Development Tribunal – Decision Notice

***Planning Act 2016*, section 255**

Appeal number:	**25-016**
Appellant:	Ryan Heazlewood-Ross and Emma Joan Hercules
Respondent (Assessment manager):	Gold Coast City Council (**Council**)
Site address:	59 Harry Mills Drive, Worongary in the State of Queensland and described as Lot 1 on SP268282 (**subject site**)

Appeal

This is an appeal under section 229, section 1 of Schedule 1 and item 1 of Table 1 of the *Planning Act 2016* (**Planning Act**) against the Gold Coast City Council's (**Council**) decision made on 6 May 2025 to refuse a development application for a development permit for a material change of use of premises to establish a dwelling house (secondary dwelling) (**Development Application**), given by a Decision Notice dated 9 May 2025 (**Decision Notice**).

Date and time of hearing:	11.00am, 18 July 2025
Place of hearing:	Subject site
Tribunal:	Samantha Hall—Chair Warren Rowe—Member
Present:	**Appellant** Ryan Heazlewood-Ross—Appellant Sean Byster-Bowles—Citywide Planning Services (Appellant Agent) **Respondent** Roger Sharpe—Manager Development Services, Council Lauren Campbell—Senior Plamer, Council Sean Gallagher—Coordinator Development Assessment, Council

Decision:

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

Background

The subject site

1. The subject site is located at 59 Harry Mills Drive, Worongary (Lot 1 on SP268282). Worongary is a suburb within the City of Gold Coast local government area, has access to all necessary services and is located to the west of the M1 highway.

2. The subject site:

   (a) is an irregular shape and comprises an area of 4,000m^2;

   (b) is a large semi-rural property that has three road frontages to Vince Hinde Drive, Harry Mills Drive and John Nielsen Court;

   (c) is a large semi-rural property that contains an existing dwelling house located in the eastern portion of the subject site, with a well-maintained garden and lawn area to the rear of the house (**primary dwelling**);

   (d) features scattered vegetation, including several mature Eucalypts within the portion of the site immediately adjacent to the primary dwelling;

   (e) has two existing vehicle crossovers onto Harry Mills Drive. One is located at the eastern extent of the site's road frontage and is linked to the primary dwelling by way of a constructed driveway. The other was more recently constructed and is located at the western extent of the site's road frontage and does not have a constructed driveway;

   (f) has a horse agistment area between the house and the boundary running along John Nielsen Court, which is enclosed by an open timber horse fence and includes a small horse shed with open walls under which a feed trough is located (**horse agistment area**);

   (g) includes a densely vegetated area along the eastern boundary which starts at the eastern edge of the garden and lawn area and slopes quite steeply to the boundary. This area is largely unusable due to the grade of the slope and the dense vegetation;

   (h) has two registered easements for drainage purposes being Easements A and B on RP223345; and

   (i) is bisected by a waterway or drainage channel that divides the land in front of the dwelling house. This has mature vegetation comprising both trees and significant undergrowth. The Tribunal understands the channel accepts stormwater flows from upstream and conveys that water downstream to a larger creek to the south of the subject site.

3. The surrounding area comprises established dwelling houses on semi-rural lots, many of which have a separate low-rise structure adjacent to the dwelling that is visible from the street frontage, which appear to be sheds for domestic or low intensity rural uses associated with the main dwelling house.

4. The Worongary Reservoir Reserve is to the north-east of the subject site. To the south of the subject site is Pioneer Downs Park, a large park area that includes a dog exercise area, children's playground and a fenced dressage arena. There is a small shopping complex within 10 minutes' drive of the subject site which includes a Coles, specialty shops and a few eateries.

5. The subject site is located within the Rural Residential Zone of the *Gold Coast City Plan 2016* (version 11) (**Planning Scheme**) and is subject to the following overlays:

   (a) Acid sulfate soils overlay – Land at or below 20m AHD;

   (b) Airport environs overlay – PANS-OPS Contour;

   (c) Bushfire hazard overlay – Potential impact buffer;

   (d) Dwelling house overlay; and

   (e) Environmental significance overlay – Priority species (Koala habitat areas).

The proposed development

6. On or about 4 December 2024, the Appellant lodged with the Council a development application for a development permit for a material change of use to establish a dwelling house (secondary dwelling) on the subject site pursuant to the Planning Scheme (**Development Application**).

7. 'Dwelling House' is defined in the Planning Scheme as follows:

   A residential use of premises involving:

   a. One dwelling for a single household and any domestic outbuildings associated with the dwelling; or

   b. One dwelling for a single household, a secondary dwelling and any domestic outbuildings associated with either dwelling.

   ***Does not include the following examples**:*

   Caretaker's accommodation, dual occupancy, rooming accommodation, short-term accommodation, student accommodation, multiple dwelling.

8. The Planning Scheme also provides an administrative definition of 'Secondary Dwelling', however, that definition differed from the definition that appeared in the *Planning Regulation 2017* (**Planning Regulation**) at the time the Development Application was made.

9. The definition in the Planning Regulation overrides that in the Planning Scheme[1] and therefore the definition of 'Secondary Dwelling' that applies to the proposed development is that found in the Planning Regulation which is as follows:

   ***Secondary dwelling** means a dwelling on a lot that is used in conjunction with but subordinate to another dwelling on the land, whether or not the dwelling is –*

   (a) *attached to the other dwelling; or*

   (b) *occupied by individuals who are related to, or associated with, the household of the other dwelling.*

10. The proposed development is:

    (a) intended to house an elderly parent of the Appellant;

    (b) to comprise a gross floor area of 66.36m^2 and a maximum height of 4.05m;

[1] Section 1.2.1 of the Planning Scheme, section 8 of the Planning Regulation and section 16 of the Planning Act.

(c) set back approximately 4.9m from Vince Hinde Drive;

(d) to be a detached single storey two-bedroom dwelling constructed in the far western end of the subject site 41.45m to the west of the primary dwelling, facing both Vince Hinde Drive and Harry Mills Drive;

(e) to comprise two bedrooms, one bathroom that includes a washing machine, a kitchen and an open plan lounge and dining room. A small deck will be located off the living area, facing Vince Hinde Drive;

(f) accessed via a dedicated vehicle crossover, being the more recently constructed vehicle crossover to Harry Mills Drive that does not have a driveway. A new concrete driveway forms part of the proposed development which links the vehicle crossover to a single proposed car space adjacent to the entry patio. The proposed development will not share access with the existing dwelling on the subject site;

(g) serviced by a new 10,000L concrete in-ground sewerage holding tank to the north of the proposed secondary dwelling;

(h) linked to the primary dwelling by a proposed walkway comprising stepping stones and a timber pedestrian footbridge over the drainage channel that dissects the frontage of the primary dwelling;

(i) to be constructed using James Hardy Easytex Wall Panelling with a 5-degree pitched flat roof. The roofing material and colour will be like that of the primary dwelling, but the facades will be different, as the primary dwelling presents a mix of red brick and cream rendered facades.

11. Section 5.3.3(1) of the Planning Scheme relevantly states that '*Accepted development does not require a development approval and is not subject to assessment benchmarks*'. It goes on to state in section 5.3.3(2) that certain requirements may apply to some types of development for it to be accepted development.

12. Table 5.5.21 – MCU Rural residential zone (where not in a precinct) of the Planning Scheme identifies that the category for assessment for a development application for a material change of use for a Dwelling House if involving a secondary dwelling with a GFA not exceeding 80m^2 in the Rural Residential Zone is *accepted development subject to requirements*.

13. This means that if the proposed development complied with the relevant accepted development acceptable outcomes identified in Table 5.5.21, which includes those within the Secondary dwelling code of the Planning Scheme (**SD Code**), then the proposed development would be accepted development. However, it is an agreed fact between the parties that the proposed development did not comply with acceptable outcomes AO1, AO3 and AO5 in Table 9.3.18-2 of the SD Code.

14. Section 5.3.3.2 of the Planning Scheme states that

> '*Accepted development that does not comply with one or more of the nominated acceptable outcomes in the relevant parts of the applicable code(s) becomes code assessable development, unless otherwise specified*.'

15. Accordingly, as the Development Application did not comply with several of the acceptable outcomes in the SD Code, the Development Application triggered code assessment.

16. By correspondence dated 18 December 2024, the Council issued a combined Confirmation Notice and Information Request to the Appellant, seeking further information with respect to the proposed location of the secondary dwelling and carparking.

17. The Appellant provided a response to the Information Request on or about 24 February 2025.

18. Both the Information Request and the Appellant's response related to the application of the SD Code in the assessment of the proposed development.

19. On 6 May 2025, the Development Application was refused by the Council and on 9 May 2025, the Council issued a decision notice refusing the Development Application (**decision notice**).

20. The reasons for refusal given by the Council in the decision notice can be summarised as follows:

    (a) The proposed development did not meet several key benchmarks in the SD Code;

    (b) The issues weren't the kind that could be easily fixed with conditions – they went to the heart of what the Development Application was proposing;

    (c) Overall, the proposed development looked, read, and functioned more like an entirely separate dwelling – in other words, a 'Dual occupancy' as defined in the Planning Scheme – rather than a genuine secondary dwelling; and

    (d) importantly, there were alternative locations within the subject site that could be suitable to address these fundamental concerns.

21. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 6 June 2025.

22. The Appellant's Form 10 identified the following summary of the Appellant's grounds of appeal, which were elaborated upon in an accompanying submission prepared by Citywide Planning (**Citywide submission**):

    - *'The separation distance of 41.5m (in lieu of 20m) does not result in vegetation clearing to meet OO2(c) and maintains sufficient proximity between the dwellings;*
    - *The use of 'inconsistent' materials was explicitly intended to be addressed through voluntary landscape screening and consistent colours, as is regularly approved;*
    - *The use of a lawful secondary VXO is consistent with the Overall outcome OO2(d) and consistent with a multitude of approvals recently issued by Council;*
    - *The development application and land use was accepted by Council via Confirmation notice, with the dwelling proximity, footpath/bridge and proposed co-habitation of a direct family member establishing a sufficient 'nexus' for the use.'*

23. A site inspection and a hearing were held at the subject site on 18 July 2025.

Jurisdiction

24. Schedule 1 of the Planning Act states the matters that may be appealed to a tribunal.[2]

25. Section 1(1) of Schedule 1 of the Planning Act provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of

[2] Section 229(1)(a) of the Planning Act.

the Planning Act, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in paragraphs (a) to (g) of sub-section (2).

26. Section 1(2)(a) of Schedule 1 of the Planning Act relevantly provides that Table 1 applies to a tribunal only if the matter involves the refusal of a development application for a material change of use for a 'classified building.'

27. A 'classified building' is defined in Schedule 2 of the Planning Act to mean a building classified under the Building Code[3] as a class 1 building. A class 1 building under the Building Code is a residential dwelling and includes a dwelling house.

28. As this appeal is about the Council's refusal to approve a development application for a development permit for a dwelling house (secondary dwelling), the Tribunal is satisfied that it has jurisdiction to hear the appeal.

29. One further matter was considered by the Tribunal, being that of Mr Rowe having been the Director of Planning, Employment and Transport at the Council. Mr Rowe had known the signatory of the decision notice, Mr Phillip Zappala, but Mr Rowe had not had contact with Mr Zappala since Mr Rowe's retirement more than 14 years ago.

30. This connection of Mr Rowe's with the Council was raised with the parties by email sent by the Tribunal's Registry dated 9 June 2025, which invited the parties to consider the connection and to raise with the Registry any objections they might have to Mr Rowe being appointed to the Tribunal.

31. The Appellant's representative, Mr Byster-Bowles replied by return email on 9 June 2025 advising the Appellant had no concerns with Mr Rowe being appointed to the Tribunal. The Council failed to provide a response, and the Registry officially established the Tribunal, including Mr Rowe, on 13 June 2025.

Decision framework

32. The decision notice the subject of this appeal was issued by the Council on or about 9 May 2025.

33. The Appellant filed a Form 10 – Appeal Notice on or about 6 June 2025 pursuant to section 229 of the Planning Act.

34. Pursuant to section 229(3)(h) of the Planning Act, the Appellant's appeal period ran for 20 business days from 9 May 2025 until 6 June 2025. Therefore, the appeal was filed within the Appellant's appeal period.

35. This is an appeal by the Appellant who must establish that the appeal should be upheld.[4]

36. The Planning Act identifies that the Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Council when it decided to give the decision notice the subject of this appeal.[5]

37. In addition, the Planning Act provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and it may seek the views of any person[6].

[3] Section 12 of the Building Act provides a definition of the Building Code of Australia, which refers to the NCC.
[4] Section 253(2) of the Planning Act.
[5] Section 253(4) of the Planning Act.
[6] Section 249 of the Planning Act.

38. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal[7].

39. By email dated 17 July 2025, the Council enquired as to whether the Tribunal would be assisted by receiving written submissions from the Council prior to the hearing.

40. By email dated 17 July 2025, the Tribunal's Registrar advised the parties that the Tribunal would be assisted by receiving pre-hearing submissions from the Council. The Council provided its written submissions by email later that same day (**Council's written submissions**).

41. During the hearing, the Tribunal asked the parties to provide copies of the Confirmation Notice and Information Request issued by the Council in respect of the proposed development. Mr Byster-Bowles, on behalf of the Appellant, provided that document by email dated 21 July 2025.

42. At the conclusion of the hearing, the Council's officers offered to provide to the Tribunal, written notes of the Council's oral submissions given at the hearing. The Tribunal accepted that offer and by email dated 18 July 2025, the Council provided a written copy of its oral submissions (**Council's oral submissions**).

43. The Tribunal grants the Council and the Appellant leave to respectively present the Council's written submissions, the Council's oral submissions and the Confirmation Notice and Information Request.

44. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the Planning Act:

    (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…'.*

Material considered

45. The material considered in arriving at this decision comprises:

    (a) 'Form 10 – Appeal Notice', grounds for appeal and all correspondence and materials accompanying the appeal lodged with the Development Tribunals Registrar on or about 6 June 2025;

    (b) The Council's written submissions provided by email dated 17 July 2025;

    (c) Oral submissions made at the hearing by the Appellant, the Appellant's representatives and the representatives for the Council;

    (d) The Confirmation Notice and Information Request dated 18 December 2024 which was provided by the Appellant to the Tribunal by email dated 21 July 2025;

    (e) The Council's transcript of its oral submissions provided by email dated 18 July 2025;

    (f) *Gold Coast City Plan 2016* (version 11) (**Planning Scheme**);

[7] Section 253(5)(a) of the Planning Act.

(g) *Building Act 1975* (**Building Act**);

(h) *Planning Act 2016* (**Planning Act**);

(i) *Planning Regulation 2017* (**Planning Regulation**).

Findings of fact

The proposed development

46. The Development Application sought a development permit for a material change of use for a dwelling house (secondary dwelling) pursuant to the Planning Scheme.

47. The decision notice given by the Council refused the Development Application.

48. The decision notice stated the following assessment benchmarks in the Planning Scheme applied to the Development Application:

(a) Rural residential zone code;

(b) Acid sulfate soils overlay code;

(c) Airport environs overlay code;

(d) Bushfire hazard overlay code;

(e) Environmental significance overlay code;

(f) General development provisions code;

(g) Healthy waters code;

(h) Secondary dwelling code; and

(i) Transport code.

49. The reasons given for refusal of the proposed development in the decision notice and the issues in dispute in the Appellant's Form 10 were limited to non-compliance with the following assessment benchmarks in the SD Code:

(a) Purpose – 9.3.18.2(1);

(b) Overall Outcome – 9.3.18.2(2)(c) (**OO2(c)**);

(c) Overall Outcome – 9.3.18.2(2)(d) (**OO2(d)**);

(d) Performance Outcome PO1 (**PO1**);

(e) Performance Outcome PO3 (**PO3**); and

(f) Performance Outcome PO5 (**PO5**).

Secondary dwelling code (SD Code)

50. As discussed earlier in this Decision Notice, pursuant to section 5.3.3(1) of the Planning Scheme, accepted development does not require a development approval and is not subject to assessment benchmarks. A planning scheme may identify that certain requirements need to be met for a development to be accepted development.

51. However, if a proposed development does not comply with one or more of the relevant acceptable outcomes required for accepted development, it will become code assessable development pursuant to section 5.3.3(2) of the Planning Scheme.

52. In this appeal, the Development Application did not comply with several of the nominated acceptable outcomes in the SD Code and therefore, the Development Application triggered code assessment.

53. Pursuant to section 45(3) of the Planning Act, code assessment is to be carried out against the assessment benchmarks in a categorising instrument for the development and having regard to any matters prescribed by regulation.

54. The Planning Scheme is a categorising instrument for the purposes of section 45(3) of the Planning Act[8] and it sets out the relevant benchmarks for the proposed developments.

55. Section 5.3.3(4)(b) of the Planning Scheme provides that code assessable development that has been made code assessable because it did not comply with one or more of the relevant acceptable outcomes, is to be assessed only against those assessment benchmarks with which it did not comply or it was not capable of complying.

56. Pursuant to section 5.3.3(4)(c) of the Planning Scheme, code assessable development that complies with:

    (a) the purpose and overall outcomes of the code complies with the code;

    (b) the performance or acceptable outcomes complies with the code.

57. The Tribunal notes and agrees with the Council's acceptance that non-compliance with an acceptable outcome does not, of itself, result in non-compliance with the corresponding performance outcome. While acceptable outcomes are not determinative of compliance with a code, acceptable outcomes are still relevant to the statutory interpretation exercise[9].

58. Similarly, compliance with the purpose and overall outcomes of the code will also demonstrate compliance with the code and will also be a relevant consideration where there is difficulty complying with the performance or acceptable outcomes.

59. Therefore, in this appeal, the parties are agreed and the Tribunal accepts that the proposed development did not comply with AO1, AO3 and AO5 of the SD Code and therefore, the proposed development was entitled to be assessed against the performance outcomes for those acceptable outcomes with which it did not comply, being PO1, PO3 and PO5 of the SD Code as well as the Purpose in section 9.3.18.2(1) of the SD Code and OO(2)(c) and OO(2)(d) of the SD Code.

Issues in dispute

60. The Tribunal has identified that the issues in dispute can be grouped as follows:

    (a) Proximity – PO1 and OO(2)(c);

    (b) Access – PO5 and OO(2)(d);

    (c) Visual and streetscape integration – PO3; and

    (d) The proposed land use:

[8] Sections 43(1) and (3) of the Planning Act.
[9] Paragraph 40 of the Council's written submissions.

(i) Does the proposed development meet the definition of 'secondary dwelling' in the Planning Regulation?

(ii) Did the Council accept the proposed use by issuing the Confirmation Notice?

(e) If the Tribunal decides that the proposed development does not comply with the relevant assessment benchmarks, could the proposed development be conditioned to comply?

61. As noted above, the proposed development does not meet three of the relevant acceptable outcomes, being AO1, AO3 and AO5 and accordingly, for compliance with the SD Code to be achieved, the proposed development must comply with PO1, PO3 and PO5[10].

62. The Purpose of the SD Code '*is to regulate the scale and appearance of secondary dwellings.*' The purpose of the SD Code is achieved through the overall outcomes in section 9.3.18.2(2) of the SD Code. If the proposed development complies with all the applicable overall outcomes, the purpose of the SD Code will be achieved and the proposed development will comply with the SD Code[11].

Proximity – PO1 and OO(2)(c)

63. Section 9.3.18.2(2) of the SD Code sets out the overall outcomes through which the purpose of the code will be achieved.

64. OO(2)(c) of the SD Code states that:

> *In non-urban areas the secondary dwelling is located close to the primary dwelling to avoid unnecessary vegetation removal.*

65. PO1 of the SD Code reflects the overall outcome, stating that:

> *The secondary dwelling is located in close proximity to that of the primary dwelling.*

66. The corresponding AO1 with which the proposed development does not comply, requires that a secondary dwelling within the Rural residential zone be located within 20m of the primary dwelling.

67. The combination of AO1, PO1 and OO(2)(c) of the SD Code, clearly exhibits an intention of the Planning Scheme that a secondary dwelling be located close to the primary dwelling, to reinforce its subordinate role. The Planning Scheme considered 'close proximity' to be within a range of 20m from the primary dwelling as set out in AO1.

68. The Council contended that in this case, the proposed dwelling was over 41 metres away from the primary dwelling, which was more than twice the 20-metre guide suggested in AO1 of the SD Code.

69. The two dwellings would also be separated by a drainage channel and a row of vegetation, so the buildings would not exhibit as being either visually or physically connected.

70. The Council further suggested that there were other locations on the subject site – closer to the primary dwelling – where a secondary dwelling could be positioned without vegetation clearing and which would not compromise the rural character or the assessment benchmarks.

[10] Section 5.3.4(c) of the Planning Scheme.
[11] Ibid.

71. In contrast, the Appellant contended that it was due to various existing site constraints, including an existing lawn and garden area and horse agistment area, that the proposed development was to be situated 41.85m from the existing primary dwelling, in lieu of the 20m guideline.

72. The assessment of the proposed development was elevated to OO(2)(c) of the SD Code, which stated that '*in non-urban areas the secondary dwelling is located close to the primary dwelling to avoid unnecessary vegetation removal*'. The Appellant contended that the proposed development would be located within the most logical and least impactful portion of the subject site, whilst maintaining sufficient proximity to the primary dwelling for ease of co-habitation between the immediate family members residing on site. The nexus between the two dwellings would be aided by the proposed walkway and footbridge over the drainage channel.

Access – PO5 and OO(2)(d)

73. OO(2)(d) of the SD Code comprises an Overall Outcome which states that:

> *The secondary dwelling utilises the existing driveway and vehicle crossover.*

74. PO5 of the SD Code relevantly states that:

> *The secondary dwelling shares its driveway and vehicle crossover with the primary dwelling.*

75. The corresponding AO5 with which the proposed development does not comply, requires the secondary dwelling to provide one driveway for both the primary and secondary dwellings.

76. The proposed development is to have a separate access to that of the primary dwelling which is via a different vehicle crossover and driveway at the western end of Harry Mills Drive.

77. The Council contends the Planning Scheme clearly states that a secondary dwelling should use the primary dwelling's driveway and vehicle crossover. The Council's written submissions allege the proposed development would conflict with both the intent and the practical expectations of the SD Code in respect of access as follows:

    (a) The wording of PO5 is deliberate in stating the secondary dwelling is to utilise 'the' existing driveway and vehicle crossover to maintain integration between the two dwellings and reinforce the subordinate nature of the second dwelling;

    (b) While another vehicle crossover has clearly been established on the subject site, there is only one existing driveway which services the primary dwelling at the other side of the subject site;

    (c) The proposed development would have its own separate driveway and crossover on the opposite side of the subject site to the primary dwelling which would result in no internal vehicle access connection and no visible integration of use between the two dwellings.

78. In response, the Appellant argued that given the proposed location of the secondary dwelling which was the result of various site constraints which are outlined in the Citywide submission, the sharing of the primary dwelling's driveway and vehicle crossover would present an undue impracticality for the Appellant's elderly parent, particularly given the drainage channel that bisects the subject site.

79. The Appellant also argued that the separate vehicle crossover for the proposed development was lawfully approved, constructed and completed prior to the Development

Application being lodged. In the Appellant's view, this resulted in an 'existing' vehicle crossover for the purposes of OO(2)(d) of the SD Code and therefore compliance with the SD Code.

80. The Appellant gave a number of examples of what the Appellant described as similar developments in the local area where a secondary dwelling was approved by the Council which did not comply with the applicable assessment benchmarks. This included secondary dwellings that did not share a vehicle crossover and driveway with the primary dwelling and those that were located at distances greater than 20m from the primary dwelling[12].

81. The Council's response was that each development turns on its own individual facts and circumstances such that many of those developments could achieve compliance through conditioning or the exercise of the discretion to approve the development despite any non-compliance did not offend the purpose of the SD Code. The Council further asserted that by virtue of section 45(3) of the Planning Act, code assessable development must be assessed only against the relevant assessment benchmarks in the Planning Scheme and any relevant matters prescribed by the Planning Regulation. Past decisions of the Council are therefore not relevant.

Visual and streetscape integration – PO3

82. PO3 of the SD Code relevantly states that:

> *The primary dwelling and the secondary dwelling are designed to present as one dwelling when viewed from the street frontage.*

83. The corresponding AO3 with which the proposed development does not comply, requires the secondary dwelling to be constructed and designed using the same materials and elements as the primary dwelling house on the subject site.

84. The Council's interpretation of PO3 was that a secondary dwelling should appear visually related to the primary dwelling, especially when viewed from the street.

85. The Council alleged that there would be a clear visual mismatch between the dwellings for the following reasons:

    (a) The primary dwelling is brick, slab-on-ground, with a pitched roof – a common dwelling form in this area. The proposed secondary dwelling however, would be elevated on poles, with fibre cement cladding and a skillion roof. The dwellings would present as quite different structures in both form and presentation. Because the subject site has three road frontages, these differences would be obvious from several vantages;

    (b) The topography of the subject site, specifically the vegetated drainage channel, will visually present from the street frontages as a physical barrier that separates the two dwellings. While the pedestrian footbridge and stone path will link the two dwellings, it likely won't be visible from any of the street frontages;

    (c) Even with conditions requiring matching colours or materials, the contrast in form and layout would remain stark. Ultimately, the buildings would appear as two separate homes – not a primary dwelling with a smaller, supporting unit.

86. The Appellant identified that the proposed construction materials for the secondary dwelling would be a slight departure from the existing primary dwelling's mix of brick and weatherboard cladding and this was to minimise construction costs to the family.

[12] Thus allegedly not complying with PO1 and OO(2)(c) of the SD Code.

However, similar colours to the primary dwelling were proposed and the use of similar roofing materials would present a consistent and cohesive design outcome. To offset the variation in materials, the Development Application specifically proposed voluntary landscaping to the frontage of the secondary dwelling, which the Appellant alleged was a solution commonly approved by the Council. Combined with the similar colour palette, the Appellant contended the proposed landscaping would effectively screen the secondary dwelling from view, thus presenting to the street as a similar ancillary outbuilding to those prevalent within the existing streetscape.

Proposed land use – 'secondary dwelling'

87. The Council's written submissions identified the importance the Council places on ensuring that any development which is ultimately approved is capable of being used lawfully in accordance with the applicable definitions.[13]

88. In the decision notice, the Council expressed the view that the proposed dwelling was not properly characterised as a secondary dwelling and was more properly described as a dual occupancy.

89. The Council's written submissions identified that the Planning Regulation definition of a 'secondary dwelling' requires the dwelling be 'used in conjunction with' the primary dwelling[14]. This isn't just about occupancy – it's about how the two buildings function together. In this case, the proposed dwelling would have its own driveway and parking and its own kitchen, bathroom, and laundry. By necessity the proposed dwelling would be serviced by its own septic system. There are no shared spaces or facilities and, despite the proposed pedestrian path and bridge over the waterway corridor, the secondary dwelling would be visually and physically separated from the primary dwelling. Functionally, these could and would operate as two independent dwellings.

90. In response, the Appellant considered the definition in the Planning Scheme of Dual occupancy which primarily requires two households, involving two dwellings on a single lot but does not include a secondary dwelling. The Appellant identified that the intended use of the proposed development is for an immediate family member and that the family would operate as a single-family unit for the purposes of meal sharing and the care of the Appellant's young children. The shared utilities of water and electricity reinforced a clear and ongoing linkage between the two households. The pedestrian pathway and bridge between the two dwellings would reduce the previous 75m walking distance when walking around the waterway channel, down to 46m. For these reasons, the Appellant contended the proposed development was not a dual occupancy but more appropriately a secondary dwelling.

91. In addition, the Appellant argued that similar developments had been approved by the Council and built near to the proposed development. In support of this the Appellant provided pictorial evidence.

92. Based on the few examples provided (noting that the list was limited by the location and zoning parameters and was in no way exhaustive of cross-city outcomes), the Appellant considered there was clear and present evidence that secondary dwellings could be established at comparable or increased separation distances to that proposed for the subject site. Given these examples, the Appellant contended that the proposed development's non-compliance in dwelling separation, location and design posed no reasonable grounds for refusal.

[13] Paragraph 98 of the Council's written submissions.
[14] Paragraph 100 of the Council's written submissions.

Council acceptance of land use

93. The remaining ground for appeal was raised in the Appellant's Notice of Appeal, being that '*The development application and land use was accepted by Council via Confirmation Notice, with the dwelling proximity, footpath/bridge and proposed co-habitation of a direct family member establishing a sufficient 'nexus' for the use*.' The Appellant spoke to this ground during the hearing, expressing the view that in accepting the Development Application and giving the Confirmation Notice, the Council was accepting that the proposed development was a secondary dwelling for the purposes of the definition in the Planning Regulation.

94. The Council's written submissions addressed this ground by identifying that a confirmation notice acknowledges that a development application is a 'properly made application' for the purposes of section 51(6) of the Planning Act.

95. To be a properly made application, certain criteria in section 51(1)-(4) of the Planning Act must be met, none of which require the assessment manager to consider the nature of the use applied for at that time. Pursuant to section 51(5)(a) of the Planning Act, the assessment manager must accept a development application that complies with section 51(1)-(4) of the Planning Act as being properly made.

Reasons for the decision

Proximity – PO1 and OO(2)(c)

96. These assessment benchmarks relate to the location of a proposed secondary dwelling apropos to the primary dwelling.

97. PO1 requires the secondary dwelling to be 'located in close proximity to the primary dwelling.' The relevant acceptable outcome for PO1, AO1, requires a secondary dwelling within the Rural residential zone (excluding the Rural residential landscape and environmental precinct) to be located within 20m of the primary dwelling.

98. PO1 does not specify a particular distance between the primary dwelling and the secondary dwelling. It instead requires the secondary dwelling to be in 'close proximity' to the primary dwelling.

99. There is no definition in the Planning Scheme, Planning Act, Planning Regulation or indeed the *Acts Interpretation Act 1954* of the words 'close' or 'proximity'. The ordinary or dictionary meanings were comprehensively set out in the Council's written submissions[15]. Considering these, the Tribunal is of the view that the combination of the words 'close' and 'proximity' signals a strong intention for a secondary dwelling to not only be near to the primary dwelling but for it to be located very near and without much space between it and the primary dwelling. The limit of 'within 20m' in the corresponding AO1 provides relevant context which supports such an interpretation. Here the proposed secondary dwelling is to be located 41.45m to the west of the primary dwelling. The primary dwelling is in the eastern portion of the subject site and the proposed secondary dwelling is to be in the western portion of the subject site.

100. The Council maintains, and the Tribunal agrees that the proposed secondary dwelling does not comply with PO1 as it will not be in close proximity to the primary dwelling. Being located at opposite sides of the subject site, the secondary dwelling will instead be a significant distance from the existing primary dwelling.

[15] Paragraphs 52 and 53 of the Council's written submission.

101. OO(2)(c) identifies why the Planning Scheme requires the dwellings to be in close proximity to each other; to avoid unnecessary vegetation removal. The Citywide submission relies upon this reason for the location of the proposed development.

102. However, the Tribunal agrees with the Council's position set out in the Council's written submissions that:

    (a) there is more than one alternative location on the subject site that could accommodate the footprint of the proposed secondary dwelling that would be in closer proximity to the primary dwelling where vegetation removal would be unnecessary; and

    (b) the proposed location of the secondary dwelling could result in the removal of vegetation. Establishing a new dwelling on the subject site may enliven additional vegetation clearing requirements in the Planning Regulation or the Planning Scheme, once the secondary dwelling is established.[16]

103. For these reasons, the Tribunal agrees with the Council that the proposed development does not meet PO1 and OO(2)(c) of the SD Code.

Access – PO5 and OO(2)(d)

104. These assessment benchmarks relate to access to the secondary dwelling. PO5 of the SD Code requires that the secondary dwelling share '*its driveway and vehicle crossover with the primary dwelling*.' For completeness, the corresponding acceptable outcome AO5 states '*One driveway is provided'*.' This reinforces the Council's interpretation that the intent of the Planning Scheme is that both a secondary dwelling and the primary dwelling share both a driveway and a vehicle crossover.

105. The Development Application proposes that the secondary dwelling has access via an existing vehicle crossover and a future driveway, both of which are separate to that of the existing primary dwelling. There is no sharing of the existing driveway and vehicle crossover used by the primary dwelling. As such, the Tribunal considers that there is clear non-compliance with PO5.

106. There is a difference in interpretation between the parties with respect to whether OO(2)(d) requires the secondary dwelling to use any existing driveway and vehicle crossover on the subject site or whether it must be the one used by the primary dwelling. Irrespective, the Tribunal considers that the Development Application does not comply with OO(2)(d) because while the proposed secondary dwelling will be using an existing vehicle crossover it will not be using an existing driveway.

107. Finally, the Tribunal agrees with the position taken by the Council that past decisions of the Council with respect to other development applications that may not comply with the relevant assessment benchmarks of the SD Code, are not relevant to the assessment of the Development Application. Section 45(3) of the Planning Act is clear as to the application of applicable assessment benchmarks to any assessment of a code assessable application and the Tribunal has not been persuaded that the residual discretion in section 60(2)(b) of the Planning Act ought be exercised to approve the non-compliance in this respect.

108. In light of the above, the Tribunal finds that the proposed development does not comply with PO5 and OO(2)(d) of the SD Code.

[16] Paragraph 65 of the Council's written submission.

Visual and streetscape integration – PO3

109. This assessment benchmark relates to the visual and streetscape perspective of the secondary dwelling and a requirement that a secondary dwelling and the primary dwelling be designed to present as one dwelling when viewed from the street frontage.

110. The corresponding AO3 provides some guidance to the interpretation of PO3, as it requires the secondary dwelling to be constructed and designed using the same materials and elements as the primary dwelling house.

111. The Appellant's choice of location for the secondary dwelling makes it difficult to see how the proposed secondary dwelling and the primary dwelling can present as one dwelling when viewed from any of the three street frontages.

112. The immediate physical barrier of the vegetated drainage channel visually cuts the subject site in half with the existing dwelling on one side and the proposed secondary dwelling on the other. The separate vehicle crossover and driveway would only compound the image that they are two separate dwellings.

113. As AO3 identifies, the physical separation might be alleviated by a consistency of design and materials of the two dwellings, however, the proposed development will comprise different design elements and materials to that of the existing primary dwelling.

114. The Tribunal has sympathy for the Appellant's position that landscaping could assist in screening the differences between the dwellings, however, landscaping can only do so much and the physical separation exacerbated by the drainage channel cannot be overcome by screening plantings.

115. For these reasons, the Tribunal finds that the proposed development does not comply with PO3 of the SD Code.

Functional definition – 'secondary dwelling'

116. The relevant definition of secondary dwelling in the Planning Regulation requires the secondary dwelling to be used in conjunction with but subordinate to the primary dwelling. It also states that it is irrelevant whether the dwellings are attached or occupied by persons who are related.

117. The Appellant contends that the proposed secondary dwelling will be a residence for a direct family member of the Appellant who resides in the primary dwelling. However, the definition calls for an objective consideration of the functional relationship between the two dwellings, irrespective of the identity of the occupants.

118. Both parties quote the decision of the Planning and Environment Court of *Lalis v Bundaberg Regional Council* [2018] QPELR 861, in which her Honour Judge Kefford considers the test to be the ability of a dwelling house and a secondary dwelling to be 'used' in conjunction with each other, with the focus on the use rather than built form.

119. When focussing on the use of the secondary dwelling, the Tribunal considers that while exhibiting some attributes that might be considered subordinate to or in conjunction with the primary dwelling, the secondary dwelling would be capable of completely independent living. The proposed secondary dwelling comprises two bedrooms, its own bathroom, kitchen and laundry and a separate outdoor space. The secondary dwelling would have its own car space, separate vehicle crossover and future separate driveway. It would not rely on the dwelling house for any practical living purposes.

120. Apart from an emotional connection given the family relationship in this instance, an occupant of the proposed secondary dwelling would not need to go to the primary dwelling

nor use any facilities in the primary dwelling. Each dwelling could function completely independently of the other.

121. For these reasons, the Tribunal finds that the proposed development does not meet the requirements of the definition of 'secondary dwelling' in the Planning Regulation.

122. In the absence of direct evidence by the parties, the Tribunal does not make any finding with respect to whether the proposed development would meet any other use definition in the Planning Scheme or Planning Regulation.

Conditioning to comply

123. In the Council's written submissions, the Council considered whether any alleged non-compliance with assessment benchmarks could be addressed through conditions, and it formed a view that this was not appropriate or indeed possible.

124. In Council's opinion the core problems of siting, the separate access, and the design approach, were fundamental to the Development Application. Responding to those issues would require a full redesign and relocation of the proposed development which would mean a new development application.

125. The Council's written submissions acknowledged that section 60(2)(b) of the Planning Act gives the Tribunal discretion to approve development that doesn't meet all benchmarks, however, such discretion should be exercised having regard to the whole of the SD Code and its focus and factual matrix. The Council offered the view that the non-compliances of the proposed development with the SD Code were significant and in disregard to the essence of what the SD Code is aiming to achieve. In the Council's view there is no compelling pattern of development, or site-specific circumstance, that would justify the discretion being exercised in this case.

126. With respect to the non-compliance with PO1 and OO(2)(c) of the SD Code, the Tribunal agrees with the Council that compliance could not be achieved by imposing conditions as such conditions would need to fundamentally alter the location of the proposed development on the subject site to address the requirements of the Planning Scheme with respect to the proximity of a secondary dwelling to the primary dwelling.

127. The Tribunal does not consider that compliance with PO5 and OO(2)(d) of the SD Code could be achieved by imposing a condition requiring the proposed development use the existing vehicle crossover and driveway that services the primary dwelling. This is because of the distance between the two dwellings and the intersecting drainage channel and associated vegetation which separates them which would prevent a supplementary driveway being constructed between the proposed car space adjacent to the entry patio of the secondary dwelling and the existing driveway.

128. With respect to the non-compliance with PO3 of the SD Code, lawful conditions could be imposed with respect to the colour choices for the proposed development and screening landscape plantings. However, the structural inconsistencies including roof pitch and wall cladding are more substantial matters that would necessitate greater design changes than can be conditioned.

Council acceptance of land use

129. The Tribunal is satisfied that in issuing the Confirmation Notice, the Council was not accepting or approving the proposed land use of a secondary dwelling.

130. Section 51(1)-(4) of the Planning Act does not require and does not permit the Council to consider the nature of the use applied for at that time. Provided the Development Application was made in the approved form to the Council and accompanied by the

documents required under the form, the required fee and the owner's consent, the Council was required to accept the Development Application as properly made.

131. As such, The Tribunal finds that issuing the Confirmation Notice was not an indication that the specific land use applied for was 'accepted'.

Conclusion

132. The purpose of the SD Code is to regulate the scale and appearance of secondary dwellings. Pursuant to the Planning Scheme, the purpose of the SD Code is achieved through the overall outcomes in section 9.3.18.2(2) of the SD Code. To the extent the proposed development does not comply with all the applicable overall outcomes, the purpose of the code is not achieved.

133. For the reasons set out above, it is the Tribunal's view that the Development Application does not comply with OO(2)(c) and OO(2)(d).

134. The Planning Scheme also identifies that compliance with the performance or acceptable outcomes complies with the SD Code.

135. For the reasons set out above, it is the Tribunal's view that the Development Application does not comply with PO1, PO3 and PO5.

136. Further, the Tribunal is satisfied that the proposed development does not meet the use definition of 'secondary dwelling' that is set out in the Planning Regulation.

137. Having considered the extent of non-compliance with the relevant assessment benchmarks, the Tribunal is of the view that it would not be possible to lawfully impose conditions that would achieve compliance with the relevant assessment benchmarks.

138. Given the extent of non-compliance with the provisions of the Planning Scheme and the Tribunal's view that compliance cannot be the subject of reasonable and relevant conditions, the Tribunal has decided to confirm the decision of the Council to refuse the Development Application and dismisses this appeal.

Samantha Hall
Development Tribunal Chair
Date: 19 August 2025

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:

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