Development Tribunal – Decision Notice

Planning Act 2016, Section 255

Appeal Number:	**21-017**
Appellant:	Grant McCrohon and Kylie McCrohon
Respondent (Assessment Manager):	Trevor William Gerhardt, Building Certifier Level 1
Co-respondent (Concurrence Agency):	Sunshine Coast Regional Council
Site Address:	61 Elizabeth Street, Kenilworth and described as Lot 1 on RP 116505 – the subject site

Appeal

The Form 10 states the appeal is about changing or cancelling conditions imposed on a building development approval. On reviewing the grounds of appeal and attached documents, the Tribunal finds the appeal is made under section 229 and Schedule 1, Table 1, Item 2 *Change applications* of the *Planning Act 2016* and is against the refusal of the Assessment Manager to change a development approval to raise an existing dwelling to a height above 8.5 metres (8.65 metres). The decision followed a refusal of the Sunshine Coast Council to provide concurrence agency advice on the grounds that a separate application for impact assessment needed to be lodged with the Council.

Date and time of hearing:	10 am, Thursday 16 December 2021
Place of hearing:	The subject site
Tribunal:	Ain Kuru – Chair Phil Cristaldi - Member
Present:	Trevor Gerhardt – representing the Appellants (Grant McCrohon and Kylie McCrohon) Stephen Whitby, Co-ordinator Planning Assessment – representing the Co-respondent (Sunshine Coast Regional Council) Angus McKinnon - observer

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the Planning Act, confirms the decision by the Assessment Manager, Trevor William Gerhardt, to refuse the change to the development approval.

Background

1. This appeal is about how an application to increase the height of a house more than 8.5 metres high should be assessed by Council. The Appellant's grounds of appeal argue that the building application can be referred to Council for assessment. Council however is of the view that a separate impact assessable application must be made directly to it. The way in which each application would be assessed by Council is quite different.

Application subject to appeal

2. The Tribunal is advised that the Assessment Manager had approved a building development application for a house on the subject site. An approval condition required the house to be less than 8.5 metres in height as required by the Sunshine Coast Council's Planning Scheme. The house when built was found to be 8.65 metres in height and because it no longer complied with the approval, the Appellant subsequently lodged a minor change building development application with the Assessment Manager. The Assessment Manager formed the view that while the house as constructed exceeded the maximum 8.5 metres height for Accepted Development as allowed by the Sunshine Coast Planning Scheme, it was a building assessment provision under section 30 of the Building Act 1975. In accordance with section 33 of the Act and Table 3, Division 2, Part 3, Schedule 9 of the Planning Regulation 2017, the Assessment Manager referred the application, on behalf of the Appellant, to the Council for its concurrence advice.
3. Council subsequently issued a notice in response to the referral application stating the change application for the increased height was a material change of use (as defined by the Planning Act) and as the height of the house now exceeded 8.5 metres in the Height of Buildings and Structures Overlay Code of the Planning Scheme, it required an impact assessable development application to be made to Council. The Council subsequently advised the Appellant to withdraw the building application referred to it. As the Council did not respond to the building application referred to it, the Assessment Manager was required to refuse the application (refer section 58(2) of the Planning Act and section 24 of the Planning Regulation).

4. This appeal is against the refusal issued by the Assessment Manager to approve the change application.

Grounds of Appeal

5. The Appellant seeks orders from the Tribunal to approve the 8.65 metre height of the dwelling. In support of these grounds, the Appellant attached a letter dated 11 February 2021 written by the Assessment Manager to Council. The letter makes the following key arguments.

> The application for increased height involves building work as defined under the Planning Act and is a *Building Assessment Provision* (BAP) under section 30 Building Act. A local government is empowered to include BAPs in its planning scheme subject to sections 31, 32 and 33 of the Building Act. Section 32 (b) of the Building Act allows a local government to regulate building work in its planning scheme as prescribed by regulation. In respect of a single detached class 1 building, Section 10[1] of the Building Regulation allows a planning scheme to provide for performance criteria for particular elements of the QDC if the scheme also includes quantifiable standards. Performance Criteria 4 of QDC MP 1.2 regulates building height. Referring to the Dwelling House Code of the Planning Scheme, PO1 is a qualitative statement and AO1 is a quantitative standard.
>
> Under section 8(5) and (6) of the Planning Act, a planning scheme must regulate BAPs in accordance with the Building Act otherwise it is of no effect:
>
> *(5) A local planning instrument must not include a provision about building work, to the extent the building work is regulated under the building assessment provisions, unless allowed under the Building Act.*

[1] Section 10 was a mistaken reference to section 6.

(6) To the extent a local planning instrument does not comply with subsection (5), the local planning instrument is of no effect.

The words "*to the extent the building work is regulated under the building assessment provisions"* are relevant as they differentiate what building work can be regulated as a BAP.

The private certifier can be the Assessment Manager under Chapter 3 Part 3 of the Planning Act and Part 4 Division 3 of the Planning Regulation. The Council can be a referral agency and must assess the referral application within the limits of its referral jurisdiction. The referral jurisdiction of the Council is prescribed in Table 3, Schedule 9 of the Planning Regulation which is "*whether the building work … complies with the qualitative statement*" This is reinforced by the wording of section 8(5) PA which precludes a planning scheme for regulating building work to the "*extent*" it is regulated under the BAPs.

Tribunal Directions (14 September 2021)

6. The Tribunal issued directions in accordance with section 250 of the Planning Act on 6 September 2021. The Appellant submitted that the Council is not a co-respondent to the appeal and therefore objected to their involvement. The Appellant also requested changes to the directions allowing for more time.
7. In response the Tribunal advised that pursuant to schedule 1, table 1, item 2 of the Planning Act, the Tribunal considers that the Council can elect to become a co-respondent to the appeal. If the Council does not elect to become a co-respondent, the Tribunal may still seek the views of the Council in accordance with s 249(6) of the Planning Act.
8. In view of the Appellant's request, the Tribunal replaced the directions made on 6 September 2021 with the following directions:

    1. *On or before Friday 24 September 2021, the Appellant provide a written submission (limited to 3 pages) addressing why the proposed building work involves or does not involve, a material change of use; and*

    2. *On or before Friday 1 October 2021, the Sunshine Coast Regional Council provide a written submission (limited to 3 pages) addressing the same issue.*

       Also, on or before Friday 1 October 2021, the Sunshine Coast Regional Council provide a written submission (limited to 3 pages) addressing why the proposed building work should be assessed as either a building assessment provision pursuant to clause 1.6 of the Sunshine Coast Planning Scheme or in accordance with the Height of Buildings and Structures Overlay of the Sunshine Coast Planning Scheme, with reference to the Assessment Manager's response to Council's Action Notice dated 11 February 2021.

    3. *On or before Monday 11 October 2021, the Appellant is to provide a response (limited to 3 pages) to the Council's above-mentioned submissions.*

       In providing submissions referred to in paragraphs 1 and 2 above the parties are requested to draw on relevant case law and extrinsic material including but not limited to Gerhardt v Brisbane City Council (2017) QPEC 49 and the explanation of the definition of a 'material change of use' contained in the Explanatory Notes to the Planning Bill 2015.

Appellant's Written Submission (24 September 2021)

9. The submission prepared by Mr Trevor Gerhardt on behalf of the Appellant makes the following points.
10. The Explanatory Notes to the Planning Bill 2015 state that the test of whether something is a material change of use is an objective test which cannot be changed by a planning scheme.

11. By requesting an application for a material change of use, Council are operating outside their referral jurisdiction as prescribed in Section 5 of the Planning Act and Schedule 9 Table 3 of the Planning Regulation.

12. Another Tribunal (Decision 19-003) has found that height under the House Code of the Sunshine Coast Regional Planning Scheme was a BAP as it was an alternative provision to the Queensland Development Code.

13. Table 1.6.1 of the Planning Scheme states that building height for a dwelling house under section 9.3.6 of the Dwelling house Code is a BAP. Building height is BAP provided for in section 32 of the BA and prescribed in section 5 of the BR which can be included in a planning scheme.

Co-respondent's Written Submission (5 October 2021)

14. The submission prepared by Council makes the following points.

15. The Council concedes that the proposed development is not a material change of use but that building work is nonetheless development assessable against the Planning Scheme.

16. Section 8(5) of the Planning Act states a local planning instrument must not include a provision about building work, to the extent the building work is regulated under the BAPs, unless allowed under the Building Act. Therefore the planning scheme may regulate other matters outside the scope of the BAPs.

17. The Council is a referral agency pursuant to Schedule 9 of the Planning Regulation where the proposed building work is subject to alternative provisions under the Planning Scheme. However, Schedule 9 is silent where the development is also made impact assessable by the Scheme and subject to provisions which are not BAPs.

18. The relevant question is whether the height provisions of the Planning Scheme co-exist with, being not inconsistent, with the BAPs. The Council states that the planning scheme provisions do not displace the BAPs in MP1.2 but co-exist with them. Reference is made to PO1 in the Dwelling House Code and PO1, PO3 and PO4 in the Height of buildings and overlays code.

19. Table 5.10.1 of the Planning Scheme identifies in respect of the Height of buildings and structures overlay that "any development" which exceeds "the maximum height specified for the site" on the applicable overlay map is impact assessable and ought be assessed against the planning scheme. The proposed development is therefore impact assessable under the Planning Scheme and Council is the Assessment Manager.

20. The advice given by Council that the development is impact assessable is appropriate given section 83 of the BA which requires a certifier to wait until all other necessary development permits are effective before issuing a permit for building work.

21. The application was for a minor change however the development permit for which the change was sought was not referred to Council. Therefore the application is not a "minor change" within the meaning of the PA as it now includes referral to a referral agency.

Appellant's Written Response to Co-respondent's Submission (18 October 2021)

22. The submission was prepared by Mr Trevor Gerhardt on behalf of the Appellant and was essentially as follows.

23. Council have conceded the application no longer involves a material change of use and so the matter to be resolved is whether the application should be assessed as a referral application as lodged, or one which is assessable under the planning scheme.

Appellant's Written Submission (30 November 2021)

24. The Tribunal wrote to Mr Gerhardt on 22 November 2021 requesting they address Council's submission that the application was not a "minor change" as it included referral to a referral agency.

25. In response, Mr Gerhardt conceded the application may not be correct but questioned the relevance of Council's submission given the application was lodged with the Assessment Manager. Mr Gerhardt also advised that the Appellant had now lodged the correct application form and that the Tribunal should address the substantive argument being the type of application.

On Site Hearing (16 December 2021)

26. The Tribunal noted that there is agreement between the parties that the application can be assessed as a BAP. Council however believes it is also impact assessable, and that the Certifier cannot issue a building development permit until an application for such is assessed and approved.

27. The Tribunal noted that the grounds of appeal involve complex legal questions some of which are outside its jurisdiction. The Tribunal however advised that it did have jurisdiction to decide an appeal in respect of a BAP including in this case height and is required to decide the matter. The Tribunal also noted that it is not constrained in respect of section 83 of the Building Act in respect of making a new decision. Therefore, the Tribunal advised that it did have the ability to decide the application subject to the appeal.

28. Mr Stephen Whitby advised that building height was a sensitive issue for Council which was why the planning scheme included a height overlay where impact assessment was triggered for development exceeding the maximum allowable height. Stephen advised that the planning scheme addressed additional matters to BAPs such as context, cumulative impact on character, scale and community expectations, as well as the overall outcomes of the planning scheme. In respect of BAPs referred to in the planning scheme, Mr Whitby believed these related to carports but not houses.

29. Asked whether Council believed the proposed house complied with performance criteria PO1 in the Planning Scheme, Mr Whitby advised that it complied with (a) overshadowing; (b) privacy and overlooking; (d) building appearance; and (e) building massing and scale as seen from neighbouring premises.

30. In respect of (c) views and vistas, Mr Whitby advised that the impact of the proposed house would need to be assessed using a computer model. The Tribunal was disappointed Council had attended the hearing without undertaking this assessment.

31. Mr Gerhardt responded advising views and vistas could be dealt with by Council as a referral agency.

32. Mr Gerhardt reiterated the Appellant's written submission that Council has BAPs for height in its planning scheme which are alternative standards to the QDC and these operate in lieu of the planning scheme's impact assessment requirements. It was also argued that BAPs derive from the Building Act and therefore override the planning scheme as they of a higher order law. Council is obliged to follow the assessment rules and the Tribunal must now assess the application.

33. In respect of broader planning issues, Mr Gerhardt advised that Council could have input through amenity and aesthetics provisions in the Building Act as well as through neighbour statements. Mr Gerhardt noted there was only one neighbour and that they would not be impacted by the additional height given the additional height involved and that their house was not nearby. It was noted that the house was in a low density residential zone and in a rural setting.

34. Finally Mr Gerhardt advised the Appellants were in financial stress. Mr Whitby advised that Council was willing to assist if the Appellants lodged the correct application. The Tribunal suggested that it would be in the Appellant's interests to seek Council assistance, given that despite any decision made by the Tribunal, Council still had the legal authority to undertake enforcement action against the Appellants if they believed an impact assessable application was still required.

35. On 28 February 2022 the Respondent, Mr Gerhardt, emailed two previously decided Court decisions and a government publication entitled 'Building provisions in planning schemes' to the Registry, purportedly 'to assist the Development Tribunal with the Appeal', although he did not indicate specifically how the cases and the publication would be of assistance. The Tribunal has reviewed the cases and the material and finds the cases not to be relevant. Further, the Tribunal does not consider the publication as relevantly authoritative.

Material Considered

36. 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 7 April 2021.

    2. Written submissions from the Appellant and Co-Respondent as noted above.

Findings of Fact

The Tribunal makes the following findings of fact.

<u>The works involve building work</u>

37. The parties and Tribunal agree development subject of the application is defined as building work under the Planning Act and Building Act, and not a material change of use.

38. Section 20 of the Building Act states unless building work is accepted development, building work is assessable. Section 30 defines BAPs as including provisions made under the Act, including the QDC.

39. The building work subject of the application is a BAP. Section 30(d) and (e) of the Building Act state BAPs comprise any provisions made under a regulation to the Act and any local planning instrument made under section 32 or any relevant provision made under section 33.

40. Section 32(b) of the Building Act states:

    A local government may make or amend—

    (b) a provision of a local law or planning scheme or a resolution about an aspect of, or matter related or incidental to, building work prescribed under a regulation; or

41. Section 6(2)(b) and (c) of the Building Regulation states that for a house:

    A local government planning scheme may provide for the following matters-

    (b) All or some of performance criteria 4, 5, 7 or 8 under QDC part 1.2[2] and the acceptable solutions for the performance criteria apply to the building work;

    (c) a qualitative statement[3] for a matter provided for under the performance criteria mentioned in paragraph (a) or (b) for the building work, if the scheme also provides for quantifiable standards for the statements.

42. A planning scheme can therefore adopt the building height provisions of the QDC under performance criteria 4 and include its own qualitative statements.

43. Section 32(c) of the Building Act also states:

    A local government may make or amend—

    (c) alternative provisions under section 33.

44. Section 33 of the Building Act states:

    *(2) A planning scheme or PDA instrument may include provisions (**alternative provisions**) that, for relevant work, are alternative or different to the QDC residential design and siting provisions.*

    (3) However, a planning scheme or PDA instrument may include alternative provisions only if the provisions are a qualitative statement or quantifiable standard.

    (4) If there are alternative provisions for relevant work, the QDC residential design and siting provisions only apply to the extent the alternative provisions do not apply to the work.

[2] Building height for single detached houses is included in QDC residential design and siting MP1.2 (lots 450 m^2 and above) . Performance criteria 4 of these codes deal specifically with building height.
[3] Qualitative statement is defined in the Building Act as "a statement about a performance or outcome sought to be achieved when applicable buildings or structures are completed.

45. The *QDC residential design and siting provisions* are defined in the Building Act as the parts, or aspects of parts, of the QDC prescribed by regulation. The Building Regulation states that for single detached houses performance criteria 1, 2, 3 and 6 of QDC MP 1.2 are prescribed along with the corresponding acceptable solutions. Building height is performance criteria 4 and is therefore not an alternative provision under section 33 of the Building Act.

Building Height is a BAP under the Sunshine Coast Planning Scheme

46. Clause 1.6(3) of the Planning Scheme provides for BAPs and specifically references the height of buildings under QDC MP1.1, 1.2 and 1.3 (1.3 related to duplex houses). Sub section (3) states:

> *(3) This planning scheme, through Part 5 (Tables of assessment), regulates building work in accordance with sections 32 and 33 of the Building Act 1975.*
>
> *Editor's note—the Building Act 1975 permits planning schemes to:-*
>
> *(a) regulate, for the Building Code of Australia (BCA) or the Queensland Development Code (QDC), matters prescribed under a regulation under the Building Act 1975 (section 32). These include variations to provisions contained in parts MP1.1, MP1.2 and MP1.3 of the QDC such as height of buildings related to obstruction and overshadowing, siting and design of buildings to provide visual privacy and adequate site lines, on-site parking and outdoor living spaces. It may also regulate other matters such as land liable to flooding, designating lands as bushfire prone areas and transport noise corridors;*
>
> *(b) deal with an aspect of, or matter related to or incidental to building work prescribed under a regulation under section 32 of the Building Act 1975; and*
>
> *(c) specify alternative planning scheme provisions under section 33 of the Building Act 1975. This relates to alternative design solutions for boundary clearance and site cover provisions MP 1.1, 1.2 and 1.3 of the QDC.*

47. Table 1.6.1 lists the BAPs and in *Column 1 Building assessment matter addressed in the planning scheme* states *QDC alternative provisions* as including:

- Alternative boundary clearance (setback) and site cover provisions for a dwelling house; and
- Provisions about Performance Criteria 4 relating to building height.

QDC alternative provisions	
Alternative provisions to the QDC for boundary clearance (*setback*) and *site cover* provisions for a *dwelling house* or a class 10 building or structure located on the same lot as a *dwelling house*.	
Provisions about performance criteria 4 and 8 under parts 1.1 and 1.2 of the QDC for a *dwelling house* or a class 10 building or structure located on the same lot as a *dwelling house*.	

48. The planning scheme is incorrect as it cannot adopt alternative provisions in respect of performance criteria 4 relating to height as this is not defined as *QDC residential design and siting provisions*. Pursuant to section 6(2)(c) of the Building Regulation a Planning Scheme can only provide for a qualitative statement and not an alternative provision under section 33 of the Building Act.

The Planning Act states a planning scheme can include a provision about building work

49. *Table 5.10.1 Overlays – Height of buildings and structures overlay* of the planning scheme states than any development exceeding the maximum height as prescribed in the overlay map is impact assessable.

50. *Clause 1.5 Hierarchy of provisions* of the planning scheme states in subclause (1)(c) that overlays prevail over all other components except where prescribed by regulation or the strategic framework. In this respect the requirement for impact assessment to be undertaken because of the overlay would appear to override the BAPs.

51. The Appellant points to subsections 8(5) and (6) of the Planning Act which state:

> *(5) A local planning instrument must not include a provision about building work, to the extent the building work is regulated under the building assessment provisions, unless allowed under the Building Act.*
>
> *(6) To the extent a local planning instrument does not comply with subsection (5), the local planning instrument is of no effect.*

52. The Appellant also argues that any provisions in the Planning Act would override the Planning Scheme as they are of a higher order.

53. The Council in its submission argued that the BAPs and Planning Scheme provisions are compatible and should be read as co-existing rather than inconsistent with the BAPs. The Tribunal notes however sections 8(5) and (6) of the Planning Act state that building work provisions of the planning scheme are of no effect where the work is regulated by a BAP unless allowed under the Building Act.

54. The appeal relates to the refusal of a building development change application relating to the height of a dwelling. Council's view that the application also triggers impact assessment under its planning scheme is not the subject of this appeal and outside the jurisdiction of the Tribunal.

55. The argument made by the Appellant is that height is a BAP which overrides other assessment provisions contained in the Planning Scheme.

Section 31 of the Building Act states:

> *(1) Each of the building assessment provisions is an assessment benchmark for the Planning Act for the assessment of building work that is assessable under section 20.*

An assessment benchmark is defined in section 43(c) of the Planning Act as:

> *(c) sets out the matters (the assessment benchmarks) that an assessment manager must assess assessable development against.*

56. Read in conjunction with subsections 8(5) and (6) of the Planning Act, the BAPs are only assessment benchmarks and do not categorise whether development is assessable. Whether or not the BAPs override the planning scheme overlay trigger for assessment is a legal matter outside the prerogative of the Tribunal.

<u>The development application was not for a minor change</u>

57. A person may apply to change a development approval pursuant to section 78 of the Planning Act. The application made by the Appellant was for a minor change. Minor change is defined in the Act as a change which does not require referral to a referral agency if there were no referral agencies for the application. Section 79 of the Act states a change application must be made in the approved form.

58. The development permit for which the change was sought was not referred to Council. Therefore, the application made is not for a minor change.

59. Section 51(1)(a) of the Planning Act states a development application must be in the approved form however section 54(4)(c) states an Assessment Manager may accept an application that does not comply with section 51(1)(a).

60. While the incorrect form was used, the Assessment Manager was able to accept the form and consider the application as properly made.

61. The type of application made was not subject of the appeal and applying the principles of *Perivall Pty Ltd vs Rockhampton Regional Council & Ors* [2018] QPEC 46, the Tribunal considers it is not relevant to this appeal. In any case the Tribunal notes there were no submissions from Council that the assessment process was compromised as a result.

Referral Agency Assessment

62. In accordance with Part 3, Division 2, Table 3 of Schedule 9 of the Planning Regulation, the referral jurisdiction of Council is:

> *… whether the proposed building or structure complies with the qualitative statement stated in the paragraph*

Reasons for the Decision

63. The relevant qualitative statements in the Sunshine Coast Planning Scheme were identified by Council as:

> *Dwelling House Code*
>
> *PO1 The height of the dwelling house is consistent with the preferred character of a local area and does not adversely impact on the amenity of neighbouring premises having regard to:-*
>
> *(a) overshadowing;*
>
> *(b) privacy and overlooking*
>
> *(c) views and vistas;*
>
> *(d) building appearance; and*
>
> *(e) building massing and scale as seen from neighbouring premises*
>
> *Height of Buildings and Structures Overlay Code*
>
> *PO1 Unless otherwise specified in PO2 below, the height of a building or structure does not:*
>
> *(a) exceed the maximum height specified for the site on the applicable Height of Buildings and Structures Overlay Map;*
>
> *(b) adversely impact upon the character of the local area; and*
>
> *(c) result in a significant loss of amenity for surrounding development.*

64. The site is zoned low density residential however the character is semi-rural as it is yet to be developed. The nearest dwelling on a residential lot is approximately 20 metres away and the two other adjoining lots are substantially larger rural lots. In this context the Tribunal believes the additional 150 mm in height is insignificant and satisfies the qualitative statements in the Dwelling House Code.

65. The qualitative statement in the Height of Buildings and Structures Overlay Code states the building must not exceed the maximum height as shown on the applicable map, which is 8.5 metres. Pursuant to section 55 (2) of the Planning Act, the referral agency must assess the application in accordance with section 22 of the Planning Regulation and the prescribed referral jurisdiction in Part 3, Division 2, Table 3 of Schedule 9.

Ain Kuru

Development Tribunal Chair
Date: 11 March 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 (07) 1800 804 833