



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	25-002
Appellant:	Aaron Lange
Respondent/Assessment manager:	James Dunstan, Professional Certification Group
Co-respondent (Concurrence agency):	Gold Coast City Council ('Council')
Site address:	14 Annerley Avenue, Runaway Bay Qld 4216 – formally described as Lot 91 on RP85706 ('the subject site')

Appeal

Appeal under section 229(2) and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1(a), of the *Planning Act 2016* ('the PA') against the assessment manager's decision to refuse the appellants' application for a building works development permit for as-built alterations to a dwelling house, in the form of a conversion of a garage to bedrooms ('the application')

Date and time of hearing:	Wednesday, 9 April 2025, at 10.00am
Place of hearing:	The subject site and Council offices, Nerang
Tribunal:	Neil de Bruyn—Chairperson Martin Roushani-Zarmehri—Member Mitchell Osborne—Member
Present	Aaron Lange—Appellant James Dunstan—Assessment Manager Roger Sharpe—Council representative Shane Weterings—Council representative Leon Newland—Council representative Sarah Godwin—Council representative

Decision

1. The Development Tribunal ('the Tribunal'), in accordance with section 254(2)(a) of the *Planning Act 2016* ('PA'), **confirms** the decision of the assessment manager to refuse the application.

Background

2. The subject site consists of a residential lot with an area of 637m² and described as Lot 91 on RP85706. The subject site has direct frontage to Annerley Avenue, forming its western boundary. The subject site is located within the Gold Coast City Council local

government area. The immediate vicinity of the subject site is characterised by low density residential land uses.

3. Based on the material before the tribunal, the subject site is included within the Low Density Residential Zone under the *Gold Coast City Plan* (Version 11), being the current and applicable planning scheme for the subject site ('the planning scheme').
4. The subject site contains a substantial dwelling house and associated domestic facilities.
5. Of particular relevance to this appeal, the subject site has been determined by Council to be potentially flood prone and thus affected by the Flood Overlay under the planning scheme. Based upon a council flood search report, the Designated Flood Level (interchangeably known as the Defined Flood Level) for the subject site is 2.35m AHD (Australian Height Datum). The Flood Overlay Code under the planning scheme specifies that a minimum freeboard of 300mm is to be applied for residential land uses. Accordingly, habitable spaces within the dwelling house are subject to a minimum finished floor level ('FFL') of 2.65m AHD.
6. Of significance to this appeal, the appellant has converted a former garage to incorporate three ground-floor bedrooms with FFLs varying from 2.212m to 2.214m (taken to be AHD levels). The proposed development includes other building works not directly material to this appeal.
7. According to the material before the tribunal, the conversion was undertaken without the necessary building works development permit. An inspection was undertaken by a council officer in 2020. Council subsequently issued a letter to the appellant, dated 24 March 2020, advising that assessable development (building work), including the garage conversion to bedrooms, had been carried out without an effective development permit.
8. The appellant engaged the assessment manager on 9 June 2020 to assess and determine the application.
9. As a consequence of the application including building work not directly relevant to this appeal, the application was referred to Council as a concurrence agency pursuant to section 57 of the PA. This referral ('first referral') was undertaken on 30 June 2023 and only in accordance with the 'design and siting' referral trigger under the *Planning Regulation 2017* ('Planning Regulation') (schedule 9, part 3, division 2, table 3).
10. Council directed approval of the application under this referral, including an advisory statement in its referral agency response stating that:

The referral agency response has not assessed the development against the Flood overlay code of the City Plan and/or the Queensland Development Code MP3.5. A separate application is required should the development not comply with the above code/s, including but not limited to minimum floor levels and flood storage balancing.

11. At the hearing of this appeal, the tribunal was advised that the application was not decided following receipt of the referral agency response for the first referral. Instead, and as a consequence of the above-mentioned advisory statement, the appellant undertook a further referral ('second referral') to Council in relation to the 'flood hazard area' referral trigger under the Planning Regulation (schedule 9, part 3, division 2, table 12). The second referral was undertaken on 20 June 2024.
12. On 14 January 2025, Council issued its referral agency response to the second referral, directing refusal of the application. Council's grounds for directing refusal were as follows:

- a) *No flood modelling has been provided by the applicant to justify that a reduced flood level is appropriate.*
 - b) *The proposed habitable floor level of the converted garage at 2.212m AHD is below the combined defined flood level and minimum freeboard of 2.656m AHD.*
 - c) *A habitable floor level below the defined flood level and required 300mm freeboard does not comply with the minimum freeboard level declared by Council within the Flood overlay code.*
 - d) *The proposed floor level is located below the designated flood level of 2.356m AHD.*
 - e) *Council as a referral agency, does not have a discretion to use earlier building assessment provisions.*
 - f) *The proposed flood level is not appropriate having regard to the flood modelling and other relevant matters.*
 - g) *In considering any other matter Council considers appropriate, the Flood overlay code has been considered as follows:*
 - i. *The floor level does not comply with the purpose of the Flood overlay code in that the development does not avoid or lessen the adverse impacts of flooding and is not designed to mitigate the risk to life and property.*
 - ii. *The development is not considered to safeguard occupants and other people against illness and injury caused by flood water affecting the building.*
13. On 10 February 2025, the assessment manager decided to refuse the application and issued a decision notice in this regard. The reason for this refusal is stated to be the concurrence agency direction by Council. No other reasons for this refusal were given.
 14. The appellant duly lodged this appeal with the tribunal registrar on 7 March 2025.
 15. A site inspection was held on the subject site on Wednesday, 9 April 2025, at 10.00am, followed by a hearing at Council's Nerang offices.
 16. Following the inspection and hearing, the tribunal issued the following directions on 14 April 2025:

Following the recent inspection and hearing, the tribunal requires the following material:

- *Council to provide a complete documentary record and chronology of the development assessment process, including all referral requests, the show cause notice and response, and all referral agency responses; and*
- *Council to provide a copy of a current flood hazard search report for the subject site.*

*Can the above information please be provided in electronic format to the Registrar, copying in all other parties, by no later than **COB Thursday 24 April 2025.***

17. On 24 April 2025, Council provided a response to the tribunal's directions, including a full documentary record of the assessment process and the requested flood search report.

Jurisdiction

18. Section 229(1) of the PA provides that schedule 1 ('the schedule') of the PA states the matters that may be appealed to a tribunal.
19. Section 1(1)(b) of the schedule provides that the matters stated in table 1 of the schedule ('table 1') are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that table 1 only applies to a tribunal if the matter involves one of the matters set out in section 1(2).
20. Section 1(2)(g) provides that table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the *Building Act 1975* ('BA'), other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
21. This appeal involves a matter under the PA, that relates to the BA, that is not one that may or must be decided by the Queensland Building and Construction Commission.
22. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision framework

23. Generally, the onus rests on an appellant to establish that an appeal should be upheld (section 253(2) of the PA).
24. The tribunal is required to hear and decide an appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA).
25. 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 PA.
26. The tribunal is required to decide an appeal in one of the ways mentioned in section 254(2) of the PA, and the tribunal's decision takes the place of the decision appealed against (section 254(4)).
27. The tribunal must not make a change, other than a minor change, to a development application (section 254(3)).

Material considered

28. The material considered in arriving at this decision was:
 - a) An email and attachments dated 24 April 2025, submitted by Council in response to the tribunal's directions of 14 April 2025.
 - b) A set of documents handed out by Council to all present at the hearing, including Council's written submissions, a copy of Building Codes Queensland's *Guideline for the Construction of Buildings in Flood Hazard Areas*, a copy of the Australian Building Codes Board Standard *Construction of Buildings in Flood Hazard Areas* and a copy of Part MP3.5 of the Queensland Development Code *Construction of Buildings in Flood Hazard Areas*.
 - c) Form 10 Notice of Appeal lodged with the tribunal registrar on 7 March 2025, including a letter dated 25 February 2025.

- d) The assessment manager's decision notice dated 10 February 2025 and attached design plans.
- e) Council's referral agency response dated 14 January 2025, directing refusal of the application.
- f) The *Planning Act 2016* and the *Planning Regulation 2017*.
- g) The *Building Act 1975*.
- h) *Gold Coast City Plan Version 11*.

Findings of fact

- 29. The development application required referral under schedule 9, part 3, division 2, table 12, item 1(a) of the Planning Regulation.
- 30. Pursuant to schedule 9, part 3, division 2, table 12, item 2 of the Planning Regulation, the referral agency is the local government.
- 31. The subject site is within a flood hazard area and the application states FFLs (2.214m AHD and lower) that are significantly lower than the Designated Flood Level ('DFL') declared by Council (2.35m AHD), interchangeably known also as the Defined Flood Level. The matters a referral agency's assessment must be against are stated in schedule 9, part 3, division 2, table 12, item 4 of the Planning Regulation. This is:

If item 1, column 2, paragraph (a) applies – whether the defined flood level stated in the development application is appropriate having regard to all or any of the following matters –

 - a) *any flood modelling carried out for the premises or all or part of the flood hazard area where the premises are;*
 - b) *any recorded flood levels for all or part of the flood hazard area where the premises are;*
 - c) *any other matter the local government considers relevant.*
- 32. As stated in paragraph 23 above, the onus rests on the appellant to establish that his appeal should be upheld.
- 33. In relation to (a) above, the appellant has not provided any flood modelling to contradict the flood hazard area status of the subject site under the planning scheme, or the DFL determined by Council's flood modelling, or to support the application by demonstrating that the proposed FFLs of the three bedrooms are appropriate from a flood hazard potential perspective. On the other hand, Council has undertaken flood modelling that has determined that the subject site is within a flood hazard area and has specified a minimum FFL for the application of 2.65m AHD (some 438mm or 0.438m higher than the minimum FFL proposed in the application).
- 34. In relation to (b) above, the appellant has also not provided any evidence regarding recorded flood levels for the subject site or the wider vicinity.
- 35. In relation to (c) above, Council has correctly considered the provisions of the Flood Overlay Code in its referral agency assessment of the second referral. In this regard, section 1.5 of the planning scheme identifies the Flood Overlay Code as forming part of the building assessment provisions for building applications over a site within a designated flood hazard area.

36. Performance Outcome ('PO') 1 of the Flood Overlay Code requires that all development activity conducted on land below the designated flood level must not detrimentally affect the flood storage capacity of the catchment and the drainage regime. At the hearing, the tribunal was informed that the original FFL of the garage was raised as part of its conversion to the bedrooms. This would have reduced the flood storage capacity of the subject site, albeit to a relatively minor extent. In this regard, the appellant has not provided any evidence regarding how the flood storage capacity of the subject site has been maintained up to the DFL and therefore how PO1 has been achieved in this case.
37. The Flood Overlay Code also provides, in AO2.1, that building floor levels must be at or above the height of the combined designated flood level and minimum freeboard derived from Table 8.2.8-6. In short, this minimum level is 2.65m AHD. Clearly, the proposed FFLs of 2.212m to 2.214m AHD do not achieve AO2.1.
38. Performance Outcome ('PO') 2 provides, in part, that development that is located on flood prone land shall not be inundated by floodwaters during a designated flood. Whilst the appellant has, in this case, not provided any evidence to indicate that PO2 would be achieved by the proposed development, Council has, on the other hand, provided clear evidence suggesting the FFLs of the proposed development would render it potentially subject to inundation by floodwaters during a designated flood event.
39. Based on the above analysis, and in the absence of any evidence provided to the contrary by the appellant, the tribunal finds that the proposed development would not comply with the matters a referral agency's assessment must be against, as referenced in paragraph 31 above.
40. Accordingly, the tribunal finds that the appellant has not established that this appeal should be upheld.

Reasons for the decision

41. The tribunal, in accordance with section 254(2)(a) of the PA, has decided this appeal as set out in paragraph 1 above.
42. The tribunal's reasons for this decision are that it has found that the application does not comply with the matters a referral agency's assessment must be against, as referenced in paragraph 31 above, and that the appellant has not provided any evidence to demonstrate otherwise, or to otherwise establish that this appeal should be upheld.

Neil de Bruyn
Development Tribunal Chair
Date: 13 June 2025

Appeal rights

Schedule 1, table 2, item 1 of the Planning Act 2016 provides that an appeal may be made against a decision of a tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au