Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**19-051**
Appellant:	Alexander Karl Klibschon
Respondent (Assessment Manager):	Toowoomba Regional Council
Site Address:	24 Chamberlain Street, North Toowoomba, formally described as Lot 29 on RP63111 ('the subject site')

Appeal

Appeal under section 229 and item 1(c), table 1, section 1 of schedule 1 of the *Planning Act 2016* ("the PA") against specific development conditions of a material change of use development permit ("development permit"), issued by the assessment manager in relation to a material change of use application ("the application") for the use of the subject site for a multiple dwelling comprising of three dwellings.

Date and time of hearing:	Wednesday, 4 March 2020 at 10:30am (site inspection) and 11:30am (hearing)
Place of hearing:	The subject site (site inspection) and Toowoomba Regional Council offices (hearing)
Tribunal:	Neil de Bruyn – Chairperson Anne-Maree Ireland - Member Michael Moran – Member
Present:	Alex Klibschon – Appellant Andrew Hill – Town Planning Consultant for the Appellant Lindsay Reid – Civil Engineering Consultant for the Appellant Lillian Paterson – Toowoomba Regional Council Representative Krys den Hertog – Toowoomba Regional Council Representative Matthew Coleman – Toowoomba Regional Council Representative Damitha Wickramasinghe – Toowoomba Regional Council Representative David Quinlan – Toowoomba Regional Council Representative

Decision:

The Development Tribunal ('the tribunal'), in accordance with section 254(2)(b) of the *Planning Act 2016* ('the PA'), **changes** the decision of the assessment manager to approve the application subject to conditions, by deleting Conditions 30 and 69.1 of the development permit and by amending the provisions of Condition 75.2 to the following:

"75.2 Provide root barrier devices where tree plantings are sited within two (2) metres of the council sewerage infrastructure within the subject lot, or plantings within this area are to comprise of species that will not impact on or compromise this sewerage infrastructure in any way.

Barriers must be fit for purpose and installed in accordance with the manufacturer's specification.

A detailed landscaping plan, prepared by a suitably qualified person and clearly demonstrating compliance with this condition, is to be included in the operational works development application for the proposed multiple dwelling development."

Background:

1. On 17 December 2018, the appellant made a development application ("the application") to the assessment manager, seeking development permit for a material change of use of the subject site for a multiple dwelling as defined under the applicable planning scheme, the Toowoomba Regional Planning Scheme, Version 19 ("the planning scheme").

2. The subject site is 776m² in extent and has a road frontage to Chamberlain Street, a local access road, on its northern side. The subject site is included in the Low-Medium Density Residential Zone and the Urban Residential Zone Precinct under the planning scheme. The site is also subject to the Airport Environs Overlay under the planning scheme.

3. Significantly, the rear half of the subject site is traversed diagonally by a sewer main, including an associated "manhole," which are assets of the Toowoomba Regional Council. Part of one of the dwelling units of the proposed multiple dwelling development is to be built over the sewer alignment, but will be clear of the sewer "manhole."

4. The proposed multiple dwelling is to incorporate the existing dwelling house situated on the subject site and to include two new dwellings, resulting in a total of three dwellings. The existing dwelling house is identified on the architectural plans included in the application as Unit 2.

5. A new Unit 1 is proposed to be situated on the eastern side of the existing dwelling house, with its own, dedicated new driveway access from Chamberlain Street. Part of this dwelling unit is to be built over the aforementioned sewer main.

6. A new Unit 3 is to be situated on the southern side (that is, to the rear) of the existing dwelling house, with access by way of a widening of the existing driveway servicing the existing dwelling house, and a new 3m wide driveway aligned to the west of the existing dwelling house.

7. Each of the two new dwellings is to include parking for two cars. An existing shed/garage on the subject site is to be demolished to make way for the proposed multiple dwelling development.

8. Under the planning scheme, the use of a lot within the Low-Medium Density Residential Zone and the Urban Residential Zone Precinct for a multiple dwelling is categorised as assessable development, requiring a code assessable material change of use application, where, as is the case here, the multiple dwelling does not exceed a building height of 8.5m and is not to be located on a hatchet lot (Table 5.5:2 of the planning scheme). Such an application is required to be assessed against a number of assessment benchmarks, including the Low-Medium Density Residential Zone Code, the Medium Density Residential Code, the Landscaping Code and the Works and Services Code.

9. The assessment manager issued its confirmation notice on 4 April 2019, and identified that the application was to be referred to the State Assessment and Referral Agency ("SARA"), as the site is located within 100m of a state-controlled road intersection. The application was duly referred to SARA on 12 April 2019, which responded on 1 May 2019 advising that it had no requirements relating to the application.

10. Based on the appeal material initially provided at lodgement, it seemed that the application was not referred to SARA within the timeframe specified in Section 5.1 of the Development Assessment Rules ("the DAR"), and may accordingly have lapsed pursuant to Section 31.1 of the DAR. Notably, the material provided initially did not include evidence of any steps having been taken under Section 29 of the DAR to ensure that the application did not lapse as a consequence of this apparent delay, or to "revive" the application under Section 31.2 of the DAR.

11. Accordingly, the tribunal issued the following directions to the parties, by email on 15 April 2020*:*

1. The parties are to consider the matters set out below and advise as to whether or not the subject development application ("the application") lapsed during the assessment process and was not revived, and are to provide a written submission (no more than three pages and as per the timetable in paragraph 4 below) as to the validity, or otherwise, of the material change of use development permit issued by the assessment manager under its decision notice dated 31 October 2019:

a. The application was properly-made on 17 December 2018.
b. As the site is located within 100m of a state-controlled road intersection, the application required referral to the State Assessment and Referral Agency ("SARA") under Schedule 10, Part 9, Division 4, Subdivision 2, Table 4, Item 1(c) of the Planning Regulation 2017 ("the PR").
c. The confirmation period for the application ended on 8 January 2019, 10 days (as defined under the Development Assessment Rules ("DAR") applicable at the time, dated 11 August 2017) after the assessment manager received the application on 17 December 2018.
d. No confirmation notice had been issued by that date, ostensibly based on Section 2.2 of the DAR, as it was presumably considered at the time that the application did not require public notification or referral under the Planning Act 2016 ("the PA"), and was properly-made.
e. Section 54(1) of the PA requires an application requiring referral to be referred to each referral agency within the time period stated in the DAR. Section 5.1 of the DAR requires that an applicant must refer an application within 10 days, or further period agreed between the applicant and the assessment manager, after a confirmation notice has been issued, or the confirmation period has ended. In this case, as no confirmation notice was issued until much later in the process, on 4 April 2019, and therefore well after the confirmation period had ended on 8 January 2019, and as there is no evidence before the tribunal of any agreed extension of this period, the application was required to have been referred to SARA by 10 days after 8 January 2019, being 22 January 2019.
f. Based on the evidence before the tribunal, the application was referred to SARA on 12 April 2019, more than 50 days after 22 January 2019.
g. Section 31.1 of the DAR provides that an application lapses if (among other actions) an applicant does not refer an application to each referral agency and notify the assessment manager in accordance with Section 5 of the DAR within the prescribed period (in this case, referral by 22 January 2019).
h. Section 29 of the DAR contains provisions under which an application the subject of a missed referral does not lapse. This relies on a notice being issued by a party to the application under Section 29.2. The tribunal has no evidence before it of such a notice having been issued in this case.

i. Section 31.2 of the DAR contains provisions providing for the revival of a lapsed application within 20 days of the application lapsing. These rely on the applicant undertaking the referral and the associated notification of the assessment manager, and the notification of the assessment manager of such actions, within that time period. Again, The tribunal has no evidence before it of such actions having been undertaken within the 20-day period prescribed under Section 31.1.

j. On the basis of the above evidence, it appears that the application lapsed on 22 January 2019 and was not revived.

2. The parties are to provide copies of all documentation and any other evidence to support their responses to 1. above.

3. The Tribunal also requests that the written submissions referred to above address the question of whether the decision by the Planning and Environment Court in Perivall Pty Ltd v Rockhampton Regional Council & Ors [2018] QPEC 46 presents any impediment to the Tribunal's finding that the material change of use development permit issued by the Council under its decision notice dated 31 October 2019 was invalid, on the ground that the application lapsed during the assessment process and was not revived.

4. The appellant is required to respond to the above directions by 4pm on 29 April 2020. Thereafter, the Council is required to respond to the above directions, and the appellant's response to same, within 10 business days of receipt of the appellant's response.

12. By email on 29 April 2020, the appellant provided a response to the tribunal's above-mentioned directions, confirming that a "missed-referral notice" had indeed been given to the assessment manager pursuant to section 29.2 of the DAR, and providing a copy of such notice. As such notice had been given on 2 April 2019, and as the referral to SARA had been undertaken on 12 April 2019, the requirements of Section 29 of the DAR had, in fact, been met and, as such, the application did not lapse.

13. The assessment manager issued an information request on 8 January 2019, prior to the missed referral having been discovered and remedied as outlined above. The appellant provided a response to the information request dated 30 August 2019. This response included updated architectural plans ("updated plans").

14. The assessment manager conditionally approved the application on 24 October 2019 and issued its decision notice dated 31 October 2019. The decision notice included the following conditions and sub-conditions relevant to this appeal:

Condition 30

Submit to Council for endorsement, and have endorsed, amended plans demonstrating that all proposed and existing buildings and structures are clear of Council's existing sewer in accordance with the Queensland Development Code QDC MP1.4 – Building Over or Near Relevant Infrastructure by:

30.1 Redesigning the site layout; and/or

30.2 Re-aligning Council's existing sewer.

Condition 69

69.1 Car parking spaces must be located within the development site, at least 4.8m south of the northern property boundary (i.e. outside of the front setback);

Note: This will require an amended site layout supported by amended RPEQ certified manoeuvring diagrams.

Condition 73

Amend the Site Plan and Landscape Plan as follows:

73.1 Provide a soft-scaped area (e.g. grass, ground covers, garden beds, shrubs, trees) within the front setback of Unit 1 to the east of the driveway for Unit 1 with minimum dimensions of 4.8m x 4.8m;

73.2 Provide a pedestrian path between the footpath and the front door for Unit 1. Where within the conditioned soft-scaped area, the pedestrian path may comprise stepping stones or a hard surface (e.g. paving or concrete) with a maximum width of 1.2m; and

73.3 Provide a vehicle resistant barrier within the front setback of Unit 1 and east of the driveway for Unit 1 to prevent parking of vehicles on the soft-scaped area.

Note: An appropriate vehicle resistant barrier may comprise or include fencing, retaining wall/s and shrub or tree plantings.

Condition 75

The development must be landscaped in accordance with the conditions of this Development Approval, the requirements listed in the Landscape Code contained within the Toowoomba Regional Planning Scheme and the following:

75.2 Provide root barrier devices where tree plantings are sited within two (2) metres of any services and or structures unless otherwise varied in the approved Landscape Plan. Barriers must be fit for purpose and installed in accordance with the manufacturer's specification;

15. On 29 November 2019, the appellant lodged this appeal against the above-mentioned development conditions.

16. At the hearing of this appeal, the assessment manager's representatives proposed an alternative site layout which they considered would achieve the assessment manager's objectives in terms of protecting the sewer main and locating all car parking spaces outside of the front setback applicable to the subject site (that is to say, would achieve the intent of Conditions 30 and 69.1 of the development permit).

17. At the hearing, the appellant stated that he was open to considering this proposal. Accordingly, the tribunal issued the following directions to the parties, by email on 11 March 2020:

1. The Appellant is to provide the following further material to the Registrar by email on or before 4pm on Friday 27 March 2020:

a) Written confirmation of whether, or not, he is prepared to amend the site layout and design of the proposed development, to:

i. Delete the garage, porch and driveway (including kerb crossing) at the front (northern side) of Unit 1 as shown on the approved plans;
ii. relocate Unit 1 to a front setback (to the site frontage) equal to that of Unit 2 (existing dwelling), such that the Class 1 building component of Unit 1 will then be entirely clear of the zone of influence of the existing sewer main traversing the site and the associated "manhole" within the site; and
iii. provide a class 10 garage/carport at the rear (southern side) of Unit 1, to be accessed by way of an extension of the driveway on the western side of the site, also servicing Unit 3.

b) If the appellant confirms he is willing to amend the site layout and design of the proposed development as mentioned above, provide an amended set of development plans of the proposed development, including:

i. the above-mentioned amendments to the Unit 1 design and site layout, showing all dimensions;
ii. the appropriate design vehicle swept path diagrams for the redesigned Unit 1, demonstrating that vehicles entering and departing the site to/from this dwelling will do so in a forward direction without the need for multiple turning manoeuvres; and
iii. an amended landscaping plan, prepared by a suitably qualified person:
- *showing, and specifically identifying, all plant species to be located within 2m of the Council sewer main and associated infrastructure, and either confirming that such species will be of a type that will not affect or compromise this infrastructure in any way, or identifying all specimens that will require the installation of appropriate root barriers for this purpose; and*
- *showing, in detail, the soft landscaping of the full width of the front setback area of Unit 1, including a pedestrian pathway to the front door.*

2. The Registrar will forward the appellant's response in relation to (a) and (b) above to Council as soon as practicable following receipt. In the event that the appellant provides an amended set of development plans in accordance with (b) above, the following order is made:

a) Council is to provide any submissions in response to the material submitted by the appellant, to the Registrar by email, within 10 business days of receipt of the material from the Registrar.

The parties should contact the Registry if they wish to seek any variation of the above orders or directions.

18. By email dated 27 March 2020, the appellant responded to the above-mentioned directions, declining to amend the layout of the proposed development and including an amended engineering report dealing with the proposal to build one of the dwelling units over the sewer main within the subject site. The assessment manager provided its response to the appellant's submissions by email dated 8 April 2020.

Jurisdiction:

19. 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.

20. Section 1(1) 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 a list of matters set out in section 1(2).

21. Section 1(2)(b) provides that Table 1 applies to a tribunal if the matter involves a provision of a development approval for a material change of use for a classified building. A classified building includes a Class 1 building or buildings under the Building Code of Australia, which classification applies to the three dwellings comprising the subject development. A provision of a development approval includes a development condition or conditions.

22. Item 1(c) of Table 1 provides that an appeal may be made to a tribunal against a provision of a development approval which, as stated above, includes a development condition.

23. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision Framework:

24. For this appeal, the onus rests on the appellant to establish that the appeal should be upheld (section 253(2) of PA).

25. The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, 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 the appeal in one of the ways mentioned in section 254(2) of the PA.

Material Considered:

27. The following hardcopy material:

a) 'Form 10 – Notice of Appeal' lodged on the appellant's behalf with the tribunal's registrar by Alpha Planning Applications on 29 November 2019;

b) Application and Written Representations for Appeal dated 28 November 2019, including

i. Development application as submitted to the assessment manager, dated 12 December 2018, including:

- Architectural plans,
- DA Form 1,
- engineering material,
- a landscaping plan, and
- assessments against assessment benchmarks;

ii. assessment manager's information request dated 8 January 2019;

iii. assessment manager's confirmation notice dated 4 April 2019;

iv. appellant's response to the information request dated 30 August, including:

- amended architectural plans,
- further engineering material, and
- an amended landscaping plan;

v. assessment manager decision notice dated 31 October 2019; and

vi. Building Over Sewer Report dated 31 October 2019 and associated engineering plans.

c) a folder provided by the respondent's representatives to the tribunal and the appellant's representatives at the hearing, including the respondent's written submissions.

28. the *Planning Act 2016* and *Planning Regulation 2017*;

29. the *Development Assessment Rules*, Version 1.1 effective as at 11 August 2017;

30. the Toowoomba Regional Planning Scheme, Version 19;

31. The following electronic material:

a) Power Point presentation made by a representative of the assessment manager at the hearing.

b) email and attachments dated 27 March 2020, received by the registrar from the appellant in response to the tribunal's directions dated 11 March 2020.

c) email and attachments dated 8 April 2020, received by the registrar from the assessment manager in response to the appellant's submissions dated 27 March 2020.

d) email and attachments received by the registrar on 29 April 2020 from the appellant, including a copy of the missed-referral notice given by the appellant to the assessment manager on 2 April 2019; and

e) email received by the registrar on 30 April 2020 from the assessment manager, confirming concurrence with the appellant's confirmation that the application did not lapse.

Findings of Fact:

32. The tribunal makes the following findings:

1. <u>The application did not lapse</u>

   The tribunal finds that the application did not lapse, despite the required referral to SARA not having been completed within ten days (as defined in the DAR) of the end of the confirmation period for the application, and that period not having been extended by agreement under the DAR.

   The tribunal accepts the additional evidence provided by the parties in response to its directions dated 15 April 2020 and, in particular, the missed referral notice given by the appellant to the assessment manager on 2 April 2019 and the fact that the application was subsequently properly referred to SARA.

2. <u>Condition 30 is not a necessary or permitted condition</u>

   This condition requires the provision of amended plans demonstrating that all buildings will be clear of Council's existing sewer main traversing the site, either by way of a redesigned site layout or by way of a proposed realignment of the sewer main.

   The tribunal finds that this condition is:

   a) in conflict with section 8(5) of the PA, in that it derives from planning scheme provisions relating to building over or near relevant infrastructure, which is a matter regulated by the building assessment provisions listed in section 30 of the *Building Act 1975* (in this case, the Queensland Development Code) that is not allowed under that Act;

   b) of no effect, to the extent that the planning scheme provisions it derives from are, pursuant to section 8(6) the PA, of no effect; and is

   c) in any event, not a permitted condition under section 65 of the PA, in that it is neither reasonably required, nor a reasonable imposition on, the development.

   In relation to (a) above, this condition derives from provisions of the Works and Services Code that purport to regulate building over or near relevant infrastructure, as follows:

   PO6 "Development near utility services does not:

a) adversely affect the function of the service; or
b) place an additional load on the service; and
c) protects the infrastructure form physical damage; and
d) allows ongoing necessary access for maintenance purposes.

AO6.1 "Setbacks and loadings comply with the Queensland Development Code QDC MP1.4."

The tribunal finds that these planning scheme provisions are inconsistent with section 8(5) of the PA, which provides that a planning scheme must not include a provision about building work (in this case, building over or near relevant infrastructure) regulated under the building assessment provisions (in this case, the Queensland Development Code), unless allowed under the *Building Act 1975*. Reference to section 32 of that Act, and to Part 3 of the *Building Regulation 2006*, identifies that provisions of a planning scheme relating to building over or near sewerage infrastructure are not allowed under the *Building Act 1975*.

In relation to (b) above, to the extent that PO6 and AO6.1 of the Works and Services Code are themselves inconsistent with section 8(5) of the PA and, pursuant to section 8(6), of no effect, it follows that Condition 30 is also of no effect.

In relation to (c) above, section 65 of the PA provides that, to be a permitted condition, a development condition must be relevant to, but not an unreasonable imposition on, a development, and must be reasonably required in relation to the development. In this case, the "development" in question is a material change of use for a multiple dwelling on the subject site.

To the extent that the proposal to build over the sewerage infrastructure is a matter for a subsequent building works development application and assessment against (among other building assessment provisions) Part MP1.4 of the Queensland Development Code, the tribunal finds that Condition 30 is neither relevant to, nor reasonably required in relation to this material change of use development.

The tribunal finds further that, to the extent that Condition 30 requires the redesign of the proposed development to be clear of the sewer, or the realignment of the sewer at the developer's cost, either of these options would constitute an unreasonable imposition on the development, in the light of the following:

- the scope for the development layout as proposed to be designed and constructed to ensure the protection of the sewer, as explained above; and
- the high probability that the significant cost of realigning the sewer (if even practical at all), relative to the relatively small scale of the development, would likely compromise the viability of the development or, at least, likely result in a disproportionate cost.

For the above-mentioned reasons, the tribunal finds that Condition 30 is not a permitted condition pursuant to section 65 of the PA.

Furthermore, from the material presented by the assessment manager at the hearing, this condition derives in part from Performance Outcome ("PO") 9 of the Low-Medium Density Residential Zone Code under the planning scheme. PO9 provides as follows (emphasis added):

"The Site layout responds sensitively to on-Site and surrounding topography, drainage patterns, utility services, access, vegetation and adjoining land use, such that:

a) any hazards to people or property are avoided;
b) any earthworks are minimised;

c) the retention of natural drainage lines is maximised;
d) the retention of existing vegetation is maximised;
e) ***damage or disruption to sewer, stormwater and water infrastructure is avoided****; and*
f) there is adequate buffering, screening or separation to adjoining development."

The tribunal finds that the proposed development will have to be designed and constructed in accordance with a building works development permit given pursuant to an assessment of Part MP1.4 of the Queensland Development Code and that, through the building assessment process, PO9(e) of the planning scheme will ultimately be achieved.

3. Condition 69.1 is not a necessary or permitted condition

This condition requires all car parking spaces for the proposed development to be set back from the front lot boundary by at least 4.8m; that is to say, no part of a car parking space may be located within 4.8m of the subject site's frontage.

From the material provided by the assessment manager at the hearing, this condition derives from PO5 of the Medium Density Residential Code, which provides as follows:

"Vehicle parking is located under or behind the building to contribute to the establishment of a garden setting and to avoid large areas of visible hardstand."

The applicable AO5.1 provides as follows:

"Vehicle parking is not located within the front Setback area and:

(a) is located underground or underneath the building; or
(b) is located at the rear of the building."

It is not in dispute that five of the required six on-site car parking spaces are not located within the front setback area and are thus accepted by the assessment manager to achieve the above-mentioned outcomes (albeit that these provisions are somewhat unclear insofar as parking spaces provided within, but neither under nor to the rear of, buildings are concerned). However, the assessment manager contends that the external car parking space for Unit 1 does not comply with these planning scheme provisions, in that it is located within the 4.8m front setback area and hence decided to impose this condition.

To achieve the requirements of Condition 69.1, Unit 1 would either have to be substantially re-designed, or the entire site layout would have to be redesigned (such as, for example, that proposed by the assessment manager at the hearing, and subsequently rejected by the appellant).

Based upon the verbal submissions of the assessment manager at the hearing, the concern with the Unit 1 car parking space within the front setback is that it will involve a hardstand surface, as opposed to a garden setting, within the setback area.

The tribunal finds that this is an unnecessary condition, in that this space is to be located within the exposed aggregate driveway of Unit 1 that will, in any event, exist in this location to provide access to its garage. Put differently, even if Unit 1 was to be redesigned to provide its second car parking space elsewhere, in a compliant location, this particular hardstand area would still exist.

In relation to PO5 of the Medium Density Residential Code, the tribunal finds that the provision of car parking within the site substantially achieves this outcome. In particular, the tribunal finds that the provision of one of six car parking spaces within a hardstand

driveway, that would exist in any event, does not offend this PO, either by increasing the area of visible hardstand, or by decreasing the area of garden that would be provided.

The tribunal also notes that locating the relevant car parking space behind the 4.8m front setback could easily be done in a manner that would increase the area of hardstand and decrease the garden area, such as, for example, if it were to be relocated to the area of the front porch of Unit 1.

In these circumstances, the tribunal finds that Condition 69.1 is not a necessary condition and it is not reasonably required in relation to the development. Accordingly, the tribunal finds that it is not a permitted condition pursuant to section 65(1) of the PA.

4. Condition 75.2 requires amendment

This condition requires the provision of root barrier devices for any tree plantings within 2m of any services and/or structures.

This condition derives from PO7 of the Landscaping Code, which provides as follows:

"Location and habit of tree planting must not interfere with the function and accessibility of any adjacent utility services."

At the hearing, and in its subsequent written submissions received by the registrar on 8 April 2020, the assessment manager has confirmed:

- That the reference to services in this condition can be taken to be a reference to the sewer main and associated "manhole" within the site, and that this condition is not required to regulate trees planted adjacent to private, internal infrastructure such as internal stormwater pipes.

- That the assessment manager agrees that shrub varieties that would not compromise the sewerage infrastructure would be acceptable within 2m of the sewerage infrastructure without barrier treatments, and that root barrier devices would only be required for species that have the potential to compromise this infrastructure.

At the hearing, and in his subsequent written submissions received by the registrar on 27 March 2020, the appellant also confirmed his acceptance of a requirement for planting within 2m of the sewerage infrastructure to either comprise of shrub varieties that would not compromise this infrastructure or, otherwise, for root barrier devices to be provided.

The tribunal finds that an operational works development permit will be required for the proposed development, and that such development application will include operational works for landscaping works (Table 5.8.1 of the planning scheme), and therefore that an amended landscape design and landscaping plan, incorporating the submissions referred to above, can be submitted as part of the operational works application.

As such, the tribunal finds that Condition 75.2 must be amended to provide as follows:

"Provide root barrier devices where tree plantings are sited within two (2) metres of the council sewerage infrastructure within the subject lot, or plantings within this area are to comprise of species that will not impact on or compromise this sewerage infrastructure in any way.

Barriers must be fit for purpose and installed in accordance with the manufacturer's specification.

A detailed landscaping plan, prepared by a suitably qualified person and clearly demonstrating compliance with this condition, is to be included in the operational works development application for the proposed multiple dwelling development."

Reasons for the Decision:

33. The tribunal, in accordance with section 254(2)(b) of the PA, has decided this appeal as set out under the heading 'Decision' at the beginning of this decision notice.

34. The reasons for this decision are:

1. Condition 30 is neither a necessary condition, nor a permitted condition under section 65 of the PA, and must be deleted.
2. Condition 30 is of no effect, to the extent that this condition derives from planning scheme provisions which are of no effect pursuant to section 8(5) and (6) of the PA, and this condition must be deleted.
3. Condition 69.1 is neither a necessary condition, nor a permitted condition under section 65 of the PA, and must be deleted.
4. Condition 75.2 requires amendment as mentioned in paragraph 30 above, to reflect the submissions of the parties at, and subsequent to, the hearing of this appeal.

Neil de Bruyn

Development Tribunal Chair
Date: 18 May 2020

Appeal Rights:

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

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

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

The following link outlines the steps required to lodge an appeal with the Court.
http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court

Enquiries:

All correspondence should be addressed to:

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