



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 19-004

Appellant: Alpha Planning Applications

Respondent (Assessment Manager): Toowoomba Regional Council

Site Address: 3 Burke Street, Rangeville Queensland and described as Lot 52 RP79067 – the subject site

Appeal

Appeal under *Planning Act 2016*, section 229(1)(a)(i) and of schedule 1, section 1, table 1, item 1(a) against the decision of the respondent assessment manager (Toowoomba Regional Council – TRC) for a material change of use for a dual occupancy at the subject site on the basis the proposal does not comply with the Purpose and Acceptable Outcome of Performance Outcome 7 of the Low-Medium Density Residential Code of the Toowoomba Regional Planning Scheme and the Purpose and Acceptable Outcomes of Performance Outcomes 13 and 16 of the Medium Density Residential Code of the of the Toowoomba Regional Planning Scheme as varied by the Temporary Local Planning Instrument 01/2017 (TLPI 01/2017).

Date and time of hearing: Thursday 20 June 2019 at 10.00am.

Place of hearing: Toowoomba Regional Council offices, Development Assessment Conference Room, Ground Floor, 543 Ruthven Street Toowoomba City.

Tribunal: Adjunct Professor Victor Feros – Chair
Ms. Tammy Neumann – Member
Dr. Christopher Robertson – Member

Present: For the Appellant:
Mr. Andrew Hill - Alpha Planning Applications, Managing Director
Mr. Steven Drysdale - Drysdale Platinum Homes

For the Respondent:
Mr. Rodney O'Brien – Toowoomba Regional Council (TRC) Senior Planner
Ms. Shokhida Safarova – TRC Planner
Mr. David Krummins – TRC Manager Regional Architecture and Heritage
Mr. Matthew Colman – TRC Principal Planner

Decision:

The Development Tribunal (Tribunal) in accordance with section 254(2)(d) of the *Planning Act 2016* (PA) **replaces** the decision of the Respondent with another decision, namely that the Development Application be approved in accordance with the Respondent's draft conditions package issued 15 October 2019.

Background:

1. The subject site is 579m² in size and is currently vacant with no structure on the site. Burke Street runs in a north-south direction and the subject site fronts this street, principally lying in an east-west direction. To the north of the subject site are two antique shops (1 and 1A Burke Street), which include some residential occupation. These two premises are built to the boundary and primarily cover their respective sites and have extended canopies to the footpath. In front of these premises. Angled vehicle street parking is provided. To the South of the subject site along Burke Street properties are residential. Burke street is split by a 3-4m wide grassed and treed landscaped strip which effectively separates both sides of Burke Street. To the north of Burke street is a large shopping centre.
2. On 20 July, 2018 the TRC received an Application for a Material Change of Use from the owner of the subject site, Majellan Investments C/- Alpha Planning Applications. The plans accompanying this application that were lodged disclose a duplex which presents garages in parallel to the street.
3. An Information Request was issued by TRC on 3 August 2018 identifying 12 points requiring further information.
4. On 16 October 2018 a response, provided by the Applicant's agent, Alpha Planning Applications, was received by TRC. Modified duplex plans were also included within this response.
5. On 6 November 2018 TRC advised the Applicant to provide a further response on certain aspects of their proposal that required additional clarification/information in order to enable proper consideration and determination of the Application. This notification cites issues with PO13 and PO16 of the TLPI 01/2017.
6. A decision Report from TRC dated 20 December 2018 refused the Application. A refusal notice dated 21 December 2018 was sent to the Applicant by TRC, with a set of Reasons for the Refusal.
7. The Applicant appealed to the Development Tribunal on 29 January 2019 by lodgement of a Form 10 Notice of Appeal. The Form 10 named the appellant as 'Alpha Planning Applications Pty Ltd', which was apparently intended as a reference to 'Alpha Planning Applications' a town planning firm acting on behalf of the property owner. As the development application had been commenced in the name of the property owner 'Majellan Investments Pty Ltd', that company was the correct appellant. This irregularity was subsequently excused under section 243 of the PA by a delegate of the chief executive.

Jurisdiction:

The Tribunal has jurisdiction for this Appeal under the *Planning Act 2016* (PA) section 229(1)(a)(i) and schedule 1, section 1(1), table 1, item 1(a). The precondition in section 1(2) of schedule 1 for the application of table 1 to a development tribunal is satisfied in this instance as section 1(2)(a) applies, being an application for a Material Change of Use for a classified building, which has been refused.

Decision Framework:

It is noted that:

- The onus rests with the Appellant to establish that the Appeal should be upheld (s. 253(2) 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 person who made the decision appealed against (s. 253(4) of the PA);
- The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under s.246 of the PA (pursuant to which the Registrar may require information for tribunal proceedings); and
- The Tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

Material Considered:

The material considered in making at this decision comprises:

1. Appeal Document Package provided by Alpha Planning to the Registry on 29 January 2019. This included (but not limited to) the 'Form 10 – Notice of Appeal, grounds for appeal, Decision Notice, Development Application Form and Original Plans.
2. Email from registry to the tribunal dated 25 November 2019 (re excusal of irregularity).
3. Toowoomba Regional Council, Temporary Local Planning Instrument 01/2017 (Dual Occupancy).
4. Toowoomba Regional Council, Temporary Local Planning Instrument 01/2018 (Dual Occupancy).
5. Summary of Submissions of Toowoomba Regional Council: Alpha Planning Applications v Toowoomba Regional council. Development Tribunal Appeal No.19-04.
6. Toowoomba Regional Planning Scheme.
7. South East Queensland Regional Plan.
8. *Queensland Planning Act 2016*.

9. Temporary Local Planning Instrument 01/2018 (Dual Occupancy): Reasons for proposing the TLPI and how it meets the requirements for making a TLPI under s23(1) of the Planning Act 2016.
10. Proposed Toowoomba Regional Planning Scheme Amendment No.16 s9.3.7 Medium Density Residential Code.
11. Fingland, David. Better to be Roughly Right Than Exactly wrong: The Concept of Certainty in Land-Use Planning (Undated).
12. Queensland Development Code.
13. Draft Conditions Package issued by Toowoomba Regional Council in an email dated 15 October 2019.

Findings of Fact:

The Tribunal makes the following findings of fact:

1. An Application was made by the Applicant/Appellant on 20 July 2018 to TRC for a Material Change of Use of the subject site for a Duplex.
2. The Application was made when the *Toowoomba Regional Council, Temporary Local Planning Instrument 01/2017 (Dual Occupancy)* (amendment No.1, 23 April 2018, was in effect.
3. An Information Request was issued by TRC on 3 August 2018 identifying 12 points requiring further information.
4. On 16 October 2018 a response, provided by the applicant's agent, Alpha Planning Applications, was received by TRC. Modified duplex plans were also included within this response.
5. On 6 November 2018 TRC advised the Applicant to provide a further response on certain aspects of their proposal that require additional clarification/information in order to enable proper consideration and determination of the application.
6. A Decision Report from the TRC dated 20 December 2018 refused the Application. A refusal notice dated 21 December 2018 was sent to the Applicant by the TRC, with a set of Reasons for the Refusal.
7. A Development Tribunal Hearing was held on Thursday 20 June 2019 commencing at 10.00am at the TRC offices.
8. No issues between the Appellant and Respondent were resolved at the hearing.

Consideration of Relevant Provisions:

1. TRC have undertaken a substantial amount of work regarding compliance for duplexes within their local government area and this is disclosed in the documents, which include *Toowoomba Regional Council, Temporary Local Planning Instrument 01/2017 (Dual Occupancy)*; *Toowoomba Regional Council, Temporary Local Planning Instrument 01/2018 (Dual Occupancy)*; and, *Temporary Local Planning Instrument 01/2018 (Dual Occupancy): Reasons for proposing the TLPI and how it meets the requirements for making a TLPI under s23(1) of the Planning Act 2016*. This latter document was provided during the post hearing period by TRC and provided information on the objectives the TRC sought with regard to duplex instruments.
2. With regard to performance-based planning schemes, such as that of TRC, while there needs to be a degree of discretion to allow adaptation of development proposals to the planning scheme, a degree of certainty with applying regulatory systems must also be existent.
3. In consideration of applying and distinguishing the roles of the “Performance Criteria” and the “Acceptable Outcomes”, reference is made to the decision in *Friend v Brisbane City Council* [2013] QPEC 77 which held there is a need to understand the context of the application of “Performance Criteria” and “Acceptable Solution.” There is a need to determine and distinguish the functional requirements of “Performance Criteria”, which must be satisfied, and those of the “Acceptable Solution” which do not provide specific limits or solutions. In this Application, no material evidence was presented which considered available options for an acceptable solution.

Reasons for Decision:

The Tribunal considers that:

1. Both the Appellant and the Respondent through their nominated agents provided evidence regarding their respective interpretation of the planning instruments, in particular TLPI 01/2017, as applied to the proposed duplex at the unique location of 3 Burke Street, Rangeville. The plans as presented clearly disclose that the proposed duplex with its double garage frontage will impact upon the streetscape at this locality, as the streetscape is currently presented.
2. Neither the Appellant nor the Respondent has adequately considered all options, methods, designs and planning processes that might reduce or mitigate any impact upon the streetscape at this locality which might otherwise provide for an “Acceptable Outcome” for this proposal.
3. Following further consultations between the parties, plans have been amended and resubmitted to the Respondent. In response, the Respondent, on 15 October 2019, issued a draft conditions package for the consideration of the Tribunal, which the Tribunal has accepted and approved.

4. The amended plans are accepted as a “*minor change*” to the Application, with reference to Schedule 2 of the Act, as the change does not result in substantially different development and would not cause the inclusion of prohibited development in the Application, or referral to a refund agency.

Professor Victor Feros OAM BA MUS MPIA (Life Fellow) CMILT LGTP (Q)
Development Tribunal Chair

Date:

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 parties.

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
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Brisbane QLD 4001

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