



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>21-073</b>
<b>Appellants:</b>	Brenton and Rhiannon Sanders
<b>Respondent (Assessment Manager):</b>	John Dunn Building Approvals - JDBA Certifiers
<b>Co-respondent (Concurrence Agency):</b>	Sunshine Coast Regional Council
<b>Site Address:</b>	Lot 15 SP128935 / 10 Townen Mount Rd Townen Mountain – the subject site

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### **Appeal**

Appeal under section 229 and schedule 1, section 1, table 1, item 1(a) of the *Planning Act 2016* (PA) against the refusal in part of a Development Application being a Material Change of Use and Operational Works for a new Dwelling House and Operational Works for associated Earthworks. Council conditioned the approval by refusing to allow the existing dwelling to remain as a secondary dwelling on the site. Council determined that this part of the proposal did not meet provisions contained in Performance Outcome PO12 (b) and those in the Purpose and Overall Outcome 9.3.6.2 (2) of the Dwelling House Code within the Sunshine Coast Planning Scheme 2014.

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<b>Date and time of hearing:</b>	1.30pm, 14 March 2022
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Debbie Johnson – Chair Suzanne Bosanquet – Member
<b>Present:</b>	Appellants – Brenton and Rhiannon Sanders Tracey Douglas – Council Representative Tegan Johnson – Council Representative Pat Ferris – Private Building Certifier Representative

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### **Decision:**

The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the *Planning Act 2016* (PA), changes the decision of the assessment manager dated 23 November 2021 namely, change Condition 3 thereby permitting the existing dwelling on the site to be approved as a secondary dwelling. Condition 3 now states:

*The existing dwelling on this site is approved as a secondary dwelling, being ancillary to the new principal dwelling.*

### **Background**

1. The subject site is an undulating but steeply sloping (1 in 4 and greater in parts) rural property having a road frontage of almost 200m and an area of 4.15ha. The driveway entrance is from the North West corner of the property. The driveway continues through the site along a ridge that

aligns to the western boundary and then falls very steeply to a level clearing at the southern extent of the property.

2. In this portion of the site there is an existing single storey dwelling having an area of 90sq/m. The dwelling is attached to a comparatively large steel shed. These structures were approved and built by the appellants in 2015 or thereabouts.
3. The appellants had purchased this site with the intention of building a large family home at the highest portion of the site, to capture the substantive views back to the eastern coast line. Their strategy was to get established on the property in a modest home initially. The appellants were aware that a secondary dwelling was permitted on a rural site providing the secondary dwelling had a floor area no greater than 90sq/m.
4. The portion of land that is now approved for the siting the proposed residence is approximately 70m from the existing dwelling and around 50m to that portion of the steel shed that is attached to the existing dwelling.
5. At the hearing, it was evident that the land between the existing residence and the siting for the proposed residence is very steep but stabilised by native vegetation, mostly mature eucalypt species. It was also noted that there is a cleared area east of (behind) the steel shed that could be large enough to accommodate the principal residence. However, it is quite obviously not the most suitable location as it would provide none of the amenity that the higher site provides.
6. On 30 June 2021, the private building certifier was engaged by the appellants seeking a development application for building works to establish a new residence. On behalf of the appellants the private building certifier prepared and lodged a development application for a Material Change of Use seeking approval for a new residence with the existing residence being considered ancillary and therefore approved as a secondary dwelling. The private building certifier also lodged an Operational Works for earthworks associated with the new dwelling.
7. On 23 November 2021, Council issued their decision notice approving the proposed residence and associated earthworks. However, Council conditioned the approval and notated the approved plans stating:  
*A secondary dwelling has not been approved on this site. Prior to approval of a Development Permit for building works by a private building certifier for the proposed new dwelling on the site, the existing dwelling house must either be:*  
*(a) Demolished; or*  
*(b) Decommissioned to ensure the structure is not capable of being used as a self-contained residence.*
8. On 17 December 2021, the appellants stated their grounds for appeal, and completed and submitted the Form 10 – Notice of Appeal to the Registrar.

## **Jurisdiction**

9. This appeal has been made under section 229 of the PA, as a matter that may be appealed to a tribunal.
10. Section 1(2) of schedule 1 of the PA states Table 1 applies to a tribunal only if the matter involves one of the circumstances set out in paragraphs (a) to (l) of that section. Paragraph (b) of section 1(2) states: *a provision of a development approval for—*  
*(i) a material change of use for a classified building;*  
*or*  
*(ii) operational work associated with building work, a retaining wall, or a tennis court;*

11. The tribunal is satisfied that the development application to Council satisfies that requirement, being a development application for a Material Change of Use for a Class 1 Dwelling and Operational Works for associated earthworks.
12. That application was subsequently approved by the Council but the provisions of that approval specifically refused the secondary dwelling as was applied for. Table 1 item 1(a) in Schedule 1 of the PA states that for a development application an appeal may be made to a tribunal against the refusal of all or part of the development application.
13. The part refusal by Council has enlivened the jurisdiction of the Tribunal.

### **Decision framework**

14. Section 246 of the PA provides as follows (omitting the examples contained in the section):

The registrar may, at any time, ask a person to give the registrar any information that the Registrar reasonably requires for the proceedings.

The person must give the information to the registrar within 10 business days after the registrar asks for the information.

Section 253 of the PA sets out matters relevant to the conduct of this appeal. Subsections (2), (4) and (5) of that section are as follows:

(2) Generally, the appellant must establish the appeal should be upheld.

(4) The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.

(5) However, the tribunal may, but need not, consider— other evidence presented by a party to the appeal with leave of the tribunal; or any information provided under section 246.

15. Section 254 of the PA deals with how an appeal such as this may be decided. The first three subsections of that section (omitting section 254(2)(e), as it relates to a deemed refusal and not relevant here) are as follows:

(1) This section applies to an appeal to a tribunal against a decision.

(2) The tribunal must decide the appeal by-

(a) confirming the decision; or

(b) changing the decision; or

(c) replacing the decision with another decision; or

(d) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time; or

(e) [not relevant].

(3) However, the tribunal must not make a change, other than a minor change, to a development application.

### **Material Considered**

The material considered in arriving at this decision comprises:

1. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 17 December 2021.

2. Sunshine Coast Regional Council 'Development.i' for 10 Towne Mount Rd Towne Mountain.
3. Google maps and street view images.
4. Nearmaps satellite images from 2010 to current date.
5. The Planning Act 2016 (PA).
6. The Planning Regulation 2017 (PR).
7. The Development Application Rules.
8. The Building Act 1975 (BA).
9. The Building Regulation 2006 (BR).
10. The Sunshine Coast Planning Scheme 2014 and amendments.
11. The National Construction Code 2019 (NCC).
12. The verbal submissions made by the parties at the hearing and during the site inspection.
13. Email correspondence from the private building certifier's representative dated 25 March 2022.  
The email provided reference to four separate examples of secondary dwelling development applications approved by Council.

#### **Findings of Fact**

16. The hearing for the appeal was held at the appellants' home and therefore at the subject site, on 14 March 2022. The Tribunal had the opportunity to view the existing dwelling and attached shed, which is the subject of this appeal. The tribunal also traversed the site to the location of the approved dwelling house location.
17. The property is very tidy with many sections covered in natural vegetation while the cleared areas were slashed and well maintained. Due to the topography and mature native vegetation, the existing dwelling (proposed secondary) dwelling is not visible when viewed from the road frontage. The proposed dwelling site is visible from the road frontage, primarily due to its elevation. The shed, rather than the existing dwelling, will be visible from the proposed dwelling although it sits approximately 10m lower than the new dwelling pad. Both the existing and the proposed dwelling will share the same access driveway.
18. The shed is used to store recreational and work vehicles for the appellants. The existing dwelling has a gross floor area that is slightly less than 90sq/m in area. The car parking provisions for this dwelling is also provided in the attached shed. The appellants stipulated that their parents intended to occupy the existing dwelling once they have built the principal residence.
19. Council's Statement of Reasons for their Decision stated:  
*The assessment manager found that, part of the proposed development (Secondary dwelling) does not comply with the requirements of the Planning Scheme and is refused. The reasons for the part refusal are as follows:*  
*The proposal departs from Performance Outcome PO12 (b) of the Dwelling house code as the secondary dwelling will not be located within close proximity to the primary dwelling.*  
*The proposal departs from the Purpose and Overall Outcomes (9.3.6.2 (2) (e) (i) of the Dwelling house code as the secondary dwelling has not been located, designed or constructed to have an association with the primary dwelling.*  
*The proposal cannot be conditioned to comply with the assessment benchmarks.*

20. A dwelling house is a defined use in Schedule 1 of the Sunshine Coast Planning Scheme 2014 which states: A residential use of premises for one household that contains a single dwelling. The use includes out-buildings and works normally associated with a dwelling house and may include a secondary dwelling. Therefore by definition, any application for a secondary dwelling is interpreted as an application pertaining to a dwelling house.
21. The land has a rural zoning designation. Under Part 5 of the Sunshine Coast Planning Scheme, Material Change of Use tables of assessment, Table 5.5.19 states: within the Rural Zone, a dwelling house is accepted development provided it meets the acceptable outcomes of the Dwelling house code.
22. Section 5.3.3 (2) of the Scheme, states: Accepted development that does not comply with one or more of the relevant acceptable outcomes in the relevant parts of the applicable code(s) becomes assessable development requiring code assessment unless otherwise specified. In this matter, development for the Dwelling House becomes code assessable.
23. Council determined that the proposal for the existing dwelling to be considered a secondary dwelling didn't meet and couldn't be conditioned to meet Performance Criteria PO12(b) of the Dwelling House Code that states,

The secondary dwelling is:

(b) located in close proximity to the primary dwelling.

Acceptable Outcome AO12 of the Dwelling House Code states that:

Where freestanding, the secondary dwelling is located within 20m of the primary dwelling (measured from the outermost projection of each dwelling).

The current AO12 provisions were adopted within the Dwelling House Code provisions when the Sunshine Coast Planning Scheme 2014 was amended on 11 November 2019.

Prior to this date there were no requirements (prescribed in the Dwelling House Code of the Sunshine Coast Planning Scheme 2014) to determine the siting of a secondary dwelling in relation to the primary dwelling.

At the hearing the appellants stated that their existing dwelling was built in 2015 with the intention that it would be subsequently endorsed as a secondary dwelling once their primary dwelling was able to be built. They had been unaware of the amendments adopted in the Sunshine Coast Planning Scheme on 11 November 2019 nor the significance to their own plans.

24. Section 9.3.6.2 Purpose and overall outcomes of the Dwelling House Code states in part: The purpose of the Dwelling house code is to ensure dwelling houses achieve a high level of comfort and amenity for occupants, maintain the amenity and privacy of neighbouring residential premises and are compatible with the character and streetscape of the local area.

Section 9.3.6.2.2 (e) also states: where provided, a secondary dwelling:

(i) is located, designed, constructed and used to have an association with the primary dwelling;

Council determined that the proposal for the secondary dwelling departs from the Purpose and Overall Outcomes (9.3.6.2 (2) (e) (i) of the Dwelling house code as the secondary dwelling has not been located, designed or constructed to have an association with the primary dwelling. Council further determined that the proposal could not be conditioned to comply with the assessment benchmarks.

## **Reasons for the Decision**

25. The proposed secondary dwelling is clearly ancillary to the proposed principal residence in respect to size, location and overall amenity. The existing dwelling is modest, attached to the vehicle storage shed and cannot be reached by car or on foot unless you drive/ walk through and past the site where the principal residence is to be built.
26. The Tribunal found that the location of the secondary dwelling is in close proximity to where the primary dwelling is to be built by virtue of the scale and topography of the property as a whole. The acceptable outcome nominates a 20m proximity, however this measure needs to take into account the relevance of the overall property size. The Tribunal has considered the performance criteria when assessing and determining what close proximity means in this instance.
27. The appellants' business and recreational vehicles will remain in the steel shed attached to the secondary dwelling. The appellants will have a continued need to be accessing this shed on a daily basis. The intended occupants of the secondary dwelling are part of the extended household.

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**Debbie Johnson**

**Development Tribunal Chair**

**Date: 11 May 2022**

## **Appeal Rights**

Schedule 1, Table 2, item 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 Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone 1800 804 833**

**Email: [registrar@epw.qld.gov.au](mailto:registrar@epw.qld.gov.au)**