Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**49-18**
Appellant:	Ms Janine Evans
Respondent (Assessment Manager):	Mr James Dunstan, Professional Certification Group
Co-respondent (Concurrence Agency): (if applicable)	Moreton Bay Regional Council
Site Address:	23 Bunyaville Close, Arana Hills, and described as Lot 55 on SP132804

Appeal

Appeal under the *Planning Act 2016* (PA), Section 229 and Schedule 1, Table 1, Item 1(a), against the decision of the Assessment Manager to refuse a building development application ('the application') for a detached addition to a Class 1a Dwelling on the subject site.

The Moreton Bay Regional Council (Council), as a concurrence agency, directed the assessment manager to refuse the application. The Council decision was made on the grounds that the proposed building work would not satisfy all of the requirements of Performance Outcome 3 (PO3) of the Dwelling House Code under the Moreton Bay Regional Council Planning Scheme 2016 (the planning scheme), or all of the requirements of Performance Criterion P2 of Part MP1.2 (MP1.2) of the Queensland Development Code (QDC).

Date and time of hearing:	The hearing was held on Wednesday, 27 February 2019 from 11am
Place of hearing:	23 Bunyaville Close, Arana Hills, and described as Lot 55 on SP132804 (the subject site)
Tribunal:	Mr Neil de Bruyn – Chair Ms Sarah Foley – Member Ms Amy Degenhart – Member
Present:	Ms Janine Evans – Appellant Mr Paul Evans Mr Owen Batchelor – Appellant's Representative Ms Melanie Marsellos – Council Representative

Decision:

The Development Tribunal (the Tribunal), in accordance with Section 254 of the *Planning Act 2016* (PA), changes the decision of Professional Certification Group, the assessment manager, to refuse the application for the proposed additions to the existing Class 1a dwelling on the subject site, to a decision to approve the application, subject to the inclusion of the following additional condition in the decision notice:

1. *The proposed building is to comply fully with RAD3 under Table 9.3.1.1 of the Dwelling House Code under the Moreton Bay Regional Council Planning Scheme, and with Acceptable Solution A2 of Part MP1.2 of the Queensland Development Code.*

Background

The subject site is a slightly irregularly-shaped cul-de-sac lot with an area of 768m². The land is located in the Moreton Bay suburb of Arana Hills and is within the General Residential Zone under the planning scheme. The subject site is also located within the Suburban Neighbourhood Precinct under that zone.

A number of planning scheme overlays apply to the subject site, as follows:

- Building Heights Overlay, under which the site is subject to a maximum building height of 8.5m.
- Bushfire Hazard Overlay, under which the site is mapped as being partly within a Medium Potential Bushfire Intensity Area, and predominantly within a Potential Impact Buffer Area.
- Environmental Areas Overlay, under which a part of the site is mapped as containing MLES (Matters of Local Environmental Significance).
- Stormwater Catchments Overlay, under which the site is mapped as being located within the Lower Pine River Catchment.

The proposed development in this case is a detached addition to an existing Class 1a dwelling house located on the subject site. Based on the architectural plans before the Tribunal in this appeal, the proposed addition is a detached, two-storey building to contain:

- At ground level – a home office, bathroom (shown as containing a shower, toilet and basin) and a kitchen area containing a sink, storage cupboards and what appears to be a refrigerator.
- At first floor level – a guest's bedroom, a "guest kid's" bedroom and a WC containing a toilet and basin.

These architectural plans are numbered 18-013, Drawings 02 to 08 (inclusive), all Issue 2 and dated 29.10.18. The total floor area of the proposed addition is given on the plans as 83.96m² (excluding the porch). It is assumed that the gross floor area (GFA) of the proposed addition would be slightly less than the above figure, given that the internal stairway does not constitute GFA, as defined. Based on the plans, the maximum height of the proposed addition would be less than the 8.5m maximum applicable to the site under the Building Height Overlay.

Significantly, the minimum setback of the proposed addition to the eastern side boundary of the site is shown as 1m, measured from the outermost projection of the building to the boundary (as required under both the planning scheme and MP1.2 of the QDC). The required setback to this side boundary is 2m (as provided by Acceptable Solution A2 (A2) of MP1.2 of the QDC).

The application was referred to Council as a concurrence agency. In this case, Council's concurrence agency jurisdiction was in relation to the design and siting (Schedule 9, Part 3, Division 2, Table 3 of the *Planning Regulation 2017*) of the proposed development, given that the setback of the proposed development to the side boundary of the site does not comply with the requirements of the Dwelling House Code and the QDC.

In a letter dated 29 October 2018, Council issued its concurrence agency response, directing the assessment manager to refuse the application in accordance with Section 56(1)(c) of the PA. The reasons for this decision were stated to be that the proposed development:

1. Would not satisfy the following requirements of PO3 of the Dwelling House Code, requiring dwelling houses and structures to:
   a. Be consistent with the intended character of the streetscape, precinct and zone; and
   d. maintain the privacy of adjoining properties.

2. Would not satisfy the requirement of Performance Criterion P2 of Part MP1.2 of the QDC that buildings and structures do not adversely impact on the amenity and privacy of residents of adjoining lots.

It was agreed, at the hearing, that only the above-mentioned planning scheme and QDC provisions were the subject of Council's concurrence agency decision.

Table 1.6.1 of the planning scheme identifies the Dwelling House Code as providing alternative provisions to the QDC boundary clearance provisions for a dwelling house. This code contains requirements for accepted development (RADs), and performance outcomes (POs) and acceptable outcomes (AOs) for assessable development.

Under the Dwelling House Code, RAD3 provides that, for a site in the Suburban Neighbourhood Precinct of the General Residential Zone (the applicable precinct and zone for the subject site), setbacks (excluding built-to-boundary walls) are to comply with the provisions of Table 9.3.1.4. This table provides that the side setbacks are to be "as per QDC."

Based on the area of the subject site being more than 450m², the applicable part of the QDC is MP1.2. A2 provides that, for a wall greater than 4.5m in height but not more than 7.5m (the case with the southern wall of the proposed development), the required side setback is 2m. As stated above, this part of the QDC requires that setbacks for buildings such as the proposed development are to be measured from the outermost projection of the building (e.g. the outside face of a fascia) to the vertical projection of the lot boundary.

In the Council's assessment of the application, it was noted that the southern side setback of the proposed development would be 1m (measured to the outermost projection), and therefore that the proposed development would not comply with A2 or RAD3. The Council's assessment thus turned to the applicable PO for RAD3, being PO3, and the applicable performance criterion for A2, being Performance Criterion P2 (P2).

As noted above, this assessment concluded that the proposed development would not meet all of the requirements of these performance measures, and the Council thus decided to direct the assessment manager to refuse the application on these grounds.

On or about 7 November 2018, the assessment manager issued a decision notice refusing the application. The appellant then lodged this appeal against that decision on 20 November 2018.

The following are the key issues in this appeal:

A. Whether, or not, the proposed development involves a material change of use that is assessable development, and therefore whether Section 83 of the *Building Act 1975* prevents the assessment manager in this case from granting the building works development permit applied for.

B. Whether, or not, the proposed development would, as concluded by the Council in its concurrence agency assessment of the application:

   - be inconsistent with the intended character of the streetscape, the precinct or the zone,
   - not maintain the privacy of adjoining properties, and
   - impact adversely on the amenity and privacy of residents of adjoining lots.

These key issues will be addressed in detail later in this decision notice.

Jurisdiction

This is an appeal under Section 229 and Schedule 1, Table 1, Item 1(a) of the PA, against the refusal of development application for a building works development permit for the proposed development. For a development tribunal, Table 1 applies pursuant to Section 1(2)(g) of Schedule 1.

Decision framework

- Pursuant to Section 253(2) of the PA, the onus in this case rests on the appellant to establish that the appeal should be upheld.

- Pursuant to Section 253(4) of the PA, the tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the assessment manager in this case.
- The Tribunal may, nevertheless, (but need not) consider other evidence presented by a party with leave of the Tribunal, or any information provided under Section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings).
- The Tribunal is required to decide the appeal in one of the ways mentioned in Section 254(2) of the PA.

Material Considered
The material considered in arriving at this decision comprises of the following:

1. 'Form 10 – Appeal Notice', grounds for appeal, plans and correspondence accompanying the appeal lodged with the Tribunal's Registrar on 20 November 2018.

2. The *Planning Act 2016* and the *Planning Regulation 2017*.

3. The *Building Act 1975*.

4. Moreton Bay Regional Council Planning Scheme Version 3.

5. Verbal submissions made by the parties at the site inspection and hearing held at the subject site on 27 February 2019.

6. The concurrence agency response of the Council for the proposed development, dated 29 October 2018.

7. The decision notice of the assessment manager refusing the application, dated 7 November 2018.

8. The further written submissions of both parties received on 18 March 2019 in response to the Registrar's request for information dated 1 March 2019.

Reasons for decision
The key issues in this appeal are repeated below:

A. Whether, or not, the proposed development involves a material change of use that is assessable development, and therefore whether Section 83 of the *Building Act 1975* prevents the assessment manager in this case from granting the building works development permit applied for.

B. Whether, or not, the proposed development would, as concluded by the Council in its concurrence agency assessment of the application:
   - be inconsistent with the intended character of the streetscape, the precinct or the zone,
   - not maintain the privacy of adjoining properties, and
   - impact adversely on the amenity and privacy of residents of adjoining lots.

These issues are addressed below:

A. Material Change of Use

The tribunal finds that the proposed development does constitute a material change of use that is assessable development, for which a material change of use development permit is required. This finding is based upon the following grounds:

- The additional 85m² of floor area proposed will constitute a material increase in the scale of the existing use of the premises (dwelling house and home office), both in terms of the

significant quantum of additional floor area involved, and in terms of its physical scale as a substantial, detached, two-storey building.

- The proposed development will not meet the applicable requirements for assessable development (in particular, RAD3 of the Dwelling House Code taken together with A2 of MP1.2 of the QDC) and the material change of use will thus be code assessable under the planning scheme.
- The exemption under Schedule 6, Part 2, Section 2(2) of the Planning Regulation 2017 does not apply as, with reference to Subsection (d)(i), the site, including the footprint of the proposed building, is affected by the Building Height Overlay and the Environmental Areas Overlay, both of which are relevant to the assessment of the material change of use.
- No other exemptions under the planning scheme or *Planning Regulation 2017* (the PR) apply in this case.

Under the PA, a material change of use is defined as including a material increase in the scale of the use of premises.

Within the Suburban Neighbourhood Precinct of the General Residential Zone, a material change of use involving a dwelling house is accepted development subject to requirements, the specified requirements being the applicable RADs under the Dwelling House Code. Under Section 5.3.3(1)(a)(ii) of the planning scheme, accepted development that does not comply with one or more applicable RADs becomes code assessable development (i.e. requires a material change of use development permit).

At the hearing, the parties were asked to comment on whether, or not, the proposed development constituted an assessable material change of use, given that it would increase the scale of the existing use of the subject site by approximately 85m², a potentially material increase, and would involve a substantial, two-storey detached building of a significant physical scale within the subject site. As neither party had given consideration to this question, the Tribunal gave the parties the opportunity to make further, written submissions on this question. The following questions were posed:

"At (the) *site inspection and hearing for Appeal 49-18, the question of whether or not the proposed development would constitute an assessable material change of use arose. As neither party had considered this aspect prior to the hearing, the Tribunal decided to invite further, written submissions on this aspect from the parties and, in particular, to invite both parties to provide responses to the following specific queries:*

- *Would the proposed development constitute a material change of use as defined in Schedule 2 of the Planning Act 2016; in particular, would it constitute a material increase in the intensity or scale of the existing use of the subject premises for a dwelling house? If the proposed development would not be considered to constitute a material increase in the intensity or scale of the existing use of the subject premises for a dwelling house, please detail the reasons for arriving at this conclusion.*

If the proposed development is considered to constitute a material increase in the intensity or scale of the existing use of the subject premises for a dwelling house, please give consideration to the question of whether such material change of use would constitute accepted development or assessable development under the Moreton Bay Planning Scheme and the Planning Act 2016, with particular reference to exemptions provided under these instruments, again providing the basis of and reasons for this conclusion.

- *Based on the submissions of both parties at the hearing, it is apparent that any requirement for a material change of use application would, in this case, arise from the acknowledged non-compliance with the side boundary setback requirements of the planning scheme (which references the Queensland Development Code). As such, in their responses, both parties are requested to consider the implications of re-siting the proposed development to comply in full with all applicable requirements for accepted*

development (RAD) under the Dwelling House Code, including RAD3 (Setbacks), and the appellant is requested to formally advise whether she would be prepared to consider this as an option for obviating any need for a material change of use application."

Written responses were received from both parties, on 18 March 2019.

In summary, Council's response stated that:

- The proposed development would be capable of being used as a self-contained dwelling and would thus constitute a dual-occupancy, which would require a material change of use development permit for which an impact assessable material change of use application (as the subject site is less than 1,000m² in area) would be required;
- the proposed development would constitute a material increase in the intensity or scale of the use of the premises and would therefore constitute a material change of use as defined under the PA;
- none of the exemptions set out under the planning scheme or the *Planning Regulation 2017* (PR) are applicable in this case, and the material change of use involved would constitute assessable development; and that
- as the proposed development constitutes an impact assessable material change of use for a dual-occupancy, the re-siting of the proposed development would not obviate the need for a material change of use development permit.

The Tribunal does not accept the Council's assertion that the proposed development constitutes a dual-occupancy. Under the planning scheme, a dual-occupancy is defined as *"premises containing two dwellings, each for a separate household …"* The Tribunal is satisfied that the purpose of the proposed development is for family use in conjunction with the main dwelling. Accordingly, the Tribunal finds that the proposed development does not require an impact assessable material change of use application.

The Tribunal accepts the Council's conclusion that the proposed development would constitute a material increase in the scale of the use of the premises, and would thus constitute a material change of use. The Tribunal also accepts the Council's conclusion that none of the exemptions set out in the planning scheme and the PR apply in this case.

In summary, the appellant's response stated that:

- The concurrence agency did not reject the application on the basis that a material change of use approval was required, and therefore it is not appropriate for the Tribunal to enquire into this aspect, and decide the appeal on a ground or basis outside of the actual events and grounds for the assessment manager's decision;
- the proposed development does not constitute a material increase in the scale or intensity of the use of the subject site, or any new or additional use, and would remain an ancillary part of the existing use; and that
- the appellant is not in favour re-siting of the proposed development to achieve compliance with RAD3 and P2, on the grounds of increased costs, reduced energy efficiency (e.g. arising from the removal of eaves) and unfeasibility.

The Tribunal does not accept the appellant's assertion that it is not appropriate for the Tribunal to consider whether, or not, the proposed development would constitute an assessable material change of use. It would, in fact, not be appropriate, for example, for a tribunal to decide an appeal so as to pave the way for the approval of a building application that would pre-empt a necessary material change of use assessment for the relevant development. This principle, providing that any material change of use assessment and approval should precede the giving of a building works approval for the development, is clearly established by Section 83(1) of the *Building Act 1975.*

The Tribunal also does not accept that the proposed development does not constitute a material change of use, on the grounds stated earlier.

The Tribunal notes that the appellant does not favour re-siting of the proposed development to achieve compliance with RAD3 and A2 but, in view of the probability that doing so will avoid the need for a lengthy and costly material change of use application process, the Tribunal finds that re-siting the proposed development to achieve full compliance is necessary in this case.

B. Character, Amenity and Privacy

Given the above-mentioned findings of the Tribunal, to the effect that the proposed development would require a material change of use development permit, unless modified to achieve full compliance with RAD3 under the Dwelling House Code and A2 of MP1.2 of the QDC, and that the re-siting of the proposed development to comply would achieve this outcome, the Tribunal finds that the application should be conditionally approved subject to full compliance with RAD3 and A2 of MP1.2 of the QDC.

As such, full compliance would ensure that the issues of consistency with the intended character of the streetscape, the precinct and the zone and the maintenance of the amenity and privacy of adjoining properties do not require any further examination.

Based upon the above findings, the decision of the Tribunal is to change the assessment manager's decision to one of conditional approval, subject to the imposition of a condition requiring full compliance with RAD3 and A2 of MP1.2 of the QDC.

This will require the siting of the proposed development to be changed, and it is thus necessary for consideration to be given to whether or not such a change constitutes a minor change to an application, as defined under the PA.

A minor change to a development application is one that does not result in a substantially different development, and would not cause:

- The inclusion of prohibited development,
- referral to a referral agency, or any extra referral agencies,
- a referral agency to assess the application against, or have regard to, prescribed matters other than those the referral agency must have assessed the original application against, or had regard to when assessing the original application, or
- public notification to be required.

Having regard to the characteristics of a substantially different development, as set out in Schedule 1 of the Development Assessment Rules (Version 1.1, effective 11 August 2017), the Tribunal finds that the change to the application would not result in a substantially different development, because it would not:

- Involve a new use of the site,
- involve a new parcel of land,
- dramatically change the built form in terms of its scale, bulk or appearance,
- change the ability of the proposed development to operate as intended,
- remove any component integral to the operation of the proposed development,
- impact on traffic flow or the transport network,
- introduce any new impacts, or increase the severity of known impacts,
- remove any incentive or offset component that would balance a negative impact, or
- impact on infrastructure provision.

The Tribunal finds that the change to the application would also not cause:

- the inclusion of prohibited development,
- referral to any referral agencies, or
- public notification to be required.

On the basis of the above, the Tribunal finds that the re-siting of the proposed development to comply with the applicable setback requirements, and therefore the proposed approval condition, would constitute a minor change.

The Development Tribunal (the Tribunal), in accordance with Section 254 of the *Planning Act 2016* (PA), changes the decision of Professional Certification Group, the assessment manager, to refuse the application for the proposed additions to the existing Class 1a dwelling on the subject site, to a decision to approve the application, subject to the inclusion of the following additional condition in the decision notice:

1. *The proposed building is to comply fully with RAD3 under Table 9.3.1.1 of the Dwelling House Code under the Moreton Bay Regional Council Planning Scheme, and with Acceptable Solution A2 of Part MP1.2 of the Queensland Development Code.*

The reasons for this decision, in summary, are:

1. The proposed development, as submitted, involves an assessable material change of use and therefore requires a material change development application to be approved by Council, involving a significant time and cost impost on the development. The inclusion of the above-mentioned condition will avoid this process and the associated time and cost impost (however, the appellant's option of proceeding with a separate material change of use application, as a means of seeking Council's approval to a side setback reduction, remains open).
2. There is sufficient area within the subject site to achieve the required side boundary setback of 2m, measured to the outermost projection of the building, without necessarily removing the proposed eaves and therefore affecting the energy efficiency of the proposed building. The re-siting of the building would only require minor, if any, alterations to the existing children's play area within the site.
3. The imposition of the above-mentioned condition would eliminate any reasonable Council concerns regarding impacts on local character, amenity and privacy.
4. The change to the siting of the proposed development to comply with the above-mentioned condition of approval would constitute a minor change as defined in the PA.

Neil deBruyn
Development Tribunal Chair
Date: 5 April 2019

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:

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

Telephone (07) 1800 804 833 Facsimile (07) 3237 1248
Email: registrar@hpw.qld.gov.au