



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-002
Appellant:	Malcolm Milan Voyka
Respondent (Assessment Manager):	Moreton Bay Regional Council
Site Address:	Lot 1, Mayfield Road, Cedar Creek, formally described as Lot 1 on RP44669 ('the subject site')

Appeal

Appeal under section 229 and item 1(a), table 1, section 1 of schedule 1 of the *Planning Act 2016* against the refusal, by the assessment manager, of a development application for a material change of use development permit ('the application') for the use of the subject site for a dwelling house.

Date and time of hearing:	Friday 26 July 2019 at 10:30am
Place of hearing:	The subject site
Tribunal:	Neil de Bruyn – Chairperson Elisa Knowlman – Member Mark Anderson – Member Jennifer Mullaney – Member Luke Neller – Member
Present:	Malcolm Voyka – Appellant Robert Stoneedge – Town Planning Consultant for the Appellant Rob Siddle – Environmental/Bushfire Consultant for the Appellant Marco Alberti – Council Representative Alida Maric – Council Representative Chris Trewin – Council Representative Jodie Wilson – Council Representative Will Miller – Council Representative

Decision:

The Development Tribunal ('tribunal'), in accordance with section 254(2)(c) of the *Planning Act 2016* ('the PA'), replaces the decision of the assessment manager to refuse the application with another decision to approve the application, subject to the development conditions attached to this decision notice (**Attachment 1**) and formulated in conjunction with the parties.

Background:

1. On 16 January 2018, the appellant made a development application to the assessment manager, seeking a material change of use development permit for the use of the subject site for a dwelling house as defined under the applicable planning scheme, being the Moreton Bay Regional Council Planning Scheme, Version 3 ('the planning scheme'). The application included a set of architectural plans ('DA plans') and other supporting material, including:
 - A bushfire hazard assessment report (dated 10 November 2017); and
 - a slope stability assessment report (dated August 2017).
2. As shown in the DA plans, the proposed dwelling house was to be located in an elevated, ridgeline location within the northern part of the subject site, approximately centrally along the northern lot boundary.
3. A material change of use development permit, permitting the use of the subject site for a dwelling house, had been previously approved in 2013 by the Moreton Bay Regional Council ('2013 approval'). This approval referenced plans showing the proposed house the subject of that approval as being located in an area towards the south-eastern corner of the subject site. That approval was never implemented and subsequently lapsed in approximately September 2017 ('lapsed approval'), prior to the lodgement of the application the subject of this appeal.
4. The subject site is approximately 31 hectares in extent, and is included within the Rural Zone under the planning scheme.
5. The subject site is also affected by various overlays under the planning scheme, notably the Bushfire Hazard Overlay, the Environmental Areas Overlay and the Landslide Hazard Overlay. In particular, the majority of the subject site is mapped as being subject to a very high potential bushfire intensity, and as containing significant areas of MLES ('matters of local environmental significance') and MSES ('matters of state environmental significance').
6. Under the Queensland Government's Development Assessment Mapping System ('DAMS'), the subject site is notably included within the Regional Landscape and Rural Production Area in relation to the SEQ Regional Plan, and as containing Category B regulated vegetation that is part of a least-concern regional ecosystem. The subject site is also mapped as being part of a Priority Koala Assessable Development Area under Queensland Government mapping, and as containing Medium Value Bushland Habitat for koala.
7. Under the planning scheme, the use of a lot within the Rural Zone for a dwelling house as proposed is categorised as accepted development subject to requirements, with the requirements for accepted development ('RADs') being listed in table 6.2.10.1 of the planning scheme (Part A of the Rural Zone Code).
8. Under section 5.3.3(1)(a) of the planning scheme, *"accepted development that does not comply with one or more of the nominated RADs becomes code assessable development."*
9. The application was triggered as the proposed development does not comply with various nominated RADs under the Rural Zone Code, and thus became code assessable development pursuant to section 5.3.3(1)(a). The assessment benchmarks for the application were the Performance Outcomes ('POs') identified in table 6.2.10.3 of the Rural Zone Code as corresponding with the RADs that the proposed development was found not to comply with.

10. The assessment manager issued its confirmation notice on 25 January 2018, and an information request on 9 February 2018. In an email dated 19 February 2018, the assessment manager identified two additional RADs that it considered would not be complied with by the proposed development.
11. Thereafter followed two separate requests from the applicant to stop the period within which a response to the information request was to be provided. The final deadline for the applicant's response was agreed as being 8 November 2018. The applicant's response to the assessment manager's information request was dated 7 November 2018. The applicant subsequently provided further response material on 13 November 2018 and 30 November 2018. The response material included the following:
 - A further bushfire hazard assessment report (dated 18 October 2018); and
 - a detailed ecological assessment report (dated 9 August 2018), including a tree retention plan (dated 24 October 2018).
12. The assessment manager issued its decision notice, refusing the application, on 7 December 2018. The decision notice cites non-compliances with the overall outcomes and a total of 20 POs under the Rural Zone Code as the grounds for the refusal of the application.
13. The POs upon which the assessment manager's decision was based related to:
 - The development footprint the subject of the 2013 approval,
 - the design response to the sloping site of the proposed house,
 - the clearing of habitat trees not within the Environmental Areas Overlay,
 - development within a bushfire hazard area, and
 - vegetation clearing in a high value area under the Environmental Areas Overlay.
14. From the verbal and written submissions of the assessment manager, it is apparent that the overall outcome upon which the assessment manager's decision was based was Overall Outcome 6.2.10.2(3)(s)(i) under the Rural Zone Code, relating to development avoiding areas subject to constraints (such as bushfire hazard, environmental values, steep slopes, etc.) by adopting a "least risk, least impact" approach to the design and siting of a development.
15. This appeal against the assessment manager's decision to refuse the application was duly lodged by the appellant on 15 January 2019.
16. At the appellant's request, the hearing and site inspection for the appeal were deferred in order to afford the parties extra time to provide written submissions as to the suitability or otherwise of the development footprint previously approved under the 2013 approval. These submissions were received by the Registrar on 12 July 2019.
17. A site inspection and hearing were conducted by the tribunal on the subject site, commencing at 10:30am on Friday, 26 July 2019.
18. Following the inspection and hearing, and subsequent deliberations by the tribunal, the following orders were made on 6 August 2019:

"The Tribunal for the above-mentioned appeal is minded to replace the assessment manager's decision to refuse the subject development application with a decision to allow the appeal and to conditionally approve the proposed development.

Accordingly, and pursuant to Section 250 of the Planning Act 2016, the Tribunal makes the following directions:

1. *The assessment manager is directed to prepare a draft set of conditions of approval, and to issue this to the Registrar by 4pm on Friday, 16 August 2019, for onward referral to the appellant; and*
2. *the appellant is thereafter directed to review the draft conditions prepared by the assessment manager and provide his written comments thereon to the Registrar by 4pm on Friday, 30 August 2019.*

The Tribunal will finalise its decision on this appeal following the completion of the process outlined above.”

19. A draft set of approval conditions was prepared by the assessment manager and issued to the tribunal and appellant on 16 August 2019. A response to the draft conditions was submitted on behalf of the appellant on 30 August 2019, including amended architectural plans ('amended architectural plans') of the proposed development. The appellant's response also included a vegetation management plan (dated 23 August 2019), incorporating an updated tree retention plan.
20. A response to the appellant's comments on the draft approval conditions was submitted by the assessment manager on 10 September 2019. In particular, this response drew attention to the fact that the amended architectural plans showed the proposed dwelling house in a different location to that shown on the DA plans. Based on the interrelationship between the site contours on the plans and the house footprint as shown, it was noted that the proposed house was now to be sited in a more elevated position on the ridge line, and therefore somewhat further to the west (given that the ridgeline rises from east to west).
21. It was also clear, from the amended architectural plans, that a far deeper and more extensive (both longitudinally and laterally) excavation footprint was proposed for the house in its revised location, including a significant crib (retaining) wall on the high side of the house site. A comparison of the sections in the DA plans and the amended plans shows the maximum depth of excavation proposed as having increased from approximately 3.9m to approximately 5.6m.
22. Following receipt of the amended architectural plans, the following further orders were issued by the tribunal on 13 September 2019:

“The tribunal has reviewed the draft conditions package prepared by the assessment manager, the responses by the appellant and the assessment manager's further submissions. Pursuant to Section 250 of the Planning Act 2016, the tribunal now directs the appellant to:

- *Provide confirmation of, and justification for, the apparent re-siting of the proposed house, further to the west and higher up the ridgeline, now involving an extensive cut area and the inclusion of an extensive crib wall;*
- *provide detailed justification that this apparent change in the application, and that involving the addition of two bedrooms, are minor changes under the Planning Act 2016 and the DA Rules (having regard to Section 254(3) of that Act);*
- *take note that, should the tribunal consider the siting and earthworks changes to be minor changes, and therefore be able to consider these changes, fully updated supporting documents (bushfire report, environmental assessment report, geotechnical report, bushfire protection zone plan, tree retention plan, etc.), reflecting the revised house location and associated works, will be required before the decision can then be finalised;*
- *provide specific comment on the draft conditions 9 and 14 suggested in the council's further submissions dated 10 September 2019; and*

- *provide the above responses by 4pm on Friday 20 September 2019.*

23. A response to the above orders was subsequently received by the Registrar, although there is some uncertainty as to the whether this response was received within the stated deadline of 20 September 2019. Notwithstanding this uncertainty, the tribunal decided to accept and review the response as submitted.

24. This response indicated that the DA plans contained an error, in that the contours were incorrectly positioned relative to the house location. The response went on to state that the proposed house location had, in fact, been moved some 20m further to the east, relative to the siting shown on the DA plans. However, this statement does not appear to be borne out by a comparison of the overall siting diagrams shown on the two sets of plans, which suggest very little change in the east-to-west positioning of the house (as dimensioned relative to the north-western corner of the subject site), and only a marked change (increase) in the north-to-south positioning (as dimensioned relative to a point on the northern site boundary coinciding with the south-western corner of the neighbouring Lot 5 on SP265708).

25. In an effort to resolve the confusion and eliminate doubt as to the nature and extent of any change in the location of the proposed house, the consistency of the architectural plans and the supporting ecological, bushfire and geotechnical assessments and the extent and depth of excavation required for the house, the tribunal issued the following further orders on 1 October 2019:

“The Tribunal has reviewed the appellant’s correspondence dated 20 September 2019 and makes the following further directions:

1. *The appellant is to provide a final and comprehensive set of architectural plans of the proposed dwelling house, including an accurate site plan, building location envelope plan and earthworks plan, and an environmental assessment report, tree retention plan, bushfire hazard assessment report, bushfire protection zone plan and slope stability assessment report that are fully consistent with the aforementioned architectural plans.*
2. *The submission referred to in 1. above is to include a statement detailing all changes to the proposed development from that shown in the material considered by the assessment manager during the assessment process, including in relation to earthworks and retaining structures.*
3. *The above material is to be received by the Registrar **before 4pm on Friday 11 October 2019**, or further period approved by the tribunal.*
4. *With reference to Section 254(3) of the Planning Act 2016 (the Act), when submitting the material referred to in 1. and 2. above, the appellant is to provide detailed justification that all changes to the proposed development from that shown on the material considered by the assessment manager, including that submitted in response to the information request, constitute only minor changes as defined under the Act.”*

26. The appellant’s response to the above orders was received on 11 October 2019. This response included a further amended set of architectural plans (‘final architectural plans’), showing a somewhat reduced excavation footprint, relative to the amended architectural plan, and additional retaining walls. The sections in the final architectural plans still show the same depth of excavation as those in the amended architectural plans which, as discussed earlier herein, were significantly greater than what was shown on the DA plans.

27. Attached to the appellant’s above-mentioned response, were further copies of:

- the bushfire hazard assessment report (dated 10 November 2017), as submitted with the original development application,

- the further bushfire assessment report (dated 18 October 2018) that was submitted in response to the assessment manager's information request,
- the detailed ecological assessment report (dated 9 August 2018) that was submitted in response to the assessment manager's information request,
- the vegetation management plan (dated 23 August 2019) that was submitted as part of the appellant's response to the draft conditions package prepared by the assessment manager,
- the slope stability assessment report (dated August 2017) that was submitted with the original development application, and
- the engineering plans for the proposed driveway (Revision C dated 17 October 2018).

28. In general, it appears that the above-mentioned documentation reflects the amended location of the proposed dwelling house, as shown on the final architectural plans.

Jurisdiction:

29. This is an appeal under section 229 and Item 1(a), table 1, section 1 of schedule 1 of PA, against the refusal of the application by the assessment manager

30. For section 1(2) of schedule 1, this appeal is against the refusal of a development application involving a material change of use for a classified building, being a Class 1 dwelling house.

Decision Framework:

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

32. 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.

33. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Material Considered:

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

- 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 15 January 2019, including the following received as hardcopies:
 1. Grounds for appeal, prepared by Robert Stonadge of Planvista Pty Ltd,
 2. the decision notice of the assessment manager refusing the application, dated 7 December 2018,
 3. the set of architectural plans that accompanied the original development application, and
 4. DA Form 1 for the original development application.
- Additional material provided in electronic form on behalf of the appellant, including:
 1. Complete copy of the development application, dated 31/10/17 and including a set of architectural plans (Revision B dated 15/02/2017), engineering plans of the proposed driveway works (up to Revision B dated 20/12/17), a bushfire hazard assessment

- report (dated 10/11/2017) and a slope stability assessment report (dated August 2017);
2. the assessment manager's confirmation notice dated 25 January 2018;
 3. the assessment manager's information request dated 9 February 2018;
 4. an email dated 19 February from the assessment manager to the applicant's town planning consultant advising of non-compliances with additional requirements for accepted development;
 5. various items of correspondence between the applicant's town planning consultant and the assessment manager regarding extensions to the period for responding to an information request;
 6. the applicant's response to the assessment manager's information request, including a further bushfire hazard report (dated 18 October 2018), a detailed ecological assessment report (9 August 2018), a tree retention plan (Revision B dated 24/10/2018) and amended engineering plans of the proposed driveway (up to Revision C dated 17/10/18);
 7. additional material provided by the applicant, by way of an email dated 13 November 2018, in response to the information request, in the form of a geotechnical declaration (Form A);
 8. further information dated 30 November 2018 in support of the proposed dwelling house siting relative to that reflected in the 2013 approval; and
 9. a copy of the assessment manager's assessment report, dated 4 December 2018, for the application, recommending its refusal and reflecting the planning team leader's approval of that recommendation;
- the *Planning Act 2016* and the *Planning Regulation 2017*;
 - the Development Assessment Rules (Version 1.1 effective as at 11 August 2017);
 - the Moreton Bay Regional Council Planning Scheme Version 3;
 - the Queensland Government's Development Assessment Mapping System, State Planning Policy Interactive Mapping System and electronic mapping for koala conservation in SE Queensland;
 - the verbal submissions made by the parties at the site inspection and hearing held at the subject site on 26 July 2019; and
 - the further written submissions by both parties received in electronic form in response to the various tribunal orders, including:
 1. an email and attachments from the appellant's town planning consultant, dated 11 July 2019, providing further arguments as to the unsuitability of the dwelling house siting approved under the 2013 approval; and
 2. an email and attachment, dated 12 July 2019, from the assessment manager, providing further information in support of the decision to refuse the application;
 - draft conditions of approval, prepared by the assessment manager at the tribunal's direction and dated 16 August 2019, and received electronically;
 - an email from the appellant's town planning consultant, dated 30 August 2019, to which was attached an electronic copy of the appellant's comments on the draft conditions of approval prepared by the assessment manager, as well as an "amended documents justification" dated 30 August 2019, containing the amended architectural plans and an updated vegetation management plan (23/08/2019);
 - an email from the assessment manager, dated 10 September 2019, attaching an electronic copy of a letter of the same date, responding to the above-mentioned submissions of 30 August 2019 from the appellant's town planning consultant;

- a letter received electronically from the appellant's town planning consultant, dated 20 September 2019, providing further information in response to the tribunal's further directions to clarify the apparently different siting of the proposed dwelling house, as shown in the amended architectural plans, relative to that shown in the DA plans; and
- an email from the appellant's town planning consultant, dated 11 October 2019, attaching, in electronic form, the final architectural plans and further copies of the vegetation management plan (dated 23/8/19), the slope stability assessment (dated August 2017), the two bushfire hazard assessment reports (dated 10/11/17 and 18/10/18), the ecological assessment report (dated 9/8/18) and the engineering plans (dated 17/10/18).

Findings of Fact:

35. The tribunal makes the following findings:

1. Approved Development Footprint

The tribunal finds that there is no approved development footprint for a dwelling house within the subject site.

The 2013 approval that gave rise to an approved development footprint for a dwelling house within the subject site lapsed in late 2017, and therefore did so prior to the application being made. No subsequent development approval has established an approved development footprint within the subject site.

2. Changes to the Application

The tribunal finds that various changes have been made to the application, and that these changes, with one exception discussed below, are minor changes as defined in the PA and having regard to schedule 1 of the Development Assessment Rules (as referenced above).

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.

Under Schedule 1 of the Development Assessment Rules, a change to a development application may be considered to result in a substantially different development, where such change would:

- 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.

As detailed above, three sets of architectural plans have been put before the tribunal in this appeal (referred to herein as the DA plans, the amended architectural plans and the final architectural plans). The main differences in these sets of plans that constitute changes to the development application are:

- The amended location of the proposed dwelling house within the subject site,
- increased finished floor levels within the proposed dwelling house,
- the extended and deeper excavation involved in the design of the proposed dwelling house and the addition of multiple external retaining walls,
- the addition of Bedroom 5 and associated ensuite to the upper level of the proposed dwelling house, and
- the conversion of a ground level storage room to a bedroom.

With the exception of the extended and deeper excavation and associated additional retaining walls, all of the above changes are found to constitute minor changes, having regard to the following factors:

- The amended location, and associated floor levels, of the proposed dwelling house was generally reflected in the supporting bushfire hazard assessment report, the slope stability assessment report and driveway plans submitted with the original development application, as well as in the further material submitted in response to the information request.

As such, the tribunal finds that the main impacts of the development within the amended location were appropriately considered, and acceptable mitigation and management measures proposed, and that these particular changes satisfy all of the above-mentioned criteria for a minor change.

- The addition of a bedroom and the conversion of a storage room to a further bedroom are also considered satisfy all of the criteria for a minor change, particularly in that these changes will not significantly change the form or appearance of the proposed house, introduce or exacerbate any significant impacts or necessarily impact on infrastructure provision.

However, the tribunal finds that the much deeper and more extensive excavation proposed, as shown in the final architectural plans relative to what was shown in the DA plans (with particular reference to the section drawings) would not constitute a minor change to the application. The grounds for this conclusion are:

- a) The significantly deeper and more extensive excavation would introduce new impacts and increase the severity of known impacts associated with the proposed development, through involving substantial landform modification in parts of the site previously shown as being maintained generally in their natural form. This would increase the risks of erosion, degradation of downstream water quality, soil degradation and/or slope instability and impact on natural overland flows and stormwater behaviour.
- b) The extended excavation footprint was not shown on the DA plans, upon which the slope stability assessment report (August 2017) was prepared. As such, the tribunal finds that the potential slope stability and geotechnical impacts of the extended excavation have not been assessed, and that there would very likely be new or additional impacts associated with these works.
- c) The extended excavation area is not shown on the vegetation management plan (dated 23 August 2019). Section B-B in the final architectural plans, shows that the

excavation to the rear (west) of the proposed house will extend well beyond the proposed crib wall, by an unidentified distance. As such, it is reasonable to conclude, based upon the available information, that clearing or disturbance of native vegetation, shown on the vegetation management plan as being protected, may well be required to accommodate the extended excavation area.

- d) The tribunal finds that the increased depth and extent of excavation is, in any event, inconsistent with the achievement of overall and performance outcomes set out in the Rural Zone Code and comprising assessment benchmarks for the application. Notably, these aspects of the proposed development would be inconsistent with the achievement of PO1(g), PO2(b), PO4(a) and (b), PO50(a) and (b) and PO122 of this code, and the tribunal finds that
- there are no compelling grounds to justify these significant non-compliances with the code, and that
 - the extended earthworks, as proposed, could not be conditioned to effectively ensure the achievement of these assessment benchmarks.

On the above basis, the tribunal finds that the extended excavation for the proposed dwelling house would introduce new impacts and exacerbate known impacts and, as such, would constitute a substantially different development from that proposed in the DA plans. Accordingly, the tribunal finds that this change to the application is not a minor change. The tribunal also finds that the extended excavation would be inconsistent with the planning scheme.

3. Assessment Benchmarks

Section 60(2)(b) of PA provides that an assessment manager may decide to approve an application even if the development does not comply with some of the assessment benchmarks. Section 60(2)(c) and (d) provide further that an assessment manager may impose conditions on an approval, and may only decide to refuse an application for a non-compliant development if compliance cannot be achieved by imposing development conditions.

The tribunal finds that certain of the POs forming the basis of the assessment manager's decision to refuse the application are not applicable and that these particular reasons for the refusal must be dismissed. These are:

- PO17 relates to the clearing of habitat trees, defined under the planning scheme as native trees with a diameter greater than 0.8m (800mm) at 1.3m above the ground.

The tribunal finds that a tree retention plan prepared by the appellant's environmental consultants, and not disputed by the assessment manager at the appeal hearing, did not identify any habitat trees to be cleared for the development footprint or bushfire protection zone for the proposed dwelling house.

Furthermore, the tribunal finds that compliance with the intent of this PO can be achieved by way of conditions of approval:

- limiting the clearing of native trees to no more than is necessary for the dwelling house footprint itself (but not the extended excavation footprint shown on the final architectural plans), bushfire protection zone and driveway construction works as specified in the approved plan and documents, and
 - requiring planting of native trees to offset any loss of habitat within the site.
- PO107 relates to the maintenance of public access. The tribunal finds that the subject site is a private, rural/residential property and that public access is neither intended nor required by or for the proposed development.

- PO109 relates to development potentially involving adverse microclimate changes. The tribunal finds that any microclimatic change associated with the proposed development would be so miniscule as to be insignificant, and would in any event be negated by the offset planting of vegetation referred to above.
- PO110 relates to the clearing of native vegetation within value offset areas under the Environmental Areas Overlay. The tribunal finds that the subject site does not contain any such areas under the overlay mapping.

The tribunal finds that RAD91 is not applicable as this RAD relates to the clearing of native vegetation within value offset areas under the Environmental Areas Overlay which, as mentioned above, are not mapped under the overlay as being contained within the subject site. Pursuant to Table 6.2.10.3 under the Rural Zone Code, this RAD is one of two that correspond to POs 99 to 110, all of which are cited in the assessment manager's reasons for refusal. However, the tribunal finds that these POs remain applicable in this appeal given the apparent non-compliance with RAD90.

The tribunal finds that the proposed development (excluding the extended excavation footprint shown on the final architectural plans) achieves, and therefore complies with, the following POs cited in the assessment manager's reasons for refusal, or that compliance can be achieved by imposing development conditions:

- PO2 and PO49, insofar as they relate to approved development footprints, as the subject site does not contain an approved development footprint.

The tribunal finds further that compliance with these POs can be achieved by imposing development conditions, including conditions requiring compliance with all applicable recommendations of the bushfire hazard assessment reports, the ecological assessment report and tree retention plan, the engineering plans for the driveway works and the slope stability assessment report (including those versions submitted in response to the assessment manager's information request).

- POs 95 and 96, relating to bushfire safety:

The tribunal finds that compliance with these POs can be achieved by imposing development conditions, including conditions requiring compliance with all applicable recommendations of the bushfire hazard assessment reports (including the version submitted in response to the assessment manager's information request).

- POs 99 to 106 and 108, relating to ecological values, vegetation clearing and habitat protection:

The tribunal finds further that compliance with these POs can be achieved by imposing development conditions, including conditions requiring:

- compliance with all applicable recommendations of the bushfire hazard assessment report, the ecological assessment report and tree retention plan (including those versions submitted in response to the assessment manager's information request),
- the offsetting of native trees cleared for the development footprint, bushfire protection zone and driveway works, and
- the implementation of an erosion and sediment control plan for all operational and building works for the development, to be designed and supervised by an RPEQ engineer.

The tribunal finds that the proposed development does not fully achieve POs 1, 2, 4, 50 and 122, to the extent that it will involve significant earthworks and retaining walls likely resulting in an associated loss of trees beyond that necessitated for bushfire protection purposes as well as a potential to cause slope instability. However, the tribunal finds that these conflicts would be mitigated to some extent by:

- the fact that the proposed development will not have a significant impact on the wider scenic amenity and landscape character of the locality, and by
- the imposition of a development condition(s):
 - limiting the depth of excavation to that shown on the DA plans;
 - confining the excavation footprint (including retaining walls) such that there will be no excavation beyond the bushfire protection zone (shown on the bushfire hazard assessment reports (dated 10 November 2017 and 18 October 2018) or within the tree protection zone shown on the vegetation management plan (dated 23 August 2019); and
 - requiring the excavation and retaining walls to be design and supervised by an RPEQ (registered professional engineer, Queensland) geotechnical engineer.

In relation to Overall Outcome 6.2.10.2(3)(s)(i), the tribunal finds that the proposed development does not represent the “least risk, least impact” siting within the subject site, and accepts the assessment manager’s submissions to the effect that an alternative siting associated with the 2013 approval does represent a lower risk, lower impact location. However, the tribunal finds that the siting of the proposed development does involve or, through the imposition of development conditions, is capable of involving, the effective mitigation of risks and impacts to people, property and the environment.

As such, the tribunal finds that a satisfactory response to this overall outcome can be achieved by the imposition of development conditions. Alternatively, the tribunal finds that section 60(2)(b) of the PA permits the tribunal to approve the application even if the development does not comply with some of the assessment benchmarks.

Reasons for the Decision:

36. The tribunal, in accordance with section 254(2)(c) of the PA, replaces the decision of the assessment manager to refuse the application with another decision to approve the application, subject to the development conditions attached to this decision notice (**Attachment 1**) and formulated in conjunction with the parties.

37. The reasons for this decision are:

1. There is no approved development footprint within the subject site that dictates the location of the proposed dwelling house.
2. With the exception of the extended excavation area and associated external retaining walls for the proposed dwelling house, as shown on the final architectural plans, the various changes made to the development relative to that shown on the DA plans, constitute minor changes pursuant to the PA. Accordingly, and pursuant to section 254(3) of the PA, the tribunal is able to make these changes to the application.
3. The extended excavation area and associated external retaining walls for the proposed dwelling house, as shown on the final architectural plans, does not constitute a minor change to the application (relative to the DA plans). Accordingly, and pursuant to section 254(3) of the PA, the tribunal is not able to make this change to the application.

4. A number of the assessment benchmarks cited in the assessment manager's decision notice (as referenced above) are not applicable in the circumstances of the application, while others are complied with, or compliance can be achieved through the application of development conditions.
5. The tribunal is satisfied that, subject to compliance with this decision and the attached conditions of approval, the proposed development will be adequately protected from natural hazards and that potential impacts will be effectively mitigated.

Neil de Bruyn

Development Tribunal Chair

Date: 22 November 2019

Attachment 1 – Development Conditions (Appeal 19-02 by Malcolm Milan Voyka)

CONDITION		TIMING
MATERIAL CHANGE OF USE - DEVELOPMENT PERMIT		
DEVELOPMENT PLANNING		
1.	Approved Development	
A	<p>The approved development is a material change of use for a dwelling house (as defined in the Moreton Bay Planning Scheme).</p> <p>The approved development is to be undertaken and operated substantially in accordance with the approved plans and documents listed in Table 1, except as otherwise stated in any of the following conditions.</p> <p>These plans and documents form part of this approval, unless otherwise amended by conditions of this approval.</p>	Prior to commencement of use and to be maintained at all times.
B	<p>The approved development <u>does not</u> include the extent or depth of earthworks, or the associated crib and retaining walls, shown on the approved architectural plans listed in Table 1.</p> <p>The design of the earthworks, retaining structures and slab/footings for the approved dwelling house is to be substantially in accordance with the architectural plans submitted with the original development application, being the following drawing numbers prepared by Focus Architecture (Project No. 00734):</p> <ul style="list-style-type: none"> • 1.02B (dated 15.02.17), • 3.01B (dated 15.02.17), and • 4.01B (dated 15.02.17). 	Prior to the issue of a building works development permit and to be maintained at all times.
C	All necessary development permits are to be obtained prior to the commencement of any works for the approved development (dwelling house and driveway), including (as applicable) for operational works and building works.	Prior to commencement of any site works.
2.	Requirements for Accepted Development	
	The approved development is to be carried out in accordance with all Requirements for Accepted Development set out in all applicable codes current at the date of this decision, with the exception of the following (where assessment against the corresponding Performance Outcome(s) has been the subject of this assessment (being the Code Assessable aspects):	To be maintained at all times.

	<p>Rural Zone Code</p> <ul style="list-style-type: none"> • Requirement for Accepted Development RAD3 • Requirement for Accepted Development RAD12 • Requirement for Accepted Development RAD26 • Requirement for Accepted Development RAD36 • Requirement for Accepted Development RAD85 • Requirement for Accepted Development RAD86 • Requirement for Accepted Development RAD87 • Requirement for Accepted Development RAD88 • Requirement for Accepted Development RAD90 • Requirement for Accepted Development RAD91 • Requirement for Accepted Development RAD104 • Requirement for Accepted Development RAD105 • Requirement for Accepted Development RAD127 • Requirement for Accepted Development RAD128 • Requirement for Accepted Development RAD129 <p>Notes</p> <ol style="list-style-type: none"> 1. For the purpose of this condition, the applicable code(s) refers to those identified in the applicable assessment criteria column for the development in the Moreton Bay Regional Council Planning Scheme. 2. This assessment is limited to the code assessable aspects of the development application only. This development approval does not confirm compliance with Accepted Development aspects of the development application. 	
3.	Ecological Assessment Report and Tree Retention Plan	
	The approved development, and all associated works and structures, are to be strictly in accordance with the approved Ecological Assessment Report and Tree Retention Plan.	Prior to commencement of, and during, site works.
4.	Flora Survey	
A	<p>Undertake a flora survey in accordance with the Department of Environment and Science (DES) flora survey requirements, incorporating the recommended firebreaks as set out in the approved Bushfire Management Plan.</p> <p>If the flora survey identifies that Endangered, Vulnerable and Near Threatened (EVNT) plants are not present within the clearing impact area, or clearing within 100m of EVNT plants can be avoided, the clearing activity is exempt from a permit. An exempt clearing notification form must be submitted to Department of Environment and Science, with a copy of the flora survey report, at least one week prior to clearing. The clearing must be conducted within two years after the flora survey report was submitted.</p>	Prior to commencement of any site works.

	<p>If a flora survey identifies that EVNT plants are present in, or within 100m of, the area to be cleared, a clearing permit is required before any clearing is undertaken. The flora survey report, as well as an impact management report, must be submitted to Department of Environment and Science (and a copy to Council) with the application form clearing permit.</p> <p>Note: The amended Ecological Assessment Report is to be consistent with the approved plans and documents for this development permit, and especially the Tree Retention Plan dated 23 August 2019.</p>	
B	Implement the requirements and recommendations of the flora survey.	During site works and to be maintained.
5.	Natural Colours, Materials and Finishes	
	Ensure that colours of predominant surfaces harmonise with the colours of adjacent rural/bushland vegetation and should include natural tones of green, grey and brown.	Prior to the commencement of the use and to be maintained all times.
6.	No Net Loss of Fauna Habitat	
A	<p>The approved development must not result in the net loss of fauna habitat. Where development does result in the loss of a habitat tree (as defined):</p> <ol style="list-style-type: none"> 1. Replacement fauna nesting boxes must be provided at the rate of one (1) nest box for every hollow removed; or 2. where hollows have not yet formed in trees greater than 80cm in diameter at 1.3m height, three (3) nest boxes are required for every habitat tree removed. 	Prior to and during site works.
B	<p>Provide a nest box management plan with details of the proposed construction, installation methods and GPS location for each nest box for Council's records. Provide details of proposed maintenance and protocols for replacing fallen or broken nest boxes. Include any additional information that may be relevant such as:</p> <ol style="list-style-type: none"> 1. Requirements for the target species 2. Next box types - design and sizes 3. Installation technique 4. Proposed location of installed nest box 5. Maintenance regime details. <p>Nest boxes must be maintained for a minimum of 12 months post installation.</p>	Prior to the commencement of use.

7.	Management of Wildlife	
A	Carry out approved vegetation clearing under the supervision of a Fauna Spotter Catcher holding a valid Rehabilitation Permit from the relevant State Government Agency.	Prior to and during site works.
B	Clearing of native vegetation on premises must be carried out in a way that ensures koalas have enough time to move from the area being cleared without human intervention.	Prior to and during site works.
C	Links between koala habitats are to be maintained to allow koalas to move from the area being cleared.	Prior to and during site works.
D	Provide an activity report, to be completed by the supervising Fauna Spotter Catcher, for Council's records, including: <ol style="list-style-type: none"> 1. The number and species of any animals observed during clearing; 2. The actions taken to deal with observed animals; 3. The number of any animals that were required to be relocated; 4. The release site for any relocated animals; 5. The number (if any) of animals injured during clearing; 6. The treatment provided; 7. The outcome of any treatment; and 8. The location of the treatment. 	Within fourteen (14) days of completion of clearing.
8.	Extent of Vegetation Clearing	
A	Clearing of native vegetation must be limited to that which is necessary for the building envelope and bushfire protection zone, in accordance with the approved plan of development, Bushfire Management Plan and Tree Retention Plan.	Prior to and during site works and to be maintained at all times.
B	Clearing of non-juvenile koala habitat trees must not occur within Medium Value Bushland (i.e. MSES Koala Bushland Habitat).	
9.	Disposal of Cleared Vegetation	
	Chip, shred or tub grind cleared native vegetation and spread as mulch on site or dispose of at an authorised waste facility. Any hollows observed in cleared vegetation must be salvaged and installed as nest boxes in trees within the property.	Prior to commencement of the use.

10.	Stockpiles of Construction and Landscaping Materials	
	Locate any stockpiles of construction and landscaping materials and other site debris clear of drainage lines and clear of any position from which it could be washed onto any roadway or into any watercourse.	During site works.
11.	Temporary Exclusion Fencing	
	Delineate those areas shown on the approved tree retention plan where vegetation is to be retained with exclusion fencing, to prevent accidental felling. Clearing is to be undertaken in accordance with AS 4970-2009 Protection of Trees on Development Sites.	Prior to, and during, site works.
12.	Bushfire Management	
	Implement the requirements and recommendations of the approved Bushfire Management Plan.	To be maintained at all times.
13.	Vegetation Clearing	
A	Vegetation clearing is to be limited to that shown on the approved Tree Retention Plan and the minimum required for the driveway construction.	To be maintained at all times.
B	<p>Provide offset replanting for all native trees to be cleared in accordance with Condition 13A above, at the minimum rate of three (3) native trees for every one (1) native tree to be removed.</p> <p>Offset planting is to comply with the following;</p> <ol style="list-style-type: none"> 1. Planting densities and species selected are to be consistent with the relevant Regional Ecosystem, in accordance with Section 2.4.2.1 of the <i>Environmental Areas and Corridors Planning Scheme Policy</i>. Technical Descriptions for Regional Ecosystems produced by the Queensland Government are to be used for determining densities and species selection. 2. Where densities are unavailable for a particular Regional Ecosystem, a tree and shrub density of 4500 stems per ha (i.e. spaced at 1.5 m centres) would be acceptable. This density is recommended in the SEQ Restoration Framework Manual to facilitate a rapid canopy closure and reduce long term maintenance. 3. Provide details for Council records on the establishment and maintenance of restoration sites, regarding weed management, watering and replacement planting. 	Prior to the commencement of the use.

	<p>For example, provide details on thresholds for replacement planting (e.g. mortality rate and how regularly plants will be replaced). The maintenance period is to be a minimum of 2 years.</p> <p>Note: The mapped Environmental Offset Receiving Area would be a preferred location to locate rehabilitation planting</p>	
DEVELOPMENT ENGINEERING		
14.	Landslide Hazard	
A	Provide certification from a suitably qualified Registered Professional Engineer Queensland (RPEQ) to the Building Certifier that the works have been designed in accordance with the recommendations of the approved Slope Stability Assessment.	Prior to building works approval.
B	Construct the works in accordance with an RPEQ-certified design and the recommendations of the approved Slope Stability Assessment.	Prior to commencement of use.
15.	Rear Allotment Access Driveways	
A	Provide a suitable all weather driveway within the site generally in accordance with the approved plans.	Prior to commencement of use.
B	Provide certification from an RPEQ that all works have been designed and constructed in accordance with this development permit.	Prior to commencement of use.
16.	Erosion and Sediment Control Plan	
A	Prepare and implement an effective erosion and sediment control plan for all works. This plan is to be prepared, and its implementation supervised by a suitably qualified RPEQ.	Prior to and during site works.

Plan / Document Name	Reference Number	Prepared By	Dated
Architectural Plans	00734 1.02 H 00734 1.04 H 00734 2.01 H 00734 2.02 H 00734 2.03 H 00734 3.01 H 00734 4.01 H 00734 4.02 H Note Condition 1B, which affects the above plans.	Focus Architecture	9/10/19

Bushfire Hazard Assessment Report and Bushfire Management Plan	N/A	Brisbane Bushfire Consulting Pty. Ltd.	10/11/2017
Summary of Bushfire Hazard Assessment Review	N/A	Brisbane Bushfire Consulting Pty. Ltd.	18 October 2018
Slope Stability Assessment	117-19355 Ver 1	Soil Surveys Engineering Pty Ltd	15/08/2017
Detailed Ecological Assessment	S50439ER001	S5 Environmental	9 August 2018
Vegetation Management Plan	S50439_VMP_001 to 006	S5 Environmental	23/08/2019
Proposed Site Layout Plan (proposed driveway)	CWD-10484-OP-004 Rev C	Civil & Water Design	17/10/18

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

Email: registrar@hpw.qld.gov.au