



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	25-024
Appellant:	Adam D Wardlaw and Caron L Wardlaw
Respondent (Assessment manager):	Gympie Regional Council (Council)
Site address:	89 Hood Road, Veteran in the State of Queensland and described as Lot 1 on MHP33611 (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 Gympie Regional Council's (**Council**) decision made on 18 July 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) and a preliminary approval for building work (**Development Application**), given by a decision notice dated 24 July 2025 (**Decision Notice**).

Date and time of hearing:	11.00am, 17 October 2025
Place of hearing:	Subject site
Tribunal:	Samantha Hall – Chair Warren Rowe – Member
Present:	Appellant Adam Wardlaw – Appellant Peter Swan – Revolution Town Planning (Appellant Agent) Kevin Dunn – Senior Pastor, Gympie Church of Christ (current owner of relocatable dwelling proposed by the Appellant for the secondary dwelling) Respondent Peter Tarlinton – Coordinator of Development Assessment, Council Tania Stenholm – Principal Planner, 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 89 Hood Road, Veteran (Lot 1 on MPH33611). Veteran is a suburb within the Council's local government area and is characterised by rural residential uses and some grazing in its northern parts. It is located to the north-east of Gympie itself and along the Bruce Highway.
2. The subject site:
 - (a) is a large irregular coffin shaped property comprising 3.230 hectares in total area with frontage to Hood Road;
 - (b) contains an existing dwelling house along its southern boundary (**primary dwelling**) and associated outbuildings located to the west of the dwelling;
 - (c) is not connected to the Council's water and wastewater network but is connected to the mains electricity supply and fixed wireless NBN;
 - (d) is largely cleared however there are two clear vegetation lines that criss-cross the subject site which follow a deep gully line which also crosses the subject site. The vegetation is mature and quite dense within the lines;
 - (e) has one existing vehicle crossover from Hood Road, with one driveway that leads to the primary dwelling.
3. The surrounding area comprises established dwelling houses on rural lots, most of which have associated outbuildings scattered around their dwellings.
4. The subject site is located within the Rural Zone of the *Gympie Regional Planning Scheme 2013* (version 4) (**Planning Scheme**) and as such is subject to assessment against the Rural Zone Code of the Planning Scheme (**Rural Zone Code**) and was also subject to the following Planning Scheme overlays:
 - (a) Bushfire Hazard Overlay; and
 - (b) Good Quality Agriculture Land.

The proposed development

5. On or about 20 May 2025, 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) (**MCU component**) and a preliminary approval for building work (**building work component**) (secondary dwelling) on the subject site pursuant to the Planning Scheme (**Development Application**).
6. "Dwelling House" is defined in the Planning Scheme as follows:

"A residential use of premises for one household which contains a single dwelling.

The use includes outbuildings and works normally associated with a dwelling and may include a secondary dwelling.

Does not include the following examples:

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

7. The Planning Scheme also provides an administrative definition of “Secondary Dwelling”, however, that definition differed slightly from the definition that appeared in the *Planning Regulation 2017 (Planning Regulation)* at the time the Development Application was made.
8. The definition in the Planning Regulation overrides that in the Planning Scheme¹ 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.”

9. The proposed development is:
 - (a) intended to house the adolescent children of the Appellant;
 - (b) a detached single story (on stumps) relocatable dwelling that will comprise 4 bedrooms, kitchen, laundry, study, living and dining areas. A small landing will be located off the laundry and living rooms and a porch located off the main bedroom, entry, dining and kitchen areas;
 - (c) a relocatable dwelling that has four (4) bedrooms, a kitchen, laundry, study, living and dining areas and uncovered outdoor car parking. The relocatable dwelling appears to be constructed of lightweight materials;
 - (d) to comprise a gross floor area (GFA) of 136.6m² under roof and an outdoor area comprising 10.9m²;
 - (e) to be serviced via a new on-site effluent treatment plant and disposal located between the proposed development and the primary dwelling and by two large rainwater tanks located adjacent to the northern side of the proposed development. A plumbing and drainage permit has already been issued for the on-site effluent treatment plant;
 - (f) to be located at the north-eastern portion of the subject site and set back approximately 8m from Hood Road and approximately 130 metres² from the primary dwelling;
 - (g) to be located on a high point of the subject site adjoining Hood Road on a building pad that had been created for the proposed development, from which the land falls quite sharply into the gully that transects the subject site. There is currently a large shed erected on the building pad and earthworks had been done to form the pad in preparation for the proposed development (**building pad**);
 - (h) to be accessed via the existing access for the primary dwelling, with the construction of a minor access track between the proposed development and the existing driveway, such that vehicles from both dwellings would enter and exit via the existing vehicle crossover. The Tribunal noted at the site inspection that an informal (not Council approved) vehicle crossover had been constructed which connected the

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

² This is an estimate by the Tribunal derived by taking measurements from the plans (which are not to scale) and is a direct line of sight measurement without taking into account the terrain between the two dwellings.

building pad directly with Hood Road, which the Tribunal understands was used for access when the earthworks were done to create the building pad;

- (i) not linked physically to the primary dwelling nor by any proposed path, due to the terrain between the primary dwelling and the building pad.

The Development Application

10. Table 5.23 Rural zone 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 including a secondary dwelling, where the secondary dwelling is attached to or located no further than 20m from the primary dwelling and does not exceed a gross floor area of 70m² in the Rural Residential Zone is *accepted development*.
11. Table 5.23 Rural zone of the Planning Scheme goes on to state that the category for assessment for a development application for a material change of use for a Dwelling House if it is not Accepted development is code assessment and the assessment benchmark is the Rural Zone Code – Section 1.
12. This means that if the proposed development was both attached to or located within 20m of the primary dwelling and did not exceed a gross floor area of 70m², then the proposed development would be accepted development. However, the proposed development is to be located approximately 130 metres³ from the primary dwelling and is proposed to have a gross floor area of 136.6m². So, the proposed development was not accepted development under the Planning Scheme.
13. Accordingly, pursuant to Table 5.23 Rural zone of the Planning Scheme, because the proposed development is a Dwelling House (secondary dwelling) and is not accepted development, it would be code assessable and assessed against the Rural Zone Code – Section 1.
14. On this basis, the Appellant lodged the Development Application on 20 May 2025. The Development Application was a combined development application seeking the MCU component and the building work component.
15. The Council did not give the Appellant a confirmation notice or an action notice under the Planning Act and the *Development Assessment Rules (version 3.0 (DAR))*.⁴
16. By correspondence dated 5 June 2025, the Council issued an Information Request to the Appellant, seeking further information with respect to:
 - (a) the gross floor area of the proposed development exceeding 70m²;
 - (b) the location of the proposed development to avoid conflict with the intent of the Rural Zone Code and remain ancillary and subordinate to the primary dwelling;
 - (c) the potential bushfire hazard and issues identified with the Bushfire Hazard Assessment and Management Plan submitted with the Development Application; and
 - (d) resubmitting a further version of the character study of Hood Road submitted with the Development Application as the version submitted was not legible and could not be interpreted.

³ Ibid.

⁴ This was raised in the Appellant's grounds of appeal, however, it didn't remain an issue in the appeal during the hearing. For completeness, the Tribunal is satisfied that a confirmation notice was not required to be issued pursuant to section 2 of the DAR as the Development Application did not require public notification, it did not require referral under the Act (per the Decision Notice) and was not required in accordance with sections 3.4 or 3.6 of the DAR.

17. The Information Request described the Development Application by reference to both the MCU component and the building work component but only requested information with respect to the MCU component.
18. The Appellant provided a response to the Information Request on or about 12 June 2025, which can be summarised as follows:
 - (a) with respect to gross floor area, the Appellant discussed the decision making rules for code assessable development under the Planning Act, including case law, to support the Appellant's position that the Council could approve a code assessable development application that did not comply with an assessment benchmark;
 - (b) the Appellant's response contended that a requirement for a secondary dwelling to be located within 20m of the primary dwelling was impractical in a rural setting;
 - (c) the Appellant did not consider it necessary to provide an amended Bushfire Hazard Assessment and Management Plan; and
 - (d) the Appellant provided an amended Hood Road Character Study with an improved resolution.
19. On 18 July 2025, the Development Application was refused by the Council and on 24 July 2025, the Council issued the Decision Notice.
20. The reasons for refusal given by the Council in the Decision Notice can be summarised as follows:
 - (a) while the Appellant applied for a material change of use for a "secondary dwelling" the use would be more properly characterised as a "dual occupancy";
 - (b) the proposed development conflicted with the assessment benchmarks in the Rural Zone Code, specifically Overall Outcome 3(f) of the Rural Zone Code (**OO(3)(f)**), Performance Outcome PO3 of the Rural Zone Code (**PO3**) and Performance Outcome PO4 of the Rural Zone Code (**PO4**);
 - (c) the proposed development conflicted with the State Planning Policy – July 2017 (**State Planning Policy**) in respect of natural hazards, risk and resilience;
 - (d) the conflicts with the Planning Scheme and State Planning Policy were material and compliance could not be achieved through the imposition of conditions;
 - (e) the Appellant had not demonstrated that the proposed development was suitable for the subject site having regard to the constraints of bushfire and the acceptable and tolerable level of risk and burden on emergency services from bushfire.
21. As with the Information Request, the Decision Notice described the Development Application by reference to both the MCU component and the building work component but only set out reasons for refusal that related to the MCU component.
22. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 11 August 2025.
23. The Appellant's Form 10 included an attachment marked as "Document A - Grounds of Appeal" prepared by the Appellant's town planner, Revolution Town Planning, which set out the Appellant's grounds of appeal and can be relevantly summarised as follows:
 - (a) no confirmation notice or action notice was issued by the Council;

- (b) the Decision Notice did not contain a decision on that part of the combined Development Application being for “Preliminary Approval for Building Work for a Dwelling House (Secondary Dwelling)”;
- (c) the Council provided no explanation as to why it stated in the Decision Notice that the proposed development was more properly characterised as a dual occupancy;
- (d) AO3.1, PO3 and OO(3)(f) served no planning purpose;
- (e) the Council provided no explanation as to why it stated the proposed development conflicted with PO4, which the Appellant argued it did not, given the slope of the land, the vegetation on the land and the significant distance between the primary dwelling and Hood Road;
- (f) the Council incorrectly assessed the proposed development against the State Planning Policy provisions as the State Planning Policy provisions were not assessment benchmarks for assessing a code assessable development application; and
- (g) the Development Application was supported by a Bushfire Hazard Assessment and Management Plan that had been prepared in accordance with the relevant bushfire provisions of the State Planning Policy.

24. A site inspection and a hearing were held at the subject site on 17 October 2025.

Jurisdiction

- 25. Schedule 1 of the Planning Act states the matters that may be appealed to a tribunal.⁵
- 26. In respect of the MCU component, 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 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).
- 27. 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.”
- 28. A “classified building” is defined in Schedule 2 of the Planning Act to mean a building classified under the Building Code⁶ as a class 1 building. A class 1 building under the Building Code is a residential dwelling and includes a dwelling house.
- 29. As the appeal with respect to the MCU component 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 this aspect of the appeal.
- 30. In respect of the building work component, section 1(2)(g) of Schedule 1 of the Planning Act provides that Table 1 applies to a tribunal if the appeal involves a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
- 31. As the appeal with respect to the building work component is also about a development application for a preliminary approval sought under the Planning Act for building work, the Tribunal is satisfied that it has jurisdiction to hear this aspect of the appeal as well.

⁵ Section 229(1)(a) of the Planning Act.

⁶ Section 12 of the Building Act provides a definition of the Building Code of Australia, which refers to the NCC.

Decision framework

32. The Decision Notice the subject of this appeal was issued by the Council on or about 24 July 2025.
33. The Appellant filed a Form 10 – Appeal Notice on or about 11 August 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 24 July 2025 until 22 August 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.⁷
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.⁸
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 person⁹.
38. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal¹⁰.
39. By email dated 10 October 2025, on behalf of the Tribunal, the Tribunal’s Registrar issued an Order to the parties requesting the Council provide written submissions to the Registry that set out the Council’s position with respect to the Appellant’s Grounds of Appeal in the Appellant’s Form 10 – Notice of Appeal (**Order**).
40. By email dated 15 October 2025, the Council provided the written submissions to the Registry in accordance with the Order (**Council’s first written submissions**).
41. By email dated 16 October 2025, the Appellant provided written submissions to the Registry, in response to the Council’s first written submissions (**Appellant’s first written submissions**). The Appellant’s first written submissions were not received by the Tribunal until after the hearing of this appeal, during the afternoon of 17 October 2025.
42. During the hearing, the Tribunal asked the Council to provide to the Tribunal legal advice received by the Council prior to the hearing with respect to the part of the Development Application that was for Preliminary Approval for Building Work for a Dwelling House (Secondary Dwelling), to which the Council’s oral submissions in the hearing referred.
43. By email dated 20 October 2025, on behalf of the Tribunal, the Tribunal’s Registrar issued an Order (**Further Order**) to the parties requesting the Council provide the legal advice and providing for the Appellant to provide a written submission in response to the legal advice, should it wish to do so.
44. By email dated 24 October 2025, the Council provided the legal advice to the Registry in accordance with the Further Order (**Council’s second written submissions**).
45. By email dated 31 October 2025, the Appellant provided its response to the Council’s legal advice to the Registry in accordance with the Further Order (**Appellant’s second written submissions**).

⁷ Section 253(2) of the Planning Act.

⁸ Section 253(4) of the Planning Act.

⁹ Section 249 of the Planning Act.

¹⁰ Section 253(5)(a) of the Planning Act.

46. The Tribunal grants the Council and the Appellant leave to respectively present the Council's first written submissions, the Appellant's first written submissions, the Council's second written submissions and the Appellant's second written submissions¹¹.
47. By email dated 14 November 2025, the Council provided a further submission that was unsolicited by the Tribunal (Council's third written submissions).
48. By email dated 14 November the Appellant provided a further submission that was also unsolicited by the Tribunal and provided in response to the Council's third written submissions (Appellant's third written submissions).
49. Despite the Tribunal not requesting either the Council's third written submissions or the Appellant's third written submissions, the Tribunal agreed to consider these additional submissions and grants the Council and the Appellant leave to respectively provide the Council's third written submissions and the Appellant's third written submissions.¹²
50. 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

51. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Appeal Notice', Document A - Grounds of Appeal and all correspondence and materials accompanying the appeal lodged with the Development Tribunals Registrar on or about 11 August 2025;
 - (b) the Council's first written submissions provided by email dated 15 October 2025;
 - (c) the Appellant's first written submissions provided by email dated 16 October 2025;
 - (d) the Council's second written submissions provided by email dated 31 October 2025;
 - (e) the Appellant's second written submissions provided by email dated 31 October 2025;
 - (f) the Council's third written submissions provided by email dated 14 November 2025;
 - (g) the Appellant's third written submissions provided by email dated 14 November 2025;
 - (h) oral submissions made at the hearing by the Appellant, the Appellant's representatives and the representatives for the Council;
 - (i) *Gympie Regional Planning Scheme 2013 (version 4) (**Planning Scheme**)*;
 - (j) *State Planning Policy – July 2017 (**State Planning Policy**)*;
 - (k) *Building Act 1975 (**Building Act**)*;

¹¹ Ibid.

¹² Ibid.

- (l) *Planning Act 2016 (Planning Act)*;
- (m) *Planning Regulation 2017 (Planning Regulation)*;
- (n) *Development Assessment Rules Version 3.0 (DAR)*.

Findings of fact

The Proposed Development

- 52. The Development Application sought a development permit for a material change of use and a preliminary approval for building work for a dwelling house (secondary dwelling) on the subject site pursuant to the Planning Scheme.
- 53. The subject site was located within the Rural Zone of the Planning Scheme and as such was subject to assessment against the Rural Zone Code and the following Planning Scheme overlays:
 - (a) Bushfire Hazard Overlay; and
 - (b) Good Quality Agriculture Land.
- 54. The Council refused the Development Application.
- 55. The Decision Notice stated the following relevant assessment benchmarks were not met by the Development Application:
 - (a) State Planning Policy 2017, part E, state interest: Natural hazards, risk and resilience, 2, 4, 5(a) and (b); and
 - (b) Planning Scheme, Rural Zone Code – Part 3(f), table 6.20 PO3 and PO4.
- 56. The Grounds of Appeal in the Appellant's Form 10 provided responses to the contention of non-compliance with the assessment benchmarks identified by the Council.

Rural Zone Code

- 57. As discussed earlier in this Decision Notice, pursuant to *Table 5.23 Rural zone* of the Planning Scheme, the Proposed Development being a material change of use for a Dwelling House (secondary dwelling) that is not accepted development, would be code assessable and assessed against the Rural Zone Code – Section 1.
- 58. 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.
- 59. The Planning Scheme is a categorising instrument for the purposes of section 45(3) of the Planning Act¹³ and it sets out the relevant benchmarks for the proposed development.
- 60. Section 5.3.3(4) of the Planning Scheme sets out the framework for assessing code assessable development and paragraph (a) identifies that code assessable development is to be assessed against all the assessment benchmarks identified in the assessment benchmarks column, in this case, the Rural Zone Code – Section 1.
- 61. Section 5.3.3.(4)(c) of the Planning Scheme relevantly identifies that code assessable development that complies with:

¹³ Sections 43(1) and (3) of the Planning Act.

- (a) the purpose and overall outcomes of the code complies with the code; and
 - (b) the performance or acceptable outcomes complies with the purpose and overall outcomes of the code.
62. Section 6.2.20.1(1) of the Rural Zone Code sets out the purpose of the zone, being to provide for a wide range of rural uses, provide opportunities for non-rural uses that are compatible with agriculture, the environment and the landscape character of the rural area and also protect or manage significant natural features, resources, processes and primary production.
63. Section 6.2.20.1(3) of the Rural Zone Code states that the purpose of the code will be achieved through a number of overall outcomes, which includes OO(3)(f).

Issues in dispute

64. In the Council's first written submissions, the Council identified it was taking the following position in the appeal with respect to the assessment benchmarks identified in the Decision Notice:
- (a) *"The Development Application should be refused because it does not comply with PO3 and OO(3)(f) of the Rural zone code;*
 - (b) *The proposed use is more properly characterised as a "dual occupancy" than a "secondary dwelling";*
 - (c) *The bushfire matters can otherwise be dealt with by a condition requiring an updated bushfire management plan be prepared;*
 - (d) *It no longer relies on PO4 or OO(3)(e) of the Rural zone code as a reason for refusal;*
 - (e) *There are no discretionary reasons why the Development Application should be approved."*
65. During the hearing, the Tribunal queried the parties about their understanding as to the issues that were in dispute in the appeal, given the Council's first written submissions. Both parties agreed that the issues in dispute in the appeal could be narrowed to the following:
- (a) The maximum gross floor area of the proposed development - assessment of the proposed development against the PO3 and OO(3)(f); and
 - (b) The categorisation of the use – whether the proposed development was a "secondary dwelling" for the purposes of the use definition in the Planning Regulation (and consequently whether it might be better characterised as a "dual occupancy").
66. Both parties referred to section 60 of the Planning Act with respect to the "bounded" assessment framework that it establishes for the assessment of code assessable development and the discretion that it provides to an assessment manager to approve a code assessable development application where the proposed development does not comply with some of the assessment benchmarks.

The building work component

67. The issues in dispute in the appeal turn largely on the assessment of the MCU component, however, the Appellant raised questions about the building work component, given the Council did not specifically address that component in either the Information Request or the Decision Notice.

68. The Appellant's grounds of appeal contended that the Decision Notice did not contain a decision about the building work component, only the MCU component.
69. The Appellant's first submission and the Appellant's second submission, contend that it was lawful for the Appellant to lodge a combined development application with the Council under section 51 of the *Building Act 1975* (**Building Act**) and that this interpretation was supported by the *Gerhardt v Brisbane City Council* series of cases and the approved forms for the lodgement of a development application, which allowed for the lodgement of a combined development application.
70. The Council's first submission commented briefly on the building work component, identifying that section 5.3.2(3) of the Planning Scheme did not make building work for a dwelling house associated with a material change of use assessable development. It went on to identify that the Council would only be a referral agency for building work associated with the MCU component for the purposes of the assessment of amenity and aesthetic requirements. The submission further stated that the Council did not issue a referral agency response because it was not requested to and it would not be appropriate to do so if the MCU component was not approved.
71. There was some confusion during the hearing about whether the Council did or did not assess the building work component of the proposed development. It was for this reason, that the Tribunal asked the Council to provide to the Tribunal any legal advice the Council received about the building work component, which the Council provided as the Council's second submission.
72. The Council's second submission clarified its position with respect to the building work component. While acknowledging that prior to receiving legal advice the Council had not taken a consistent position about this component of the Development Application, the Council clarified that in the wake of receiving legal advice, its position was that:
- (a) *"It was not the assessment manager for the building work and could not issue a preliminary approval for the building work;*
 - (b) *It had not received a referral request and as such it did not need to issue a referral agency response."*
73. The Council's second written submissions refuted the contentions in the Appellant's first written submissions as follows:
- (a) neither section 73A nor 54(3) of the Planning Act were relevant to the building work component. The former, because the Development Application was not made to a private certifier as the assessment manager and the latter because it applied to an assessment manager that was also a referral agency for the Development Application whereas in this case, the Council was the referral agency only and not the assessment manager;
 - (b) section 51 of the Building Act would not be relevant because the requisite development application had not been made, as it was a preliminary approval that was sought by the building work component; and
 - (c) even if the Council did issue a referral agency response (it denies it could issue an approval), the Appellant could not proceed with the building work in any event, as the Council had refused the MCU component and pursuant to section 83(1)(a)(ii) of the Building Act, a building development approval could not be granted by a private certifier until all necessary development approvals were granted under the Planning Act for the use. The Council had not approved the use of the subject site for a dwelling house (secondary dwelling).

The third written submissions

74. The Council's third written submissions were provided well after the Tribunal commenced its deliberations; however, the Tribunal agreed to accept and consider these additional submissions. To ensure procedural fairness was provided to the Appellant, the Tribunal also agreed to accept and consider the Appellant's third written submissions that were provided in response to the Council's third written submissions.
75. The Council's third written submissions referred to a development application for building work that the Appellant had made to the Council pursuant to section 51 of the Building Act, to support the Council's contention that the Appellant no longer sought to engage the Council as the certifier for the building work required to erect the proposed secondary dwelling.
76. The Appellant's third written submissions provided a response, fleshing out details about the development application for building work that had been made and explaining the events which lead the Appellant to withdraw that application.
77. Both sets of submissions related to an earlier development application for building work that the Appellant made to the Council in respect of the proposed secondary dwelling. That earlier development application did not include a material change of use component but was simply for building work and was withdrawn prior to the Appellant lodging the Development Application.
78. Given, the purpose of this tribunal hearing is for the Tribunal to consider the Development Application that was refused by the Council and not any other development application made by the Appellant that relates to the proposed secondary dwelling, the Tribunal finds that neither of the third written submissions is relevant to the consideration of the issues in dispute in this appeal.

PO3 and OO(3)(f)

79. Section 6.2.20.1(3) of the Rural Zone Code set out the overall outcomes through which the purpose of the code would be achieved.
80. OO(3)(f) of the Rural Zone Code stated that:

"Where development is a secondary dwelling, the secondary dwelling has a maximum gross floor area of 70m²."
81. AO3.1 of the Rural Zone Code provided no acceptable outcomes.
82. PO3 of the Rural Zone Code reflected the overall outcome, stating that:

"Where development is a secondary dwelling, the secondary dwelling has a maximum gross floor area of 70m²."
83. The combination of PO3 and OO(3)(f) of the Rural Zone Code, clearly exhibited an intention of the Planning Scheme that a secondary dwelling not have a gross floor area greater than 70m².
84. The Council contended that PO3 did not have an alternative acceptable solution. The requirement of PO3 was clear - a secondary dwelling must have a maximum gross floor area of 70m². The proposed development comprised a secondary dwelling which exceeded the maximum GFA of 70m² prescribed by the Planning Scheme for a secondary dwelling in the Rural Zone. The proposed GFA of the secondary dwelling of 136m² (internally) is almost double the maximum GFA prescribed by the Planning Scheme. Further, when including the roofed outdoor areas, the GFA increases to 155m².

85. The Planning Scheme clearly intends that secondary dwellings should not exceed 70m². There is a clear policy intent stated in the performance outcome and reinforced in the higher order OO(3)(f), to specifically limit the GFA of a secondary dwelling to 70m².
86. Performance outcome PO3 is a critical assessment benchmark in terms of the planning outcomes being sought by the Council for the Rural Zone.
87. The Council further contended that the proposed development could not be conditioned to achieve compliance with PO3 and OO(3)(f) because the reduction of the GFA of the proposed development by more than half its proposed size, would be a substantially different development and would not meet the test for a minor change¹⁴.
88. In contrast, the Appellant contended that the application of the 70m² GFA benchmark in PO3 and OO(3)(f) was arbitrary as it did not consider the context of the proposed secondary dwelling on the specific subject site. In addition, there was no acknowledgement by the Council that the provisions of the Rural Zone Code and other relevant zone codes in the Planning Scheme unduly and unreasonably removed the ability to consider the context of a proposed secondary dwelling when assessing a code assessable development application for a secondary dwelling.
89. The Appellant further contended that the proposed secondary dwelling would be subordinate to the primary dwelling as:
 - (a) the secondary dwelling would be of a much smaller scale than the primary dwelling, noting the primary dwelling (including domestic outbuildings) had a building footprint of approximately 480m², a swimming pool and substantial outdoor garden areas within a development footprint of approximately 4,100m² (excluding shared access areas). Conversely, the proposed secondary dwelling had a building footprint of approximately 155m² and a total development footprint of approximately 1,300m², the greater majority of which was land area for the on-site sewerage;
 - (b) the secondary dwelling would be accessed via the existing access that lead directly to the primary dwelling, via a minor access track diverging to the secondary dwelling;
 - (c) the occupancy of the secondary dwelling would be regulated by the landowner and residents of the primary dwelling; and
 - (d) the utilities connections to the secondary dwelling would be in the name of and paid by the landowner and residents of the primary dwelling.

Categorisation of the use – “secondary dwelling”

90. In the Decision Notice, the Council expressed the view that while the Appellant applied for a material change of use for a secondary dwelling, the proposed development was consistent with and therefore more properly described as a dual occupancy.
91. The Council’s first written submissions identified that it was the Council’s position that the proposed development was not subordinate to or used in conjunction with the primary dwelling as it:
 - (a) would be located 130 metres away from the primary dwelling;
 - (b) would be of a similar size to the existing primary dwelling;
 - (c) would have one more bedroom than the primary dwelling (four bedrooms in total);

¹⁴ See section 254(3) of the Planning Act which restricts the power of the tribunal to make a change to a proposed development, other than a minor change.

(d) would have its own separate vehicular access; and

(e) would be fenced off from the existing primary dwelling,

thus, it would be able to function completely separately to the primary dwelling.

92. The Planning Regulation's definition of a "secondary dwelling" requires that a secondary dwelling be "used in conjunction with" the primary dwelling. This isn't just about occupancy – it's about how the two buildings function together. The proposed dwelling would have its own parking and its own kitchen, laundry, study, living and dining areas. Indeed, it would have one additional bedroom to that of the primary dwelling. The proposed dwelling would be serviced by its own septic system. There are no spaces or facilities shared with the primary dwelling and the secondary dwelling would be visually and physically separated from the primary dwelling, specifically by the gully which transects the subject site. Functionally, the two dwellings could and would operate as two independent dwellings. For these reasons the Council contended that the proposed development would function more as a dual occupancy rather than a secondary dwelling.
93. The Appellant's grounds of appeal allege that AO3.1, PO3 and OO(3)(f) unduly and unlawfully attempt to determine what constitutes a secondary dwelling through the imposition of provisions of the Planning Scheme that ignore the definition of "secondary dwelling" in the Planning Regulation. The grounds go on to allege the provisions have no nexus with any planning purpose or planning policy, they assume the secondary dwelling is in an urban area whereas the assessment of a secondary dwelling in a rural area should take into consideration different forms of bulk and scale and that the GFA limit in PO3 and OO(3)(f) are not unique to the Rural Zone Code but are repeated in most zone codes throughout the Planning Scheme.
94. While not acknowledging that a familial link is required by the definition in the Planning Regulation, the Appellant identified that the intended use of the proposed development was for the landowner's adolescent children and that the utilities would be paid for by the landowner and not the children. For these reasons, the Appellant contended the proposed development was not a dual occupancy but more appropriately a secondary dwelling.
95. In response to the Appellant's position, at the hearing, the Council indicated that it had set limits to the size and separation of secondary dwellings across multiple codes within the Planning Scheme to ensure compliance with the Planning Regulation's definition, as is common practice within Queensland local governments. Attached to Council's first submission was the last five (5) decision notices issued by the Council for secondary dwellings in the Rural Zone in the Council's local government area, all of which had been approved at or below 70m². By setting the maximum GFA for a secondary dwelling at 70m² across multiple zones, the Council was reinforcing the importance of this planning requirement to the Planning Scheme.

Reasons for the decision

PO3 and OO(3)(f)

96. These assessment benchmarks relate to the size of a proposed secondary dwelling.
97. The Council contends that the proposed development does not comply with PO3 and OO(3)(f) as it exceeds the maximum GFA requirements expressed in those provision for secondary dwellings.
98. PO3 does not have an alternative acceptable solution. The requirement of PO3 is simple and clear - a secondary dwelling must have a maximum GFA of 70m².

99. The proposed development contemplates a dwelling which greatly exceeds the secondary dwelling maximum GFA in PO3 and OO(3)(f) of 70m². Indeed, the GFA for the proposed secondary dwelling of 136m² (internally) is almost double the prescribed GFA. The proposed dwelling inclusive of outdoor covered areas is 155m².
100. The Planning Scheme clearly intends that secondary dwellings should not exceed 70m². There is a clear policy intent stated in PO3, which is reinforced by the higher order overall outcome (3)(f), that specifically limits the GFA of a secondary dwelling in the Rural Zone to 70m². Indeed, as identified by the Appellant, this policy intent is repeated through a number of zones in the Planning Scheme, thus demonstrating a consistent planning intent by the Council.
101. Given this clear planning intent, coupled with the size of non-compliance of the proposed development with the maximum GFA identified in the Planning Scheme, the Tribunal is satisfied that the Development Application does not comply with PO3 and OO(3)(f).

Tribunal's discretion

102. The Council's first 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 constraint expressed in section 59(3) of the Planning Act that the assessment manager's decision must be based on the assessment of the proposed development carried out by the assessment manager pursuant to the requirements of section 45 of the Planning Act.¹⁵ In this case, the assessment was against the relevant benchmarks of the Rural Zone Code.
103. The Council expressed a view that the non-compliance with PO3 and OO(3)(f), while only one benchmark set out in the Rural Zone Code, was significant and in disregard to the essence of what not just the Rural Zone Code but the whole Planning Scheme was aiming to achieve. In the Council's view there was no compelling pattern of development, or site-specific circumstance, that would justify the discretion in section 60(2)(b) of the Planning Act being exercised in this case.
104. While the Appellant saw the repetition of the requirements of PO3 and OO(3)(f) in many use codes through the Planning Scheme as detrimental to the import of these benchmarks, the Tribunal disagrees and respects the consistency of planning intent demonstrated by the Council in so rigorously repeating these benchmarks and consistently reinforcing them through the Planning Scheme. This demonstrates a clear and strong planning intent of the Council with respect to the size of secondary dwellings within its planning scheme area.
105. So, when considering the non-compliance with PO3 and OO(3)(f), the Tribunal agrees that these assessment benchmarks are fundamental and the Tribunal is not prepared to exercise its discretion to approve the proposed development despite the conflict.

Conditioning to comply

106. In deciding this appeal, the Tribunal also considered section 60(2)(d) of the Planning Act with respect to whether any alleged non-compliance with assessment benchmarks could be addressed through imposing conditions on the proposed development. The Tribunal has formed the view that this is not appropriate or indeed possible.
107. It is the Tribunal's view that the core problems of distance from the primary dwelling, size of the proposed development and concerns about the practical access that will be obtained to the proposed development (while it is proposed that an access spur come off the existing driveway, there is a formed vehicle crossover to Hood Road which would undoubtedly be used in practice) are together fundamental to the Development Application. Responding to

¹⁵ The Council's First Written Submissions, page 2.

those issues would require reducing the gross floor area and number of bedrooms in the existing relocatable building and more importantly, relocating the proposed development to a site closer to the primary dwelling.

108. The Appellant's second written submissions propose that conditions could be imposed requiring a reduction in the number of bedrooms in the relocatable dwelling to three and reducing the GFA of the dwelling to between 100m² and 110m². This would be a reduction of 30%.
109. Pursuant to section 254(3) of the Planning Act, the Tribunal may make a change, including through the imposition of conditions, to a development application but only if that change is a minor change.
110. In this case, the Tribunal believes that reducing the GFA of the proposed development as proposed by the Appellant is not minor for the purposes of the definition of "minor change" in the Planning Act¹⁶ because the change would dramatically change the built form of the proposed development in terms of scale, bulk and appearance and would therefore result in a substantially different development. Accordingly, the Tribunal would have no jurisdiction to impose a condition of the nature proposed by the Appellant.
111. Further, even if the Tribunal could impose a condition requiring a reduction in the number of bedrooms and GFA as suggested by the Appellant, the resulting dwelling would still be close to 50% larger than the maximum GFA for a secondary dwelling provided in PO3 an OO(3)(f). Thus it would still be in substantial non-compliance with those assessment benchmarks.

Categorisation of the use – "secondary dwelling"

112. The relevant definition of secondary dwelling in the Planning Regulation requires a 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 are occupied by persons who are related.
113. The Appellant contends that the proposed secondary dwelling will be a future residence for the Appellant's adolescent children who currently reside 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.
114. Both parties quoted the decision of the Planning and Environment Court of *Lalis v Bundaberg Regional Council* [2018] QPELR 861, in which her Honour Judge Kefford considered 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.
115. When focussing on the use of the proposed secondary dwelling in conjunction with the primary dwelling, the Tribunal considers that the proposed secondary dwelling would present as a standalone development unrelated to the existing primary dwelling due to its size, location, distance from the primary dwelling and orientation directly on to Hood Road.
116. The Tribunal finds it difficult to identify any attributes that might be considered subordinate to or in conjunction with the primary dwelling, except for the metering and payment of the services, which the Tribunal understands would be paid for by the owner of the primary dwelling.
117. Indeed, the secondary dwelling would be capable of completely independent living. The proposed secondary dwelling comprises four bedrooms, its own bathroom, kitchen, laundry

¹⁶ See the definition of "minor change" in Schedule 2 of the Planning Act, as well as the definition of "substantially different development" in the DAR.

and a separate outdoor space. The secondary dwelling would have its own car space and while the formal access would be obtained from a spur to the proposed development from the existing driveway that services the primary dwelling, there is an informal vehicle crossover directly into the part of the subject site on which the proposed secondary dwelling will be located. The Tribunal finds it difficult to believe this informal access would not be utilised in a practical sense.

118. Given all these attributes, the proposed dwelling would not rely the dwelling house for any practical living purposes.
119. Indeed if it wasn't for the familial connection between the two dwellings, there would be no need for any of the occupants of the proposed secondary dwelling to go to the primary dwelling or use any of the facilities in the primary dwelling. Both dwellings could function completely independently of the other.
120. 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.
121. The Tribunal also turned its mind to whether conditions could be imposed that might change the development to better meet the definition of "secondary dwelling". As noted above with respect to the conflict with the assessment benchmarks of PO3 and OO(3)(f), the Tribunal is satisfied that any such conditions would fall foul of the "minor change" requirement. Such conditions would need to require the relocation of the proposed development closer to the primary dwelling, a reduction in the GFA and number of bedrooms of the proposed development and increased clarity around a shared driveway and vehicle crossover.
122. The Tribunal considers that the obstacles to compliance are too great and that any redesign and relocation of the proposed development to achieve compliance with the Rural Zone Code and the use definition, would better be addressed in a fresh development application.
123. Finally, while the Decision Notice alleges the proposed development might better meet the definition of another use, in the absence of direct evidence by the parties and given the Tribunal's jurisdictional bounds, 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.

The building work component

124. The building work component of the Development Application sought a preliminary approval for building work (secondary dwelling).
125. Neither the Information Request nor the Decision Notice specifically referred to the building work component, although the Council argued at the hearing that because the refusal in the Decision Notice was stated as being to "*the development application described below*" which was described as a "*Material Change of Use and preliminary approval for Building Work*" for "*a Dwelling House (Secondary Dwelling)*", the Council's decision to refuse the Development Application was a decision to refuse both components of the Development Application.
126. In the Council's second submission, the Council moved away from this original interpretation of the Decision Notice and clarified its position following receipt of legal advice that:
 - (a) "*It was not the assessment manager for the building work and could not issue a preliminary approval for the building work;*
 - (b) "*It had not received a referral request and as such it did not need to issue a referral agency response.*"

127. It is unfortunate the Council had not reached that conclusion earlier in the assessment of the Development Application, because had it done so, the Appellant might have had an opportunity to restructure the Development Application. However, the Tribunal does not have the jurisdiction to recast the form of the Development Application and must consider it within the bounds of section 253(4) of the Planning Act¹⁷.
128. Having considered the parties' submissions in respect of this point and the relevant provisions of the Planning Act, Planning Regulation and Building Act, the Tribunal agrees with the legal advice obtained by the Council and communicated in the Council's second written submissions that the building work component of the Development Application could not be lawfully decided by the Council and this Tribunal for the following reasons:
- (a) the Council was not the assessment manager for the building work component and therefore the Council could not grant the preliminary approval sought; and
 - (b) as the Council had not received a referral request, it was not required to issue a referral agency response.

Was the Council the assessment manager?

129. Section 5.3.2(3) of the Planning Scheme provides that "*Building work and operational work is accepted development, unless the tables of assessment state otherwise or unless otherwise prescribed within the Act or the Regulation*".
130. Section 5.7 (Reconfiguring a lot, Building and Operational Work) of the Planning Scheme states that table 5.27 (Building work if not associated with a material change of use) identifies the level of assessment for reconfiguring a lot, building and operational work.
131. Table 5.27 however, would not apply to the building work component for two reasons. Firstly, the table applies to building work "*not associated with a material change of use*" whereas the building work in the Development Application is associated with the MCU component. Secondly, the table identifies that "building work not listed in this table"¹⁸ would be accepted development with no assessment benchmarks.
132. Therefore, a development application for building work associated with the MCU component would be accepted development under the Planning Scheme. The Tribunal also notes that neither the Planning Act nor the Planning Regulation provide otherwise.
133. Accordingly, the Tribunal is satisfied and agrees with the Council that the Council would not be the assessment manager for a development application for building work associated with the MCU component.

Was the Council a referral agency?

134. The Tribunal is satisfied that the Council could be a referral agency for any building development application that was made for the proposed development due to Schedule 9, Division 2, Table 1 of the Planning Regulation. This table identifies that a local government is a referral agency for particular class 1 and class 10 buildings and structures involving possible amenity and aesthetic impacts.
135. However, the Appellant didn't refer the Development Application to the Council as a referral agency but instead lodged it with the Council as the assessment manager. For this reason,

¹⁷ Section 253(4) of the Planning Act provides that "*The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.*"

¹⁸ Table 5.27 (Building work if not associated with a material change of use) lists "Dwelling house if not located in the Character Residential zone" as the only building work. The subject site is not located in the Character Residential zone.

the Tribunal is satisfied that any referral jurisdiction of the Council was not enlivened and therefore it was not required to issue a referral agency response.

Application of section 51 of the Building Act, section 73A of the Planning Act and section 54(3) of the Planning Act

136. The Appellant's second written submissions agree that the building work component was not assessable against the Planning Scheme but instead contended that the building work component was for building work assessable against the building assessment provisions and submitted to the Council under section 51 of the Building Act.
137. The Appellant's second written submissions expressed a view that section 51 of the Building Act allowed a development application to be made to a local government as a single assessment manager for both the planning and building work components of a proposed development.
138. Section 51 of the Building Act relevantly provides that a local government must assess and decide an application and appoint or employ a building certifier to perform relevant building certification functions if:
 - (a) *"a person wishes to make a building development application to the local government; and*
 - (b) *if the application were made, it would be a properly made application; and"*.
139. "Building development application" is defined in section 6 of the Building Act as "*a development application for a development approval ... if the local government is the assessment manager for the application – to the extent the application is for building work that, under the Planning Act, must be assessed against the building assessment provisions; and"*.
140. It has been established above that the Council is not the assessment manager for the building work component. Accordingly, the Tribunal is of the view that the building work component would not meet the definition of "building development application" for the purposes of section 51 of the Building Act and therefore section 51 of the Building Act would not be applicable.
141. The Tribunal notes that the Appellant's first written submissions argue the relevance of sections 73A and 54(3) of the Planning Act to the assessment of the building work component. The Council's second written submissions refuted the Appellant's interpretation of these sections and the Appellant's second written submissions (which respond to the Council's second written submissions) did not raise these sections again. However, for completeness, the Tribunal considered the Appellant's first written submissions and the Council's second written submissions in respect of the relevance of these sections of the Planning Act. The Tribunal agrees with the Council's second submissions that neither section would apply to the building work component of the Development Application for the reasons given in the Council's second written submissions.

Conclusion

142. The purpose of the Rural Zone Code in section 6.2.20.1(1) of the Rural Zone Code is to provide for a wide range of rural uses, provide opportunities for non-rural uses that are compatible with agriculture, the environment and the landscape character of the rural area and also protect or manage significant natural features, resources, processes and primary production.
143. Pursuant to the Planning Scheme, the purpose of the Rural Zone Code is achieved through the overall outcomes in section 6.2.20.1(3) of the Rural Zone Code. To the extent the

proposed development does not comply with all the applicable overall outcomes, the purpose of the code is not achieved.

144. For the reasons set out above, it is the Tribunal's view that the Development Application does not comply with OO(3)(f).
145. The Planning Scheme also identifies that compliance with the performance or acceptable outcomes complies with the Rural Zone Code.
146. For the reasons set out above, it is the Tribunal's view that the Development Application does not comply with PO3.
147. 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.
148. 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 and meet the use definition of "secondary dwelling".
149. The Tribunal finds that the building work component of the Development Application could not be lawfully decided by the Council and this Tribunal for the following reasons:
 - (a) the Council was not the assessment manager for the building work component and therefore the Council could not grant the preliminary approval sought; and
 - (b) as the Council had not received a referral request, it was not required to issue a referral agency response.
150. 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: 20 November 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

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