



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 23-12
Applicant: Barry and Gayle Coogan
Assessment Manager: Sunshine Coast Inspection Services
Concurrence Agency: Sunshine Coast Regional Council (Council)
(if applicable)
Site Address: 87 Dales Road Chevallum and described as Lot 3 on RP 222062 — the subject site

Appeal

Appeal under section 526 of the *Sustainable Planning Act 2009* (SPA) against the assessment manager's decision, dated 30 April 2012, to refuse a development application for a siting variation (building works) for a carport.

Date of hearing: Tuesday 31 July 2012
Place of hearing: The subject site
Committee: Kari Stephens – Chair
Present: Barry and Gayle Coogan – Applicant
Neil Lockett, Sunshine Coast Inspection Services – Assessment Manager
Alan Thompson – Sunshine Coast Regional Council
Chris Werner - Observer

Decision:

The Committee, in accordance with section 564 of the SPA, sets aside the decision of the assessment manager, and finds that the application was not properly made and therefore, the decision notice is invalid.

BACKGROUND

The site

The subject site is located in the rural area of Chevallum and comprises an area of 3.246 ha. The topography is generally undulating, with the lowest part of the property coinciding with the frontage of Dales Road. The frontage to Dales Road is approximately 161m long. The land is used for agricultural purposes, and contains a dwelling house and a shed. A carport has been built on the western (Dales Road) end of the existing shed, albeit without Council approval. The carport is the subject of the appeal.

Planning scheme provisions

The Maroochy Plan 2000 is the relevant planning scheme. Within that document, the subject site is located in Planning Area 21 "Eudlo Creek Valley" and specifically within Precinct 8 which has a zone of "general rural lands".

Unauthorised building works and land use

The shed is located in the south-western corner of the site and was approved on 29 April 2011 (reference RAB11/0064) with a setback of 18m to Dales Road, and a setback of 3m to the site property boundary. Since that time, a carport structure has been added to the front of the shed (without the appropriate approvals) reducing the front setback to approximately 12m. The carport will reduce the existing Dales Road set back from 18m to 12m. The carport side setback of 3m will remain the same as the existing shed.

By letter dated 10 January 2012, the Council wrote to the property owners to advise them that unauthorised building work (a "breach") had occurred with the construction of the carport. The letter also advised that the building which had previously been approved as a shed, was being used as a second dwelling, for which no planning approval existed.

There are two issues that need to be considered with regard to be Council's letter about the breach.

1. The first is that the carport, as attached to a **shed**, required building approval as well as a siting variation.
2. The second issue relates to the **use** of the shed **as a dwelling**. There is no planning approval for a second dwelling on the subject site, and to obtain approval would require the lodgement of a material change of use application. The change of use issue is a planning matter, and cannot be handled through a building application. Furthermore, if the shed is a "dwelling" the siting variations are different to that of a shed, and different assessment criteria apply, including the Detached House Code.

In order to deal with issue 1, the applicant would need to demonstrate that the building was being used as a shed (not a dwelling), and an application for building works (approval of a carport, including siting variation) ought to have been made. However, this option can only be taken if the building is being used as a **shed**.

In order to deal with issue 2, an application for material change of use would be needed, with that application also dealing with the issue of the siting variation.

Shed or dwelling?

There has been ongoing conjecture between the assessment manager and the concurrence agency about whether or not the shed is actually a "dwelling". The assessment manager maintains that because there is no kitchen sink, the building is a "studio", and therefore is not a dwelling. However, the Maroochy Plan 2000, being the relevant planning scheme, does not define "studio" as either a use, or in the administrative definitions.

However, the administration definitions of Maroochy Plan include the term "dwelling unit" as:

"... habitable rooms and other spaces used or intended for use as one self-contained residential unit, comprising at least bathroom, toilet and kitchen facilities, as well as the living and sleeping space to accommodate one or more persons".

The definition makes no reference to a kitchen sink. An inspection of the building indicates that a family is living in the structure and has been set up in the style of a house (in the common use of the word) and includes bedrooms, bathroom, living areas etc. The kitchen space includes a dishwasher, kitchen benches and cabinetry, pantry, full-sized fridge, coffee machine and island bench. Whilst there is no sink, and that the cooking facilities are limited to a portable cooktop and a barbecue (on the veranda) in my opinion, this room is nevertheless a kitchen. I am satisfied that the shed is being used as a dwelling, and that this dwelling constitutes a second dwelling on the subject site, for which there is no planning approval.

In addition to the above, the assessment manager's request to the concurrence agency also sought to change the classification of the shed to a class 1(a) building. A class 1(a) building is generally associated with a residential dwelling. This would seem to indicate an acceptance on the part of the assessment manager, that the shed is being used as a dwelling, and not as a non-habitable building which would continue to be classified as a 10(a).

Properly made application

The Committee believe the assessment manager has erred in the processing of this application, primarily because no properly made application for building works appears to have been made. There ought to have been an application for building works to allow for the retrospective approval of the carport. The assessment manager has not been able to produce the IDAS forms or any other material which would have constituted an application for building works. If the application was not properly made, then the decision notice issued as a result, has no validity.

As part of the processing of this application, there ought to have been a referral to the Council (as concurrence agency) for the setback variation. The referral to the Council, ought to have included a copy of the application mentioned above. It would seem the former occurred, but not the latter.

A "request for referral agency response for building work" was lodged with the Council (the concurrence agency) by the assessment manager on 6 March 2012. This request sought two things: 1) approval of the carport within 20m of the road boundary and 2) a reclassification of the shed from 10(a) structure to a studio 1(a).

Whilst a change of classification can be made as part of a building works application, the appropriate planning approvals must first be in place. The as-of-right allowance for a dwelling house on an allotment under Maroochy Plan is limited to one dwelling house on each allotment. The assessment manager's request to change the classification to a class 1(a) building would therefore constitute a second dwelling house on the allotment, which needs planning approval (material change of use) prior to any application for reclassification to 1(a).

Concurrence agency response

By letter dated 30 April 2012, the Council issued a concurrence agency response, recommending refusal because of an alleged non-compliance with the Detached House Code, specifically Element 1, P3, and Element 3, P1, both of which are replicated below:

The application is refused as the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria of Maroochy Plan 2000, Code 4.1 (Detached House Code):

Element 1, P3 – buildings are sited to maintain the amenity of adjacent land and dwellings having regard to:

- a) ~~overshadowing;~~*
- b) ~~privacy and overlooking;~~*
- c) ~~views and vistas;~~*
- d) ~~building character and appearance;~~*
- e) ~~building massing and scale as seen from neighbouring premises;~~*
- f) ~~the typically open or forested rural landscape in which buildings are a minor element;~~*
- g) ~~maintaining an open visual landscape dominated by natural elements; rather than built structures;~~*
- h) ~~buffering from unsealed roads, heavily trafficked roads and existing or likely future heavy vehicle haul routes in order to avoid or minimise noise and dust nuisance.~~*

Element 3, performance criteria P1 – the density of detached houses or display homes is consistent with the planning area and precinct intent in which the site is located.

The concurrence agency has also erred, in that the reasons for refusal relate to the Detached House Code, yet the application was for a siting variation for a building application for a carport. The Council ought to have approved or refused the siting variation for the car port only, rather than rely on provisions intended for detached houses.

Decision notice

About 1 month after receiving the concurrence agency response, the assessment manager issued a decision refusing the application, and citing the reasons set out by the concurrence agency (Decision Notice dated 29 May 2012).

Siting variation

In my opinion, there are sufficient grounds to support the siting variation to allow the carport at a distance of 12m from the front boundary setback. There are numerous examples throughout the locality of other structures well within a 20m front setback area. The approved shed is already located within the 20m setback area (at 18m). The carport is an open structure, and is lightweight and relatively non-intrusive when viewed from the road. Landscaping has been provided along the frontage and adjacent to the shed which will, over time, sufficiently screen the structure and help maintain the rural character of the area. If the concurrence agency were to reconsider this application, the Committee would support the reduced setback, subject to the inclusion of additional mature plantings along the frontage, and the requirement that the carport remain "open" so as to avoid the opportunity for the owners to enclose this structure at some future date.

Appropriate future course of action

Whilst it is outside the jurisdiction of the Building and Development Dispute Resolution Committee, I believe the most appropriate way to resolve the issues raised in this appeal, is for the owners to seek a material change of use application for a second dwelling on the allotment. The application for the second dwelling may be in the form of a "caretaker's residence", or similar, and will be required to go through the IDAS process associated with this particular form of 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 Registrar;
2. An inspection of the site and the locality, undertaken by the chairperson;
3. Verbal and written submissions from the parties at the hearing;
4. Planning scheme for the former Maroochy Shire Council "Maroochy Plan 2000", in particular code 4.1 "Code for the Development of Detached Houses and Display Homes";
5. Queensland Development Code (QDC), MP 1.2;
6. *Building Act 1975* and associated regulations;
7. *Sustainable Planning Act 2009* and associated regulations.

Findings of Fact

The Committee makes the following findings of fact:

There is no evidence that the application was properly made. A copy of the application was not included in the referral to the concurrence agency, as required by the SPA.

The request to the concurrence agency was for two matters; 1) relaxation of the setback requirements for the carport and 2) reclassification of the shed to a class 1(a).

The concurrence agency can only deal with the aspects of the request made to it. In terms of the relaxation of the setback requirements, there are sufficient grounds to allow the relaxation of the carport setback on the basis that it is attached to a shed. Whilst Sunshine Coast Council may hold the view that the shed is being used as a dwelling, a view with which I concur, that is not the issue for which the application was referred. There are other mechanisms for dealing with a breach of the Maroochy Plan in terms of land-use. A building application is not the correct mechanism for determining this issue.

With regard to the reclassification, which was requested to be considered by the concurrence agency, they have no jurisdiction to change the classification of the shed without a prior planning approval dealing with the various issues and non-compliance with the planning scheme. In my opinion, the reclassification of the shed ought to have been refused for this reason.

Reasons for the Decision

For the reasons outlined above, the Building and Development Dispute Resolution Committee does not have jurisdiction to decide this appeal, because the application was not properly made in the first place.

Building and Development Committee Chair
Date: 25 September 2012

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
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248