHD at the lower eastern boundary to about 105m AHD at the upper western boundary.
6. An area within the eastern part of the subject site was historically used for pineapple farming although this was discontinued over 15 years ago and the site had been allowed to regrow both native and exotic woody vegetation to about 2021.
7. Around 2022, part of the subject site being in the order of about 2ha was cleared, and two sheds were constructed within the cleared area. Substantial earthworks were also carried out within the cleared area.
8. In February 2023, the Appellant made the Development Application to Council seeking approval for a new dwelling house (originally referred to as a secondary dwelling / granny flat) and the existing shed located towards the eastern part of the subject site within part of the previously cleared area (the western shed located on the subject site is not part of the proposed development the subject of the Development Application).
9. Council refused the Development Application by decision notice dated 9 August 2023 for the following reasons (**Reasons for Refusal**):
  1. *The development does not comply with Performance Outcome PO1 of the Biodiversity, waterways and wetlands overlay code as the dwelling house is not sited such that the clearing of native vegetation is avoided or minimised.*
  2. *The development does not comply with Overall Outcomes of the Biodiversity, waterways and wetlands overlay code as follows:*
    - (a) *The development has not demonstrated that it protects and enhances ecologically important areas and ecological connectivity;*
    - (b) *The development does not protect and establish appropriate buffers to native vegetation and significant fauna habitat;*
    - (c) *The development has not demonstrated that it protects supporting habitat of rare and threatened flora and fauna species, as listed in the State Nature Conservation Act 1992, Nature Conservation (Wildlife) Regulation 2006 and the Commonwealth Environment Protection and Biodiversity Conservation Act 1999;*
    - (d) *The development is not located, designed and managed to avoid or minimise adverse direct or indirect impacts on ecological systems and processes; and*
    - (e) *The development does not avoid or minimise adverse impacts on koalas and koala habitat.*

*The development does not ensure ecologically important areas are protected rehabilitated and enhanced and ecological connectivity is improved and therefore does not achieve the Purpose of the Biodiversity, waterways and wetlands overlay code.*

3. *The development does not achieve Assessment benchmarks in Schedule 11 of the Planning Regulation 2017, Part 2, section 4, subsection (1)(b) and subsection (2), (a), (b), (c), (d) and (e). The clearing undertaken on the site for the development extends beyond the area that is not mapped as Core Koala Habitat and the development footprint is not located more than 50m from a mapped Koala Habitat Area. Further, not all of the clearing that has been undertaken complies with the exempt clearing provisions under Schedule 24 of the Planning Regulation 2017. The development footprint has been cleared and left exposed for some time. There is no evidence of measures to control erosion and sedimentation from the development footprint into surrounding Koala habitat areas.*
10. The key issues in the Appeal relate to compliance with the following assessment benchmarks:
  - (a) Biodiversity overlay code being part 8.2.3 of the Planning Scheme (Reasons 1 and 2);
  - (b) Schedules 10 and 11 of the *Planning Regulation 2017 (Planning Regulation)* in relation to koala habitat (Ground 3).
11. After the refusal of the Development Application and commencement of this appeal, Council issued a show cause notice and later an enforcement notice to the Appellant alleging development offences in relation to the clearing of the land and construction of the sheds.
12. The Appellant separately appealed to the Planning and Environment Court against the enforcement notice which has been resolved through an amended enforcement notice given by consent judgement<sup>1</sup>.
13. Whilst this appeal does not directly concern the lawfulness of the clearing on the subject site it will become evident in these reasons that issues about the extent and lawfulness of clearing required for the proposed development, siting of the proposed development and impact on native vegetation and ecological values are central to the determination of the appeal.

### **Jurisdiction**

14. The Tribunal has jurisdiction to hear an appeal about the refusal of a development application for a material change of use for a classified building under schedule 1, section (2)(a)(i) of the Planning Act.
15. The Development Application is for a material change of use for a dwelling house which is a class 1(a) building and a shed which is a class 10(a) building, which are a classified building as defined in schedule 2 of the Planning Act.

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<sup>1</sup> *Kate Elizabeth Jasch and Benjamin Joseph Jasch v Sunshine Coast Regional Council*, Planning and Environment Court Appeal D191/23.

16. The Tribunal is accordingly satisfied it has jurisdiction under the Planning Act to hear and decide the appeal.

### **Decision framework**

17. This is an appeal against the refusal of a development application and the Appellant has the onus to show that the appeal should be upheld in accordance with section 253(2) of the Planning Act.
18. 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 (section 253(4) of the Planning Act).
19. 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 the Planning Act (pursuant to which the registrar may require information for tribunal proceedings).
20. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the Planning Act, being:
  - (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.
21. The Development Application is subject to code assessment under the Planning Scheme. Under section 45 of the Planning Act, code assessment must be carried out only:
  - (a) against the assessment benchmarks in a categorising instrument for the development; and
  - (b) having regard to any matters prescribed by regulation.
22. Under section 60 of the Planning Act, the assessment manager (and Tribunal in this appeal) after carrying out the assessment:
  - (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks; and
  - (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and
  - (c) may impose development conditions on an approval; and
  - (d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.
23. The Tribunal must decide the appeal based on the laws in effect when the Development Application was made but may give the weight the Tribunal considers appropriate, in the circumstances, to any new laws (section 251 of the Planning Act).

### **Material considered**

24. The material considered by the Tribunal in arriving at this decision was:

- (a) Form 10 Notice of appeal, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals registrar dated 1 September 2023;
  - (b) Email of 6 December 2023 from Elise Wilton for the Appellant about Koala Mapping Update Report;
  - (c) Email of 19 September 2024 from Zana Larikka for Council about the proposed development;
  - (d) Correspondence of 30 September 2024 from the Appellant about the history of the proposed development and dealings with Council;
  - (e) Sunshine Coast Planning Scheme 2014;
  - (f) *Planning Act 2016*;
  - (g) *Planning Regulation 2017*;
  - (h) *Building Act 1975*.
25. Following the hearing of the Appeal on 11 December 2023, on 19 December 2023 the Registry issued an order from the Tribunal to the parties adjourning the Appeal and giving the Appellant the opportunity to consider any changes to the proposed development or other measures to respond to the Council's grounds for refusal. The Appellant was encouraged to engage with Council with respect to any proposed changes and mitigation measures before responding to the Tribunal.
26. This resulted in a series of further adjournments as discussions were held between the parties before the parties made further submissions to the Tribunal in September 2024 as referred to above.
27. Pursuant to section 253(5)(a) of the Planning Act, the Tribunal grants leave and accepts the further material provided by the parties to the Tribunal.

### **Proposed development**

28. The Development Application was made to Council on or about 17 February 2023 (Council reference MCU23/0035).
29. At the time, the subject site was improved by:
- (a) One class 10a shed and an associated (domestic) sewerage treatment area in the west of the subject site
  - (b) One class 10a shed in the east of the subject site, and
  - (c) a driveway providing access to Old Gympie Road, Glass House Mountains.
30. The existing western shed and sewerage treatment area are located upslope (west) of the proposed dwelling house and shed which are located downslope (east) and closer to the road frontage.
31. The Appellant submits that the following approvals were in effect / had been obtained at the time of making the Development Application:
- (a) Development permit for building work for a shed (class 10a) dated 22 July 2021 (Council reference PC21/05979) (western shed);
  - (b) Development permit for building work for a shed (class 10a) dated 12 April 2022 (Council reference PC22/02179) (eastern shed);

- (c) Development permit for plumbing, drainage and on-site sewerage work given by Council dated 21 November 2022 (Council reference PLQ22/2640) (associated with the western shed).
32. A site plan prepared by Arise Design & Drafting dated 6 February 2023 was submitted with the Development Application showing a proposed 90m<sup>2</sup> granny flat, proposed 12 x 12 shed and proposed sewerage treatment area.
33. Although the 'granny flat' and shed are both described as 'proposed' on this site plan, the shed in fact was constructed and exists on the subject site.
34. An updated site plan by Arise Design and Drafting dated 7 June 2023 was submitted in response to an information request showing the 12 x 12 shed as 'approved' and the granny flat and sewerage treatment area as 'proposed'.
35. Whilst originally described as a 'granny flat' in the Development Application and supporting material, it is understood that the parties now agree that this proposed building is properly characterised as a 'dwelling house' as there is currently no approved dwelling house on the site. With no (primary) dwelling house existing on the premises the proposed building cannot constitute a granny flat (i.e. secondary dwelling) on the subject site.
36. The Tribunal has proceeded on the basis that the proposed development is properly described as a dwelling house (class 1a building) and shed (class 10a building) and in this decision refers to the proposed building as the proposed dwelling house (despite various references to the building being a secondary dwelling or granny flat in supporting documents).
37. As noted above, the existing two (2) sheds each have a development permit for building work issued by a private certifier. However, Council has submitted that the sheds have been unlawfully constructed on the basis that development approval was also required under the Planning Scheme which was not obtained.
38. The western shed is not part of the proposed development, and its lawfulness is not an issue in this appeal. In relation to the eastern shed, whilst this is an existing structure, it is nevertheless part of the proposed development and has been assessed as part of the Development Application.

### **Assessment benchmarks**

39. The parties agree that the Biodiversity overlay code is a relevant assessment benchmark for the proposed development. Whether the proposed dwelling house complies with the Biodiversity overlay code is a matter of dispute.
40. The parties disagree as to whether schedule 11 of the Planning Regulation in relation to koala habitat is a relevant assessment benchmark. The Appellant submits that schedule 11 does not apply as the proposed development is 'exempt development' and is excluded from assessment. Council however submits that the proposed development is not exempt development and is subject to assessment against the koala habitat provisions.
41. The applicability of the assessment benchmarks is considered later in this decision with the following sections setting out the relevant provisions of the Biodiversity overlay code and schedule 11 of the Planning Regulation.

### **Biodiversity Overlay code**

42. The whole of the subject site is mapped under the Biodiversity overlay map of the Planning Scheme as a Native Vegetation Area and is subject to the Biodiversity overlay code.
43. The purpose of the Biodiversity overlay code is to ensure that:
- (a) ecologically important areas are protected, rehabilitated and enhanced; and
  - (b) ecological connectivity is improved.<sup>2</sup>
44. The purpose of the Biodiversity overlay code is achieved through the following overall outcomes:
- (a) development protects and enhances ecologically important areas and connectivity;
  - (b) development protects and establishes appropriate buffers to waterways, wetlands, native vegetation and significant fauna habitat;
  - (c) development protects known populations and supporting habitat of rare and threatened species flora and fauna species, as listed in the *State Nature Conservation Act 1992*, *Nature Conservation (Wildlife) Regulation 2006* and the *Commonwealth Environmental Protection and Biodiversity Conservation Act 1999*;
  - (d) development is located, designed and managed to avoid or minimise adverse direct or indirect impacts on ecological systems and processes;
  - (e) development avoids or minimises adverse impacts on koalas and koala habitat and
  - (f) development is designed to achieve the prescribed water quality objectives for waterways and wetlands in accordance with the *Environmental Protection (Water) Policy 2009*.<sup>3</sup>
45. For a dwelling house, Performance outcome PO1 is:
- A dwelling house is sited such that waterways, wetlands and riparian areas are protected and the clearing of native vegetation is avoided or minimised.*
46. A series of Acceptable outcomes are prescribed for Performance outcome PO1 which are dealt with in detail later in this decision.

### **Koala habitat**

47. Under schedule 10, part 10, division 5 of the Planning Regulation, development in a KPA not interfering with koala habitat is assessable against schedule 11, part 2 of the Planning Regulation. Council is the assessment manager for the assessment benchmark.
48. Schedule 11, part 2 of the Planning Regulation applies to development including a material change of use of premises that does not involve interfering with koala habitat in a KPA and the premises on which the development is carried out includes an area that is both a KPA and KHA.
49. Assessment benchmarks are prescribed in schedule 11, part 2.
50. However, schedule 11, part 1 provides that schedule 11 does not apply to a development application if the development results in a development footprint of 500m<sup>2</sup> or less.

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<sup>2</sup> Section 8.2.3.2(1) of the Planning Scheme.

<sup>3</sup> Section 8.2.3.2(2) of the Planning Scheme.

51. While schedule 11 applies to development not interfering with koala habitat in a KPA and KHA, it is important to note that development interfering with koala habitat in a KPA and KHA is prohibited development—schedule 10, part 10, division 1, section 16A.
52. Accordingly, if the proposed development involves interfering with koala habitat it is prohibited development, and a development application cannot be made or approved for prohibited development.

### **Findings of fact**

53. The Tribunal makes the following findings of fact in relation to the Development Application.

### **Biodiversity overlay code**

54. The Appellant accepts that the proposed development is subject to the Biodiversity overlay code and submits that the proposed development complies with the code through compliance with Performance outcome PO1.
55. The Appellant submitted an Ecological Assessment Report (**EAR**) prepared by North Coast Environmental Services dated 7 June 2023 (Report Ref: J001173) as part of the assessment of the Development Application with the EAR concluding:
  - (a) No vegetation clearing is required for the proposed development;
  - (b) Approximately 0.766ha of unapproved clearing within a mapped Native Vegetation Area has occurred beyond the limits of the maximum clearing rights available for the two sheds;
  - (c) No referral for assessment against State Code 16 Native Vegetation Clearing is required but about 0.275ha of endangered Regional Ecosystem 12.5.3 has been cleared which cannot be classified as exempt clearing;
  - (d) No referral is required for assessment against State Code 25 Development in South East Queensland Koala Habitat Areas but about 0.225ha of Koala Habitat Area has been cleared which cannot be classified as exempt clearing and hence represents prohibited development;
  - (e) No referral is required under the Nature Conservation Act 1992 for protected plants but about 0.275ha of a mapped High risk area has been cleared which cannot be classified as exempt clearing.
56. Council has not provided any expert ecology evidence of its own and relies on the findings of the EAR which are not disputed in terms of the nature and extent of clearing (the parties however disagree on the consequences of the clearing and its compliance / non-compliance with the assessment benchmarks).
57. Based on the EAR, the Tribunal finds that prior to the clearing in about 2022, the subject site contained remnant / native vegetation, including endangered regional ecosystem 12.5.3.
58. However, part of the subject site had historically been cleared and used for pineapple farming and whilst this agricultural use had ceased more than 15 years ago, this part of the subject site did not comprise remnant / native vegetation (as discussed later in this decision, this area generally coincides with the existing Category X mapped area).
59. Having regard to a Property Map of Assessable Vegetation (**PMAV**) approved in 2020 for the subject site, the Tribunal finds that prior to the clearing in about 2022, the subject site

contained about 1.2331ha of Category X (non-remnant) vegetation and about 6.7ha of Category B (remnant) vegetation.<sup>4</sup>

60. Whilst these classifications are under the *Vegetation Management Act 1992*, the Tribunal accepts the Appellant's submission that the Category X non-remnant vegetation did not satisfy the requirements for a Native Vegetation Area under the Biodiversity overlay and as such most, but not all, the subject site was a Native Vegetation Area under the Biodiversity overlay mapping.
61. The Tribunal further finds that whilst about 1.2331ha of the subject site was not native vegetation, the area of clearing carried out on the subject land comprises about 2.14ha, meaning about 0.9ha of native vegetation has been cleared.
62. The Tribunal therefore finds that the proposed development is not confined to the part of the subject site that contained non-native vegetation prior to the clearing of the subject site in about 2022.

### **Koala Habitat**

63. Development that results in a development footprint of 500m<sup>2</sup> or less is not subject to schedule 11, part 2 of the Planning Regulation.<sup>5</sup>
64. The term 'development footprint' is defined in schedule 24 of the Planning Regulation as:

*development footprint, on premises, means the total area of the premises covered by a building, structure or landscaping.*
65. Council has assessed the development footprint as being 3,577.99m<sup>2</sup> based on an expansive approach whereby the development footprint includes not only the proposed dwelling house and shed, but the proposed effluent disposal area, cut and fill areas for the building pad and batters.
66. The Appellant relies on the 'exempted development' definition in schedule 24 of the Planning Regulation in relation to items (k) (500m<sup>2</sup> or less of KHA clearing since 7 February 2020), (n)(vii) (essential management), and (n)(viii) (routine management) to submit that a referral (for assessable development) is not required for assessment against SDAP State Code 25 Development in South East Queensland koala habitat areas.
67. The Appellant does not detail how the development footprint is calculated to be less than 500m<sup>2</sup> under item (k) or what area is permitted to be cleared under item (n).
68. It appears that Council and the Appellant have approached the issue of the relevance of schedule 11 of the Planning Regulation as an assessment benchmark on materially different bases.
69. The exempted development definition relied upon by the Appellant is relevant to the prohibition on development interfering with koala habitat in a KPA and KHA. In effect, exempted development permits development that would otherwise be prohibited development under schedule 10, part 10, division 2 of the Planning Regulation.
70. The exempted development definition has no application to development on premises in a KPA not interfering with koala habitat under schedule 10, part 10, division 5 and schedule 11, part 2 of the Planning Regulation.

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<sup>4</sup> The Tribunal notes that there are some discrepancies in these figures given the subject site area of about 8.009ha but considers these are immaterial.

<sup>5</sup> Schedule 11, part 1, 1(g).

71. As Council notes, a development application cannot be made for prohibited development, and the proposed development is for a dwelling house and shed in an area not mapped as Core KHA.
72. Accordingly, the exempted development definition is not relevant to whether schedule 11, part 2 is an applicable assessment benchmark.
73. The Tribunal finds that Council has properly considered whether schedule 11 is an applicable assessment benchmark and whilst Council may have been excessive in its calculation of the development footprint (noting the definition includes buildings and structures and landscape areas), the area is nevertheless more than 500m<sup>2</sup>.
74. The Tribunal therefore considers that under schedule 10, part 10, division 5 of the Planning Regulation, the Development Application is assessable against the assessment benchmarks in schedule 11, part 2 of the Planning Regulation.

#### **Reasons for the decision**

75. The Tribunal has considered each of the Reasons for Refusal having regard to the Appellant's grounds of appeal and further evidence accepted with the leave of the Tribunal to determine whether the Appellant has discharged its onus to show that the appeal should be upheld.
76. In considering the evidence and submissions of the parties, the Tribunal has also had the benefit of the view at the hearing to contextualise the evidence and submissions of the parties (noting that the view is not itself evidence).

#### **Biodiversity overlay code**

77. The parties agree that the Biodiversity overlay code applies to the proposed development.
78. The Appellant through the EAR submits that the proposed development complies with the Biodiversity overlay code by virtue of compliance with Performance outcome PO1, because the proposed development does not require any vegetation clearing and is located outside of ecologically important areas.
79. The EAR also proposed mitigation measures, including a recommended Vegetation Protection Covenant, amongst other protected vegetation avoidance and mitigation measures including maintaining buffers to a waterway and implementing a Waterway Rehabilitation Plan.
80. In contrast, Council submits that the proposed dwelling house and shed are located within a mapped Native Vegetation Area as regulated by the Biodiversity overlay map and code and does not achieve Acceptable outcome AO1.4, which is:

*The dwelling house is not located on land identified as being a native vegetation area on a Biodiversity, Waterways and Wetlands Overlay Map.*

...

**OR**

*Where there is no approved building envelope plan for the lot, clearing of native vegetation, except for the purposes of driveway access:*

(a) *does not extend beyond:*

- (i) *1.5 times the height of the predominant tree canopy as measured from a building or structure, where in a bushfire hazard area; or*

(ii) 20 metres of a building or structure otherwise; and

(b) does not exceed a total area of 600m<sup>2</sup>.

81. Council further submits that the proposed dwelling house and shed extend into mapped native vegetation that supports an endangered regional ecosystem and does not achieve acceptable outcome A01.3 of the Biodiversity overlay code, which is:

*The dwelling house is not located on land identified as being an endangered or of concern regional ecosystem on a Regional Ecosystem Map, unless the location is in accordance with a certified Property Map of Assessable Vegetation.*

82. At the time of the lodgement of the Development Application, the whole of the subject site was mapped as a Native Vegetation Area under the Biodiversity overlay map. This continues to be the situation at the time of the decision on the Development Application and determination of the Appeal.

83. The Appellant does not submit that the proposed development complies with the Acceptable outcomes and does not challenge Council's reasons in respect of the asserted non-compliance with the Acceptable outcomes for Performance outcome PO1.

84. The Tribunal finds that as the whole of the subject site is a mapped Native Vegetation Area under the Biodiversity overlay mapping, the proposed development does not satisfy the relevant Acceptable outcomes for Performance outcome PO1.

85. Compliance with Performance outcome PO1 of the Biodiversity overlay code therefore needs to be considered.

86. Council submits the Appellant has not demonstrated compliance with Performance outcome PO1 as there is no evidence that the clearing of mapped native vegetation has been avoided or minimised, with Council considering the following measures being appropriate measures to avoid and minimise clearing:

- (a) Maximising the use of cleared or previously disturbed areas;
- (b) Consolidating buildings and structures into the smallest footprint possible;
- (c) Locating buildings and structures in a way that avoids or minimises the creation of future exempt clearing opportunities;
- (d) Locating buildings and structures as close to the nearest road as possible.

87. In contrast, the Appellant seeks to rely on the fact that the proposed development is within the existing cleared area and asserts no further clearing of native vegetation is required for the proposed development.

88. The Tribunal notes that updated vegetation mapping recording part of the subject site as Category X (non-remnant) vegetation in accordance with the certified PMAV was obtained in 2020 before the clearing was carried out.

89. The Tribunal also acknowledges that the proposed dwelling house and shed are located within the mapped Category X area.

90. Whilst Council's Biodiversity overlay mapping has not been updated since the PMAV, the Tribunal considers that this mapping is persuasive evidence that that part of the subject site (i.e. the area mapped as Category X under the certified PMAV in 2020) did not in fact contain native vegetation and clearing of that part of the subject site did not impact native vegetation.

91. Whilst the proposed dwelling house and existing shed are located within the Category X area and do not require the clearing of native vegetation, the Tribunal is not satisfied that the proposed development has been located to avoid or minimise the clearing of native vegetation in accordance with Performance outcome PO1.
92. The proposed dwelling house and existing shed are located very close to the boundary of the Category X area of the certified PMAV and the extent of clearing carried out on the subject site for the proposed development has extended beyond the Category X area.
93. In particular, clearing has been carried out and will, in future, be required to be maintained outside of the Category X area for bushfire protection, general maintenance and possibly fencing, of the proposed dwelling house.
94. The difficulty for the Appellant is therefore that the proposed development is sited such as to require (or relies upon) clearing of native vegetation and the impact of the proposed development is not wholly contained within the Category X area.
95. Thus, while the proposed dwelling housing and existing shed are located within the Category X area, the location requires consequential clearing for bushfire protection, general maintenance and potential fencing, that does not avoid or minimise the clearing of native vegetation.
96. Further, given the substantial area of Category X vegetation (about 1.2331ha), there was / is ample opportunity to locate the proposed dwelling house elsewhere on the subject site within cleared areas and achieve suitable buffers to protected vegetation that does not warrant further clearing.
97. The Appellant acknowledges that about 0.766ha of unapproved clearing of native vegetation under the Biodiversity overlay map has occurred. The cleared area includes two constructed sheds. The Appellant has not specified the area relevant to the proposed development, but the Tribunal considers that the amount of the unapproved clearing is substantial and cannot be considered minor or inconsequential.
98. The location of the proposed development close to the southern boundary impinges on the ability for development to maintain buffers and ecological corridors along the boundary of the subject site. This part of the subject site is close to a waterway that has been impacted on by site clearing and earthworks associated with existing buildings.
99. The Appellant has not demonstrated a need to locate the dwelling house where it is proposed or that there are no other suitable locations for a dwelling house on the subject site that do not avoid or minimise the clearing of native vegetation.
100. Indeed, the Appellant's supporting material in fact discloses an intent to construct a further dwelling on the site demonstrating that there is no need for the proposed dwelling house to be located where it is on the site plan.
101. Put simply, the Tribunal considers that a dwelling house can be located elsewhere on the subject site to avoid or minimise the clearing of native vegetation. In particular, a dwelling house can be sited within the Category X area to maintain buffers and native vegetation areas around the development footprint and allow regeneration of vegetation that has been cleared outside of the Category X area, including appropriate bushfire hazard breaks.
102. The Tribunal therefore finds that the proposed dwelling house and shed is not sited such that riparian areas are protected and the clearing of native vegetation is minimised and that the Development Application does not comply with Performance outcome PO1.

103. Assessment of the proposed development against the Purpose and Overall outcomes of the Biodiversity overlay code is therefore required.
104. Council submits that the proposed development does not comply with any of the Overall outcomes and thus fails to comply with the Purpose of the Biodiversity overlay code.
105. As the Appellant submitted the Development Application complies with Performance outcome PO1, the Appellant did not make any submissions about compliance with the Purpose and Overall outcomes of the Biodiversity overlay code.
106. The Tribunal is therefore limited to Council's assessment in relation to compliance with the purpose and overall outcomes of the Biodiversity overlay code.
107. Council's decision in relation to the assessment of compliance with the Overall outcomes of the Biodiversity overlay code lacks detail to support its findings. For example, in relation Overall outcome 2(c), Council does not identify the known populations and supporting habitat of rare and threatened flora and fauna species under the listed legislation. Similarly, in relation to Overall outcome 2(f), the prescribed water quality objectives are not identified and dealt with.
108. However, despite the lack of detailed supporting information from Council, the Tribunal finds on the balance of probabilities the proposed development:
  - (a) Does not protect and enhance ecologically important areas and ecological connectivity (Overall outcome 2(a));
  - (b) Does not protect and establish appropriate buffers to waterways and native vegetation (Overall outcome 2(b));
  - (c) Is not located, designed and managed to avoid and minimise adverse direct or indirect impacts on ecological systems and processes (Overall outcome 2(d));
  - (d) Does not avoid or minimise adverse impacts on koalas and koala habitat (Overall outcome 2(e)).
109. This is because the siting of the proposed development relies upon and requires ongoing clearing of the subject site beyond the Category X mapped area, on the certified PMAV, and is based upon an extent of clearing that the Appellant's experts acknowledge is not approved or is prohibited development in circumstances where it is possible locate a dwelling house in cleared areas on the subject site.
110. Given the large area of non-remnant vegetation on the subject site, a dwelling house can be readily accommodated without the need for the clearing of native vegetation and there is no justification for locating a dwelling house in circumstances where it relies upon or requires clearing of native vegetation.

### **Koala habitat**

111. The Appellant submits that schedule 10, part 10, division 5 of the Planning Regulation (development on premises in koala priority areas not interfering with koala habitat) does not apply as an assessment benchmark to the Development Application because the proposed development is not located in Core Koala Habitat Area (**Core KHA**) and is not assessable development in accordance with schedule 11 of the Planning Regulation as the development footprint does not exceed 500m<sup>2</sup>.
112. As the Appellant submits that schedule 11 does not apply, it has not provided any assessment in this regard.

113. In contrast, Council submits that the assessment benchmarks in schedule 11 of the Planning Regulation apply to development that is not interfering with koala habitat on a site that is both in a KPA and contains mapped KHA.
114. Council accepts the proposed development is in an area that is not mapped as Core KHA but considers that, based on the Appellant's EAR, the development footprint exceeds 500m<sup>2</sup> and therefore the exemption under schedule 11, part 1, 1(g) of the Planning Regulation is not applicable.
115. Pursuant to schedule 11, part 1, section 1(g), schedule 11 does not apply to a development application for development if the development results in a development footprint of 500m<sup>2</sup> or less.
116. As noted above, the Tribunal finds that the development footprint of the proposed development is more than 500m<sup>2</sup>, and accordingly schedule 11, part 2 of the Planning Regulation applies to the proposed development.
117. Having regard to the relevant assessment benchmarks in schedule 11, Council submits that 4(1)(b) and 4(2)(a) and (e) are not satisfied (Council also noted that it is unclear whether (4)(b), (c) and (d) have been complied with).
118. Under 4(1)(b), building, structures or works associated with the development is required to be at least 50m from a KHA or the development complies with the criteria in 4(2). The development footprint is not located more than 50m from the mapped KHA (as applied at the time) and hence does not comply.
119. Assessment benchmark 4(2)(a) is that any change to the condition of soil as a result of the development does not affect a KHA and 4(2)(e) is that a building, structure, or works associated with the development is located to minimise the amount of vegetation required to be cleared for safety purposes.
120. The Tribunal is faced with the difficulty that whilst the Appellant has the onus to show that the appeal should be allowed, it has not provided any evidence to counter Council's assertions that the proposed development does not comply with the assessment benchmarks in schedule 11 of the Planning Regulation (because the Appellant submitted that the assessment benchmarks did not apply).
121. Whilst Council has not detailed the grounds for non-compliance with the assessment benchmarks, these are nevertheless uncontradicted.
122. As the Appellant has the onus to prove the Development Application should be approved and the Tribunal is satisfied that the assessment benchmarks are applicable, the Tribunal considers that the Appellant has failed to discharge its onus to demonstrate that the proposed development complies with these assessment benchmarks.
123. A further issue faced by the Appellant is that whilst there have been changes made to the KHA mapping applying to the subject site that exclude part of the subject site from mapped KHA, clearing has occurred outside of the non-KHA mapping for the proposed development contrary to the Planning Act.
124. By notice of decision dated 20 January 2021, the Department of Environment and Science approved a request to amend a KHA determination under the Nature Conservation (Koala) Conservation Plan 2017.
125. The amended KHA determination identified a large central area towards the eastern road frontage as not being Core KHA (generally reflecting the area of Category X vegetation

under the PMAV approved in 2020). The whole of the balance of the subject site remained mapped as Core KHA being about 6.77ha.

126. This mapping applied at the date of lodgement of the Development Application and continued until 28 November 2023 when new mapping was released which further reduced the area of Core KHA on the subject land to about 6.11ha with the excluded area generally matching the extent of the clearing that has been carried out on the subject land.
127. Under the current KHA mapping, the proposed development does not interfere with mapped KHA. However, this mapping did not apply at the time of the Development Application was properly made, and based on the Appellant's EAR, 0.225ha was cleared which was prohibited development.
128. Whilst this appeal is not directly concerned with the lawfulness of prior development on the subject site, for section 45(3) of the Planning Act, the code assessment must be carried out having regard to any development approval for, and any lawful use, of the premises or adjacent premises.<sup>6</sup>
129. The Tribunal considers that any clearing outside of the mapped non-KHA required for the proposed development was not lawful at the time and cannot be relied upon.
130. Further, having regard to section 45(3) of the Planning Act the Tribunal is bound to assess the proposed development against the assessment benchmarks in effect at the time the application was properly made.
131. Section 45(7) of the Planning Act further provides that if a statutory instrument or other document is amended or replaced before the assessment manager decides the application, the assessment manager can give the weight that the assessment manager considers is appropriate.
132. In this case, the KHA mapping changed after Council decided the Development Application and after the appeal commenced. The Tribunal therefore considers it is unable to give weight to the change to the KHA mapping.
133. The Tribunal therefore finds that the proposed development does not comply with the assessment benchmarks for koala habitat in schedule 11 of the Planning Regulation.

#### **Enforcement action for unlawful clearing**

134. Although not part of the issues directly in dispute in the appeal, the timing and conduct of the appeal has been affected by action taken by Council in relation to the alleged unlawful clearing of the subject site.
135. Both parties have referred the Tribunal to the appeal against the enforcement notice given by Council about the clearing on the subject site and the amended enforcement notice made by consent order of the Planning and Environment Court, under which the Appellant is required to comply with the rehabilitation management plan attached to the enforcement notice (Covenant Rehabilitation Plan (CRP) v2).
136. According to the amended enforcement notice, about 20,000m<sup>2</sup> (2ha) of vegetation was cleared between 13 June 2021 and 24 June 2022. This is stated to include about 3,600m<sup>2</sup> of non-exempt vegetation clearing of Core Koala Habitat being prohibited development and about 10,000m<sup>2</sup> of non-exempt vegetation clearing that was assessable development.

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<sup>6</sup> Section 27(1)(f) of the Planning Act.

137. Vegetation clearing associated with the proposed development the subject of this appeal is expressly stated to be excluded from the amended enforcement notice.
138. Under the Covenant Rehabilitation Plan, about 6.03ha is designated as Assisted Natural Regeneration Area and about 0.82ha is designated as Revegetation Area.
139. The development footprint of the proposed development is excluded from these areas.

**Consequences of non-compliance with assessment benchmarks**

140. The Tribunal has assessed the Development Application in accordance with section 45(3) of the Planning Act and finds that the proposed development does not comply with the Biodiversity overlay code and schedule 11, part 2 of the Planning Regulation.
141. However, non-compliance with these assessment benchmarks does not mandate refusal of the Development Application and pursuant to section 60(2)(b) of the Planning Act the Tribunal may decide to approve the Development Application even if the development does not comply with some of the assessment benchmarks.
142. Taking account of the Tribunal's discretion, the Tribunal acknowledges that the clearing for the proposed dwelling house and shed has been carried out. No assessment of further clearing for maintenance or bushfire hazard breaks has been undertaken.
143. The Tribunal also acknowledges that under the amended enforcement notice approved by the Planning and Environment Court there is no obligation to remediate the area proposed for the dwelling house and shed as part of the Development Application.
144. The Tribunal further notes that the KHA mapping has been amended by the State to exclude the cleared areas of the subject site.
145. In essence, the Appellant's case is that the subject site is not as constrained by native vegetation and koala habitat as appears from the Council's Biodiversity overlay code and previous KHA mapping and much / most of the clearing carried out has been of non-native / non-remnant vegetation and to the extent that additional clearing has been carried out, the consequences are minor and / or will be remedied through the Covenant Rehabilitation Plan required by the amended enforcement notice.
146. Council however maintains that the proposed development requires / relies upon the clearing of native vegetation and structures have not been located so that ecologically important areas are protected, rehabilitated and enhanced and ecological connectivity is maintained.
147. The Appellant acknowledges that about 2.14ha has been cleared on the subject site, including the area for the western shed and associated effluent disposal area which is not part of the proposed development.
148. Of the total area cleared, the Appellant accepts about 0.766ha of the unapproved clearing was within a mapped Native Vegetation Area under the Biodiversity overlay map (about 1/3<sup>rd</sup> of the total clearing);
149. The Appellant submits that much of this area was dominated by weed species but concedes that development approval ought to have been obtained from Council for this clearing.
150. Overall, the Tribunal considers that whilst the Appellant has established that part of the subject site contained non-remnant vegetation and the clearing of this part of the subject site was not / is not inconsistent with the applicable assessment benchmarks, the Tribunal

finds that the proposed development relies on the clearing of native vegetation that is not consistent with the Biodiversity overlay code.

151. The Tribunal is satisfied that the Development Application does not comply with the Biodiversity overlay code and compliance cannot be achieved by imposing development conditions. Therefore, in accordance with section 60(2)(d) of the Planning Act, the Tribunal considers that the Development Application should be refused.
152. As noted above, the Tribunal considers it is bound to assess the proposed development based on the KHA mapping that applied at the time the Development Application was decided by Council as the assessment manager.
153. However, even if the Tribunal can give weight to the changed KHA mapping and/or found that the proposed development was not assessable against schedule 11 of the Planning Regulation, the Tribunal would nonetheless confirm Council's decision to refuse the Development Application based on non-compliance with the Biodiversity overlay code.
154. Ultimately, the Tribunal considers that the location of the proposed dwelling house and shed is inappropriate as it is too close the southern boundary and does not minimise or avoid the need for the clearing of native vegetation (noting that the construction of a dwelling house in the proposed location will require ongoing maintenance of fire, maintenance or fencing clearing which will prevent the regeneration of native vegetation along the southern boundary).
155. The Appellant has not demonstrated that a dwelling house cannot be sited elsewhere, within cleared areas of the site, in compliance with the Planning Scheme and has not justified the need to site the dwelling house as proposed.
156. Overall, the Tribunal considers that the Development Application does not achieve the purpose of the Biodiversity overlay code as the proposed development does not ensure that ecologically important areas are protected, rehabilitated and enhanced, and ecological connectivity is improved.

### **Summary**

157. Having considered the appeal, the Tribunal is not satisfied that the Appellant has discharged its onus to show the appeal should be upheld.
158. The Tribunal therefore confirms the Council's decision to refuse the Development Application.

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**Stafford Hopewell**  
**Development Tribunal Chair**

**Date: 14 August 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**

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