



Building and Development Dispute Resolution Committees – Decision

Sustainable Planning Act 2009

Appeal Number:	39 - 15
Applicant:	Noosa Building Certifiers
Assessment Manager:	Sunshine Coast Regional Council
Concurrence Agency:	N/A
Site Address:	37 Sugar View Lane, Rosemount Qld 4565 and described as Lot 4 on RP 801524 – the subject site

Appeal

Appeal under section 519 of the *Sustainable Planning Act 2009* (SPA), against the decision of the Assessment Manager, the Sunshine Coast Regional Council, to refuse an application for a material change of use for a 'dwelling and secondary dwelling'. The proposal was to erect a new dwelling on the subject site with the existing dwelling to remain, reclassified as a *secondary dwelling*.

Date and time of hearing:	11am, Thursday 10 December, 2015
Place of hearing:	The subject site
Committee:	John Panaretos – Chair Richard Prout – Member
Present:	Luke Neller of Noosa Building Certifiers – Applicant Terry Neller – Noosa Building Certifiers – Representing the applicant Richard MacGillivray – Sunshine Coast Regional Council Tim Balcombe – Sunshine Coast Regional Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(a) of the SPA **confirms** the decision of the Council to refuse the application for material change of use for a *dwelling house* and *secondary dwelling*.

Background

On 20 October 2015, Dwyer Quality Homes Pty Ltd, acting for the land owner, Ms Freda A. Heidi Jones, lodged an application for material change of use to erect a second dwelling on the subject site. Ms Jones is suffering health problems which, among other things, severely limit her mobility. The purpose of the development was to provide a purpose designed and built dwelling

for Ms Jones, while her son and carer would occupy the existing house on site, reclassified as a 'secondary dwelling'.

The application was triggered under the Sunshine Coast Planning Scheme 2014 because the site is zoned Rural Residential, a zone in which a secondary dwelling is Code Assessable where not complying with the Acceptable Outcomes (AO) of the Dwelling House Code. AO11.2 of the Code limits secondary dwellings in the Rural Residential Zone to a gross floor area (GFA) of 90 m², and 60 m² in other residential zones.

Reclassification of the existing house to a secondary dwelling results in a GFA of 136 m², (51% larger than the acceptable outcome). The proposed new dwelling has a GFA of 258.9 m² or almost twice the area of the existing dwelling.

On 10 November 2015 Council issued its Decision Notice refusing the application for the following reasons:

1. *The proposed secondary dwelling conflicts with the Purpose and overall outcomes of the Dwelling house code as it would not be compatible with the character of the local area.*
2. *The proposed secondary dwelling conflicts with Performance Outcome PO11 of the Dwelling house code as it would not be small in scale or clearly ancillary to the dwelling house.*

Noosa Building Certifiers lodged an appeal with the Registrar against Council's refusal on behalf of Ms Jones on 13 November 2015. The grounds of appeal rest on the proposal being consistent with the Performance Outcome PO11 of the Dwelling House Code of the Sunshine Coast Planning Scheme 2014 and can be summarized as follows:

1. The subject site is a large lot (0.79 Ha), much larger than small allotments to the north which contain larger houses. Hence, the resulting density (two buildings on one lot) appears consistent with nearby character;
2. The subject site is a rear lot, accessed via a driveway easement shared with neighbouring allotments, with only one neighbour using the portion of the driveway which passes the subject lot;
3. Existing vegetation is clustered towards the eastern end of the site, proximate to the proposed secondary dwelling;
4. The existing dwelling is roughly half the floor area of the new dwelling, and thus 'subordinate' to it. The alternative approach of building a new secondary dwelling of similar size to the existing dwelling would conflict with PO11 as it would not be smaller in scale than the existing dwelling.

COMMITTEE JURISDICTION

In its written submission and during the course of the hearing, Council raised further objections to the proposal, including a jurisdictional concern for the Committee. Council asserts that the proposal is, in fact, a 'Dual occupancy' as defined by the Sunshine Coast Regional Plan 2014, a land use that triggers Impact Assessment under the scheme. Hence, the current application is invalid along with any appeal decision.

The relevant scheme definitions are as follows:

Dwelling House

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.

Secondary Dwelling

A dwelling used in conjunction with, and subordinate to, a dwelling house on the same lot. A secondary dwelling may be constructed under a dwelling house, be attached to a dwelling house or be freestanding.

Dual Occupancy

Premises containing two dwellings on one lot (whether or not attached) for separate households. Does not include a Dwelling House or a Multiple Dwelling.

Council asserts that the scale of the buildings is not consistent with the intent of the definitions, and the physical separation of the buildings, "...approximately 40m horizontally and 15m in elevation", precludes the possibility of 'one household' occupying them.

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 Committees Registrar on 13 November 2015.
2. IDAS Form 1 – Application Details, IDAS Form 5 – Material change of use assessable against a planning scheme.
3. Material Change of Use application from Noosa Building Certifiers dated 16 October 2015 to Sunshine Coast Regional Council.
4. Decision Notice dated 10 November 2015 from Sunshine Coast Regional Council.
5. Written submission presented to the Committee by Council at the hearing and dated 10 December 2015, with attached Council issued documents: "Sunshine Coast Planning Scheme 2014 Dwelling House Guide", "Sunshine Coast Planning Scheme 2012 Dwelling House Information Sheet" and "Sunshine Coast Planning Scheme Review of Submissions, Region Wide Key Issues Paper No. 7, Dwelling House Provisions".
6. Response to Council's written submission ("Comments in Red") submitted on 18 December 2015, with accompanying documentation: "NBC Further Submissions", AAD Design Pty Ltd v BCC [2012] QCA 44 case notes and a letter from the owner dated 11 December 2015;
7. The Sunshine Coast Planning Scheme 2014, in particular the Dwelling House Code;
8. The SPA.

Findings of Fact

The Committee makes the following findings of fact:

1. There is nothing in the definitions of *dwelling house* and *secondary dwelling* which renders the proposal in conflict or inconsistent with those definitions. The proposal is for a single household to occupy the two dwellings, and their physical separation is not a barrier to this;
2. The site is zoned Rural Residential and in a Rural Residential Growth Management Area. It is subject to a range of overlays, including the Bushfire Hazard Overlay,

Biodiversity, Waterways and Wetlands Overlay and the Land Subject to Landslide Hazard and Steep Land Overlay, all of which must be addressed by new development but none of which significantly impacts on the appeal decision;

3. The area is characterised by a range of rural residential lot sizes, and any new subdivision is subject to the 'Reconfiguring a lot code', which requires a minimum average lot size for new subdivision in the Rural Residential Zone of 1 Ha, (i.e. larger than the subject site);
4. The planning scheme recognizes and accommodates the particular character of Rural Residential development by allowing secondary dwellings to be 50% larger than in denser residential zones. This is achieved through Acceptable Outcome AO11.2 of the Dwelling House Code, which allows secondary dwellings of 90 m² in the Rural Residential Zone compared to 60 m² in other residential zones;
5. The flexible approach to secondary dwellings in the Rural Residential Zone, described in item 4. above, is tempered by the Performance Outcome PO11 which requires, amongst other things, that a secondary dwelling be ...*(b) small in scale and clearly ancillary to the dwelling house*;
6. Pursuant to Section 5.3.3, Table 5.5.20 and its failure to comply with all Acceptable Outcomes of the Dwelling House Code, the proposal is subject to Code Assessment, assessable against the Dwelling House Code. The Purpose of the 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.*

Reasons for the Decision

Committee's Jurisdiction

The committee considered the question of whether the proposal constitutes on the one hand, a *dwelling house* and *secondary dwelling* or on the other, a *dual occupancy*. If the latter, it would require an Impact Assessment application and the committee would have no jurisdiction to decide the appeal. In this case, the proposed *secondary dwelling* is subordinate in size to the proposed *dwelling house* and the physical separation of the two dwellings does not preclude occupation by a single household and is of little consequence, when one considers that the driveway connects the two dwellings.

The primary difference between the two forms of development is the number of households occupying the dwellings; built form may be indistinguishable. The applicant's intent of a single household occupying the dwellings has been clearly stated. Hence, the proposal is encompassed by the *dwelling house* and *secondary dwelling* definitions above, despite the GFA of the *secondary dwelling* exceeding that contained in Acceptable Outcome AO11.2.

In fact, Council's proposed solution of a *secondary dwelling* of 90 m² GFA or less, could have proceeded with no development application required, despite the physical separation. Hence, the application for *dwelling house* and *secondary dwelling* is a valid one within the framework of the planning scheme.

Conflict with Dwelling House Code

The Dwelling House Code applies a greater maximum size to secondary dwellings (compared to that applicable in denser residential zones) by 50%, to accommodate the particular character of the Rural Residential Zone. Unless very unusual circumstances apply, an additional relaxation in GFA of a further 50% is likely to conflict with the character and amenity objectives of the Rural Residential Zone Code.

In this case, the subject site is a rear lot, accessed by a driveway easement and well vegetated in parts. However, such circumstances are insufficient to justify the significant departure from the character and amenity objectives of the Code. The proposed *secondary dwelling* can not be described as "*small in scale and clearly ancillary to the dwelling house*", as required by Performance Outcome PO11.

John Panaretos
Building and Development Committee Chair
Date: 14 January 2016

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees
Building Codes Queensland
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 1800 804 833 Facsimile (07) 3237 1248