Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	**55- 17**
Appellant:	Mr John Maher (Applicant)
Assessment Manager:	Mr Jim Locke, Jim Locke Building Consultants Assessment Manager)
Concurrence Agency: (if applicable)	Sunshine Coast Regional Council (Council)
Site Address:	215 Ocean Vista Drive, Maroochy River and described as Lot 94 on RP 258214 ─ the subject site

Appeal

The appeal is made under the *Planning Act 2016* (PA), Section 229 and Schedule 1, Table 1, Item 1(a), against the decision of the Assessment Manager to refuse a building development application for a class 1a dwelling and class 10 shed on the subject site. The Sunshine Coast Regional Council (Council), as the Concurrence Agency, directed the Assessment Manager to refuse the application. The decision was made on the grounds that the proposed building work would not comply with, and could not be conditioned to comply with, the setback requirements, in Rural and Rural Residential Zones, of Performance Outcome PO4 of Part 9, section 9.3.6 of the Dwelling House Code, of the Sunshine Coast Planning Scheme 2014.

Date and time of hearing:	The hearing was held on Friday 19 January, 2018 at 12 Midday
Place of hearing:	The Subject Site
Tribunal:	Mr Peter Rourke– Chair Mr Neil de Bruyn - Member
Present:	Mr John Maher Mrs Susanne Maher Mr Peter Chamberlain - Council representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) confirms the decision of Jim Locke Building Consultants, the Assessment Manager, to refuse the application for the proposed Class 1a and Class 10 buildings.

Please be advised that you may elect to lodge an appeal/declaration about this matter in the Planning and Environment Court (the Court). The Court appeal period starts again from the date you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

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

Background

The subject site is irregularly shaped with an area of 5,768m². The land is located in the Rural Residential Zone under the Sunshine Coast Planning Scheme 2014 (the planning scheme). A number of overlays apply to the subject site. These are as follows:

- Airport Environs Overlay, under which the site is mapped as being affected by the runway separation distances (8 to 13km) and the obstacle limitation surface ('OLS').
- Biodiversity, Waterways and Wetlands Overlay, under which the site is mapped as containing native vegetation.
- Height of Buildings and Structures Overlay, under which the site is within the area for which a maximum height of 8.5m applies under this overlay.
- Land Subject to Landslide Hazard and Steep Land Overlay, under which the site is mapped as being subject to a moderate landslide hazard, and as containing steep land exceeding a gradient of 25%.

The proposed development in this case is building works for a Class 1a dwelling house and associated Class 10 shed. Significantly, the proposed dwelling house is to be set back a minimum of 2.5m from the road frontage of the site, and the associated shed is to be set back 4m from the frontage.

On or about 2 June 2017, the appellant referred the proposed development to Council regarding its jurisdiction as a concurrence agency in relation to the design and siting of the proposed development under Schedule 7, Table 1, Item 20 of the Sustainable Planning Regulation 2009 (being the applicable Regulation at the time). Pursuant to Section 33 of *the Building Act 1975*, the Council had nominated Performance Outcome PO4 and Acceptable Outcome AO4 of the Dwelling House Code as alternative provisions to the Queensland Development Code Part MP1.2, and the proposed development was assessed against these provisions.

Performance Criterion PO4 (b) states: "Where located in the Rural zone, the *dwelling house* is set well back from any road *frontage* so as to:

(a) …;
(b) preserve the amenity and character of the rural or rural residential area, having regard to building massing and scale as seen from the road and neighbouring premises;
(c) …;
(d) …;
(e) …."

Acceptable Outcome AO4.2 (being the AO relevant to the Rural Residential Zone) states: "Where located on a lot in the …… Rural residential zone, the *dwelling house* (including any associated garage, carport or shed) is set back at least:

(a) 10 metres from any road *frontage*; or
(b) …."

It was agreed at the hearing that only PO4 (b) and Acceptable outcome AO4.2 (a) of the above code, are the subject of this appeal.

At this point, it is pertinent to note that, based on the opening sentence, PO4 appears to apply only to the Rural Zone. Clarification was sought from the Council representative as to whether this is, in fact, the case. At the hearing, it was stated by the Council representative that this was considered to be a drafting error, and that the PO is taken to apply to the Rural Residential Zone as well as to the Rural Zone. After the hearing, an email was sent by the Council representative to the Registrar, stating that:

"The Tribunal today sought clarification from Council regarding the application and validity of Performance Outcome PO4 of the Sunshine Coast Planning Scheme 2014, Dwelling House Code ("DHC") in relation to rural and rural residential zones. The opening statement in PO4 states "Rural zone" however it then states "rural and rural residential" in sub-item (b). Please be advised that Council is of the opinion that both AO4 and PO4 sufficiently identify and are understood by industry to include both rural and rural residential zones. This is evident in the fact that this particular question of validity has never been raised by industry. However, I have recommended that the words rural residential should be included in the opening statement as an administrative amendment to the DHC."

On the basis of the above clarification received from Council, it is taken that PO4 does, in fact, apply in this case.

As it is proposed that the Class 10 shed be located 4 metres from the front boundary, and that the Class 1a dwelling house be located a minimum of 2.5 metres from the front boundary, and therefore that the requirements of AO4.2(b) would not be achieved, Council's assessment turned to the requirements of PO4(b), and it determined that the proposed development also did not achieve these requirements. Consequently, on 13 October 2017, the Council, as the Concurrence Agency, decided to issue a concurrence agency response refusing the proposed building works, on the grounds that they would not comply with, and could not be conditioned to comply with, the setback requirements applicable to the Rural Residential Zone under the Dwelling House Code.

Because the proposed building work will not comply with Acceptable Outcome AO4.2 (a), the Council as the referral agency for the application must decide whether or not the proposed building work complies with the performance criteria stated in PO4 of Part 9, section 9.3.6 of the Dwelling House Code.

Relevantly, at the time the concurrence agency response was issued, no building development application had been made to an assessment manager for the proposed building works. Both Section 271 of the *Sustainable Planning Act 2009* (SPA) and Section 57 of the PA enable a referral agency to give a response on a proposed development application before a development application is made.

On 4 December 2017, a building development application for the carrying out of the proposed building work was lodged with the Assessment Manager.

At some time on or after 4 December 2017, pursuant to section 62 of PA, the assessment manager refused the building development application at the direction of the Concurrence Agency.

On 13 December 2017, an appeal against the decision of the Assessment Manager refusing the building development application at the direction of the concurrence agency, was lodged with the Registrar of the Development Tribunals.

Discussion

At the hearing, and in response to a question from the Tribunal, the Council representative indicated that an Material Change of Use (MCU) approval was not required for the subject site because of the provisions of Schedule 6, Part 2 of the *Planning Regulation 2016*. On 22 January 2018, the Registrar wrote to the Council requesting confirmation as to whether or not an MCU approval is necessary before a development application for the subject building work can be approved to allow the work to be carried out.

On 22 January 2018, the Council responded to the above request as follows:

*"Please be advised that council as a Planning Act 2009 concurrence agency assessed the referral based on the applicant's submission of preliminary sketch drawings for design and siting consideration (front boundary relaxation). Given that only preliminary sketch designs were submitted, Council could not assess the application for compliance with all relevant planning provisions (e.g. planning scheme overlays etc.) as this is the function of an assessment manager (private building certifier). Council is not the assessment manager for this proposa*l"

Section 83 of the *Building Act 1975* applies general restrictions on granting building development approval. Among other things, section 83 prevents a private certifier from granting a building development approval applied for until, under the *PA*, all necessary development permits are effective for the development, other than building work.

If, in this case, an MCU is required, an MCU application would need to be approved by the Council and become effective before any development application for building work under the *Building Act 1975* could be approved by a private building certifier.

Under Schedule 6, Part 2, Section 2 of the *Planning Regulation 2016*, an MCU for a dwelling house and associated outbuildings cannot be made assessable development by a planning scheme where, among other things, there are overlays identified in the planning scheme that are relevant to the assessment of the MCU.

A full assessment against the applicable overlay codes has not been possible based upon the level of information that has been provided. However, there would appear to be little doubt that at least the Landslide Hazard and Steep Land Overlay, as it applies to the subject site, would be relevant to the assessment of an MCU. As such, the provisions of Schedule 6, Part 2, Section 2 do not apply to the subject development, and the way is open for the planning scheme to categorise the development as assessable development.

Under the planning scheme, a MCU for a dwelling house within the Rural Residential Zone is identified as accepted development provided the development complies with the requirements of the acceptable outcomes of the Dwelling House Code (refer to Table 5.5.20 and Section 5.3.3(1) of the planning scheme). Under the Airport Environs Overlay and the Height of Buildings and Structures Overlay, the proposed use is accepted development (not subject to requirements) (refer to the relevant parts of Table 5.10.1 and Section 5.3.3(1) of the planning scheme). Under the Biodiversity, Waterways and Wetlands Overlay and the Land Subject to Landslide Hazard and Steep Land Overlay, the category of development is not changed, and is therefore accepted development subject to requirements. In the case of these two overlays, the requirements for accepted development are the relevant acceptable outcomes of each of the two overlay codes.

Under Section 5.3.3(2) of the planning scheme, accepted development subject to requirements, that does not comply with one or more relevant acceptable outcomes under an applicable assessment benchmark, becomes assessable development, requiring code assessment (unless otherwise specified).

Based upon an assessment of the architectural plans provided in this appeal, the proposed dwelling house would, at a minimum, not comply with AO 4.2 of the Dwelling House Code, requiring, *inter alia*, a dwelling house in the Rural Residential Zone to be set back at least 10 metres from any road frontage. Based on the submitted plans, the proposed dwelling house would be set back between approximately 2.5 and 3 metres from the road frontage of the site, and the associated shed would be set back 4 metres from the frontage.

The proposed dwelling house may not comply with other relevant acceptable outcomes of the Dwelling House Code, the Biodiversity, Waterways and Wetlands Overlay Code and/or the Land

Subject to Landslide Hazard and Steep Land Overlay Code. A full assessment against these codes has not been possible based upon the level of information that has been provided.

Based on the assessment that the proposed dwelling house would not comply with at least one relevant acceptable outcome under an applicable code, the use of the site for this purpose would, pursuant to Section 5.3.3(2) of the planning scheme, be assessable development. As such, the proposed development requires a MCU development permit, for which an application would have to be made to the Council as assessment manager.

No MCU application has been made or approved in this case and, pursuant to Section 83 of the *Building Act 1975,* the assessment manager is not able to grant the building development approval applied for.

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
2. Sketch drawings accompanying the Appeal Notice and nominated as SK01 to SK05 and sectional drawing WD03
3. The *Planning Act 2018*
4. The *Building Act 1975*
5. The *Sustainable Planning Act 2009*
6. Sunshine Coast Planning Scheme 2014
7. Verbal submissions made at the hearing on 19 January 2018 at the subject site
8. The Concurrence Agency response dated 13 October 2017 for the proposed building work
9. The decision notice of the Assessment Manager refusing the proposed building development application

Findings of Fact

The Tribunal makes the following findings of fact:

- The site for the proposed building work is located in a rural residential zone.
- Performance Outcome PO4 of Part 9, section 9.3.6 of the Dwelling House Code, of the Sunshine Coast Planning Scheme 2014 applies to the proposed building work.
- Schedule 6, Part 2, Section 2 (d) of the *Planning Regulation 2016*, does not apply to the proposed building work, as there are overlays identified in the planning scheme that are relevant to the assessment of an MCU, and which apply to the subject site.
- An MCU is a necessary development permit, which must be effective before a development permit for building work can be approved pursuant to section 83 of the *Building Act 1975*.
- Pursuant to Section 83 of the *Building Act 1975,* the building development approval applied for in this case cannot be granted, until the required MCU development permit is effective.

Reasons for the Decision

Because an MCU is a necessary development application in this case, pursuant to Section 83 of the Building Act 1975, such development permit must first be effective before the subject building development application can be approved.

Accordingly, and for this reason, the decision of the assessment manager to refuse the application for the proposed Class 1 and Class 10 buildings must be confirmed.

Peter Rourke
Development Tribunal Chair
Date: 2 February 2018

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.

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 Facsimile (07) 3237 1248