



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	37- 11
<b>Applicant:</b>	Andrew Mogg
<b>Assessment Manager:</b>	Mackay & Whitsunday Building Certification Pty Ltd
<b>Concurrence Agency:</b> (if applicable)	Mackay Regional Council (Council)
<b>Site Address:</b>	13 Nott Street, East Mackay and described as Lot 10 on M.91144 - the subject site

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### Appeal

Appeal under Section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of Mackay and Whitsunday Building Certification Pty Ltd as assessment manager to approve with conditions a Development Application (DA) for construction of a carport, deck and two patio areas.

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<b>Date of hearing:</b>	Tuesday 26 July 2011 at 10.00am
<b>Place of hearing:</b>	Conference room, Mackay Regional Council, Development Services Department, 42 Wellington Street, Mackay
<b>Committee:</b>	Gordon Heelan – Chairperson Martin Clark - General referee
<b>Present:</b>	Andrew Mogg - Applicant/Owner Lawrence Reck - Assessment manager Shane Kleve - Council representative

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### Decision:

The Committee, in accordance with section 564 of the SPA, **sets aside** the decision of Whitsunday Building Certification Pty Ltd dated 18 April 2011, and **replaces** it with the following decision.

The assessment manager is directed to amend the DA for building works, by the inclusion of the following conditions:

- 1 The roof over the proposed deck (over the carport) can be constructed in the position indicated on sheet 7 of 19 Rev A and sheet 8 of 19 Rev A, (eg) having a minimum distance of 3.525m from the outer-most projection to the front property boundary / street alignment.
- 2 With the exception of the balustrade to the proposed elevated deck (which must comply with the requirements of the Building Code of Australia), all of the structures hereby approved must remain open, and not enclosed, fitted with doors, gates, screening blinds, insect screening, shade cloth or the like.
- 3 The proposed structures shall not be used for purposes other than those described in the submitted documentation. Should this change a Town Planning application will be required and must be submitted to Mackay Regional Council for their consideration.

## **Background**

The applicant lodged a DA with the Assessment Manager for a Development Permit for building works, comprising of:

1. a single storey patio to the front of the dwelling;
2. a single storey patio to the rear of the dwelling;
3. a double carport with an open deck (over the carport) to the front of the dwelling, and
4. a single carport on the north-west side of the dwelling.

The planning scheme provisions provide for significant concessions in relation to open structures within the 6m front boundary setback.

Queensland Development Code (QDC) MP 1.2 applies to side and rear setback provisions.

The combined total length of the structure within the side boundary setback on the north-west side of the site does not exceed 9m cumulative, is below the mean height limit, is not a patio, verandah or similar, and is therefore meets the requirements under QDC MP 1.2.

The applicant applied for the proposed structures on the south-east side encroaching on the side boundary setbacks, with a combined total length of new structures within the side boundary setback of 11.6m

Council issued a response with conditions to the applicant on 21 January 2011. Council required the following be attached to a Development Approval:

1. The structure shall be constructed in accordance with the plans provided with the application (attached), except as amended by Condition 2.
2. The roof over the proposed deck (over the carport) is to be amended so that it has a minimum setback of 4.5 m from the front (road) boundary.
3. A Building Permit for the structure must be obtained prior to the erection of the structure/s.

The Assessment Manager provided correspondence to the applicant on 18 April 2011 based on the advice of the concurrence agency.

The condition relevant to this appeal was “the roof over the proposed deck (over the carport) is to be amended so that it has a minimum setback of 4.5m from the front (road) boundary.”

The reason stated was that “the proposal will not detrimentally impact on the amenity of the surrounding area.”

## 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 on 9 May 2011.
2. Drawings submitted with the appeal.
3. Decision notice issued by the assessment manager on 18 April 2011.
4. Concurrence agency response from Council dated 21 January 2011.
5. Verbal submissions from those attending the appeal hearing.
6. The *Sustainable Planning Act 2009* (SPA).
7. The *Building Act 1975*.
8. The Queensland Development Code (QDC) Part MP 1.2 – Publication Date: 11 March 2010.
9. Mackay City Planning Scheme (24 March 2006), Consolidated Planning Scheme (24 April 2009)
10. Additional drawings submitted by the applicant on 26 July 2011.

## Findings of Fact

The Committee makes the following findings of fact:

1. The subject site is generally flat and the existing 2 storey dwelling is located 9.1m from the front (street) property boundary.
2. The proposed building work comprises:
  - a single storey 26m<sup>2</sup> patio to the rear (south-west corner) of the existing dwelling
  - a 22m<sup>2</sup> carport to the right (north-west) side of the dwelling
  - a 22m<sup>2</sup> patio to the front right (north-east) side of the dwelling
  - a 28.87m<sup>2</sup> carport with a proposed open deck (over the carport) on the front left (north-east) side of the dwelling, which is the subject of this appeal.
3. The combined total length of existing and proposed structures within the 1.5m side boundary setback on the south side of the dwelling is 21.31m.
4. The applicant applied for a variation to the (southern) side boundary setbacks.
5. Council directed the certifier to condition the Development Approval on 21 January 2011.
6. Council's response did not address the matter applied for. This condition imposed by Council reflects their understanding of the meaning of the term "open", and its interpretation of the scheme provisions, specifically, Acceptable/Probable Solution S3.5, Table 9-7, of the Dwelling House Code.
7. S.3.5 of the Dwelling House Code allows that "... *An open verandah or patio may have a minimum setback of 3m to an Access Place or Access Street*".
8. S.3.7 of the Dwelling House Code provides for open carports to be constructed up to the front boundary.
9. A definition of "open" does not appear in the code or the scheme provisions, and the concession for verandahs is not specifically limited to ground-floor level verandahs.

## **Reasons for the Decision**

In discussions at the hearing, Council confirmed it had no concerns regarding the encroachment on the side boundary, and that Nott St is an Access Street or Place. The issue therefore concerns the interpretation of the term “open” and whether the scheme concessions apply to verandahs other than ground floor verandahs.

It is the view of the Committee that, in the absence of a definition in the scheme, the definition of “open” which must apply is that stated in QDC MP 1.2. This clearly states that an open structure is one with a roof, but having walls that are open to a minimum specified degree.

Elevated verandahs are common in the area and throughout Queensland generally. While it may be that the failure to limit the concession to ground-floor level verandahs was an error or oversight, it was apparent that the concession had been utilised on a number of occasions since the scheme was gazetted.

The Committee considered the possible effect on the adjoining owner and the streetscape. It takes the view that the difference between the proposed setback of 3.525m and the setback of 4.5m acceptable to the Council will not detrimentally impact on the amenity of the surrounding area.

**Gordon Heelan**  
**Building and Development Committee Chairperson**  
**Date: 6 September 2011**

## **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 Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**