



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	09- 13
Applicant:	Kilby Contracting Pty Ltd
Assessment Manager:	Mackay Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	23827 Peak Downs Hwy, Eton and described as Lot 25 on RP734900 – the subject site

Appeal

DECLARATION under s510 of the *Sustainable Planning Act 2009* (SPA) about whether a development application for material change of use for a *Home-based Business* (Mobile Mechanical Workshop & Associated Activities) (the development application) was properly made.

Date of hearing:	The proceeding was by written representation by agreement of the parties
Place of hearing:	N/A
Committee:	John Panaretos – Chair Michael Labone - Member
Submissions Received From:	Cardiff Law on behalf of the Applicant, Kilby Contracting McCulloch Robertson Lawyers on behalf of Mackay City Council

Decision:

The Building and Development Dispute Resolution Committee (Committee) declares that development application was not a properly made application.

Background

The subject site is 35.631Ha, used for agricultural purposes and occupied by a dwelling house and, some distance away, farm sheds.

By way of an electronic development application, Kilby Contracting Pty Ltd (Kilby) lodged a Code Assessment application for a material change of use to use the subject site for the purposes of a *Home-based Business* (Mobile Mechanical Workshop & Associated Activities) to supplement the farm income.

Despite the Applicant's proposed use classification, Council deemed the proposed use to be *General Industry* as defined by the Mackay City Planning Scheme, consequently notifying Kilby that the application

was not properly made. Council also notified Kilby that *General Industry* is subject to Impact Assessment under the planning scheme.

Cardiff Law, on behalf of Kilby, subsequently notified Council that the proposed use would be limited to office based activities with two staff only. However, Council maintains that the proposal cannot satisfy the definition of *Home-based Business* due, amongst other things, to the extent of area to be engaged in the use and the fact that the proposed activities are not located within the 'curtilage' of the house.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for appeal/ declaration, grounds for appeal and correspondence issued by Council on 14 February 2013 and 11 March 2013, accompanying the application lodged with the Registrar on 13 March 2013.
2. Smart eDA lodgement package including Form 1, Form 5 and proposal plans received by Council on 4 February 2013.
3. Correspondence from Cardiff Law to Council dated 19 February 2013.
4. Written submissions made to the Committee by Council and the applicant.
5. Council's planning scheme.
6. The *Sustainable Planning Act 2009* (SPA)

Findings of Fact

The Committee makes the following findings of fact:

Kilby's development application report describes the following activities involved in the use:

- Dispatching of mobile units to repair machinery in the field
- The mobile units return to the subject site to replenish supplies and check equipment before returning to the field
- Bringing plant and machinery to the subject site for dismantling for parts or repair and refurbishing prior to redeployment or resale.

These activities were proposed to be conducted at an existing collection of farm sheds and hardstand. The plans for the largest shed were submitted with the application. The site plan depicts the location of the office external to and under the awning of the large shed.

Kilby subsequently modified its proposal by limiting the application to the 30 m² office attached to the large shed and only to 'office like' activities, co-ordinating the dispatch of mobile units.

Council submits that the proposed use necessarily involves the retrieval and dismantling of heavy machinery and storage of reusable parts on site, and possibly abrasive blasting and spray painting used in the refurbishment process.

Council submits that the dismantling and refurbishing processes and storage of machinery and parts would occupy more than the 80 m² allowable within the definition of *Home-based Business*. Additionally, Council points out that the activities in question are accommodated in and around the farm sheds which are at least 200 metres from the house and thus not within the curtilage of the house.

Home-based Business is defined in the planning scheme as follows:

...means any premises being part of a dwelling unit or its curtilage used for a business by a resident of the dwelling house where:

- (i) The area occupied by the use (including storage areas) does not exceed 30% of the total floor area of the dwelling house and 10% of the area of the lot on which the dwelling house is located, with a maximum area of 80 m² occupied by the use; and
- (ii) Employs no more than 2 persons who do not reside at the premises.

“Curtilage” is not defined in the planning scheme. The term was considered by the Queensland Court of Appeal in *Grasso and Grasso v Stanthorpe Shire Council* [1996] QCA 187. In that case the court said “the appropriate test is to ask the question, what land actually or supposedly contributes to the enjoyment of the building for the fulfilment of its purposes?”

The evidence before the Committee is that the dwelling on the land and the farm shed in which the proposed use is to be located are separated by over 200 metres of farm paddocks. There is no evidence before the Committee that the farm shed in which the proposed use is to be located contributes to the enjoyment of the dwelling *for the fulfilment of its purpose as a dwelling*. Accordingly, farm shed in which the proposed use is to be located does not form part of the ‘curtilage’ of the dwelling.

The Committee also notes that Kilby’s application documents currently do not include certain mandatory information required to satisfy s.261 of SPA:

- The Applicant, at Item 8 of IDAS Form 1, indicates that owner’s consent is not required for the application. On the contrary, owner’s consent or a declaration at Table F of that item is required;
- The submitted site plan labels the office, but the office, which becomes the focus of the application, is not evident on accompanying floor plans or elevations.

Reasons for the Decision

The proposed use area does not form part of the curtilage of the dwelling, and, accordingly, the proposed use does not fall within the definition of a *Home-based Business* under the relevant planning scheme.

John Panaretos
Building and Development Committee Chair
Date: 29 April 2013

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:

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