



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	08 - 14
Applicant:	Walter Schutte
Assessment Manager:	Nick Schofield (Assessment Manager)
Concurrence Agency: (if applicable)	Sunshine Coast Regional Council now Noosa Shire Council (Council)
Site Address:	9 Hinterland Close, Tinbeerwah and described as Lot 9 on RP 162815 — the subject site

Appeal

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to refuse a Building Development Application for a partially constructed Class 10a structure, being a shed (Application). The decision followed a Concurrence Agency response by the Council, directing refusal of the Application due to noncompliance with performance criteria in relation to the design and siting of the proposed shed.

Date of hearing:	11.00am Thursday 24 April 2014
Place of hearing:	The subject site
Committee:	Debbie Johnson - Chair Samantha Hall - Member
Present:	Walter Schutte - Applicant Rob Wibrow – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **sets aside** the decision of the Assessment Manager to refuse the Application and approves the Application subject to the following conditions:

1. Compliance with the Building Code of Australia, the Queensland Development Code and all relevant Australian standards;
2. The proposed development must be carried out generally in accordance with the plans attached to the Application, subject to the change to the minimum side boundary setback in condition 3;
3. The minimum boundary setback is 1.3m.

The Committee does not impose any other conditions of approval for this Application.

The parties must notify the Committee within 7 days of being given written notice of this decision if they have any objections or representations about the conditions of this approval otherwise this decision is deemed to have been given to the parties at the expiration of that 7 day period for the purposes of section 479 of the SPA.

Background

The subject site is residential with a rural character, due to the large lot size (5,675m²) and expansive areas of uncleared land. The subject site and the majority of surrounding lots have been developed for residential uses, with the exception of one vacant site adjoining the western boundary of the subject site. It is within the 6m minimum building setback of this shared side boundary prescribed by *The Noosa Plan* that the Applicant proposes to erect the shed.

The proposed structure can best be described as a steel framed, slab on ground shed with a low pitched skillion roof. The height of the structure is approximately 2.4m above the finished surface level of the concrete slab and the building is square, measuring 7m x7m. The proposed shed is located 1.3m from the western side boundary of the subject site.

The Applicant proceeded to construct the proposed shed after making initial inquiries with the Council. The Applicant mistakenly believed that the work did not require a development application. While the construction was in progress, the Council received a complaint from an adjoining property owner. The Council initially contacted the Applicant verbally, then followed up with an email and subsequently issued a written notice on 16 July 2013, to advise that the works to construct the proposed shed could not be undertaken without a development approval for building works.

The Applicant ceased work on the construction of the proposed shed and engaged consultants to prepare a building development application. The Applicant lodged the Application with the Assessment Manager seeking a building approval for the shed.

The Assessment Manager referred the Application to the Council due to the siting of the proposed shed at 1.3m from the side boundary, that is, within the 6m minimum side boundary setback prescribed by *The Noosa Plan*.

On 24 October 2013, in its Concurrence Agency response, the Council directed the Assessment Manager to refuse the Application in accordance with section 287(2)(b) of the SPA.

On 19 February 2014, the Assessment Manager refused the Application as directed by the Council and issued a Decision Notice dated 20 February 2014.

On 4 March 2014, the Applicant filed an appeal with the Building and Development Dispute Resolution Committees against the decision to refuse the Application.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for appeal/declaration', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 4 March 2014.
2. Oral submissions by the Applicant and the Council representative at the hearing.
3. The Committees' on site inspection of the subject site and immediate locality.
4. Property details as available through the Council's website.
5. The Noosa Plan (16 September 2013).
6. *The Queensland Development Code (QDC) Part MP1.2.*
7. *The Sustainable Planning Act 2009 (SPA)*
8. *The Building Act 1975 (BA).*
9. *Acts Interpretation Act 1954 (AIA)*
10. *The Building Regulation 2006 (BR).*
11. *The National Construction Code 2012.*

12. Historic aerial photographs of the subject site as viewed through Google Maps.
13. Photographs taken during the site inspection.

Findings of Fact

The Committee makes the following findings of fact:

Siting

The QDC Part MP1.2 determines the design and siting standards for single detached housing on lots 450sq/m and over.

Performance criteria P1 of the QDC Part MP1.2, relevantly provides that:

"The location of a building or structure facilitates an acceptable streetscape, appropriate for-

- (a) the bulk of the building or structure; and*
- (b) the road boundary setbacks of neighbouring buildings or structures; and*
- (c) the outlook and views of neighbouring residents; and*
- (d) nuisance and safety to the public."*

Acceptable solution A1 of the QDC Part MP1.2, relevantly provides that the minimum road setback for a detached dwelling, garage or a carport is 6m and acceptable solution A2 of the QDC Part MP1.2 further provides the minimum side and rear boundary clearance for a part of the building or structure is 1.5m where the height of that part is 4.5m or less.

Pursuant to section 10 of the BR and section 33 of the BA, local government planning schemes may impose additional or alternative requirements to those in the QDC.

The Noosa Plan provides alternative siting requirements to those found in the QDC. Therefore, neither the acceptable solutions nor the performance criteria of the QDC apply to the Application.

Under the provisions of The Noosa Plan, the subject site is included in the Cooroy and Lake Macdonald Locality Plan and is zoned Rural Settlement. The Noosa Plan defines Rural Settlement as follows:

"Rural Settlement means residential development on a lot greater than 2,000m², regardless of whether the land is also used for hobby farming."

The shed, the subject of the Application, would fall within the use of the subject site as a Detached House. The Noosa Plan defines a Detached House as follows:

"Detached House means the use of premises for a single dwelling unit which comprises the whole of the building on one lot. The term includes uses and works incidental to and associated with the detached house."

The Noosa Plan defines a Dwelling Unit as follows:

"Dwelling Unit means a building or part of a building used as a self-contained residence for the exclusive use of one household. It includes outbuildings and works normally associated with a dwelling."

Acceptable solution S1.1 of Table 14-28 of The Noosa Plan's Detached House Code states the minimum setback of a Detached House or dwelling unit and associated buildings and structures from boundaries is not less than the minimum specified in Schedule 1.

Table 1-1 of Schedule 1 - Minimum Boundary Setbacks for Buildings and other Structures of The Noosa Plan, states that a 6m setback is required for all boundaries on land within the Rural Settlement Zone.

Section 6.4 of the Cooroy and Lake Macdonald Locality Plan of The Noosa Plan, provides that where setbacks do not comply with an acceptable solution that provides an alternative siting requirement to

those found in the QDC, assessment must be made against the relevant specific outcomes, in this case being specific outcome 01 of The Noosa Plan's Detached House Code.

As the proposed shed requires a reduced setback of 1.3m, assessment is made against the following provisions of specific outcome O1:

"Buildings and other structures are appropriately designed and sited to—

- a) provide amenity for users of the premises as well as preserve the visual and acoustic privacy of adjoining and nearby land uses;*
- b) preserve any existing vegetation that will buffer the proposed building from adjoining uses;*
- c) allow for landscaping to be provided between buildings;*
- d) maintain the visual continuity and pattern of buildings and landscape elements within the street;*
- e) for class 10a structures, do not visually dominate the street;*
- f) avoid any significant adverse impacts on the natural values of waterways and their foreshores, including those of the Noosa River and its lakes; and*
- g) do not interrupt the natural cycles of erosion and accretion of waterways and foreshore areas."*

Concurrence Agency response of the Council

The Council's response to the Assessment Manager stated that pursuant to section 289(1) of the SPA, the reasons for the Council's refusal of the Application were as follows:

"the proposed development does not comply with and cannot be conditioned to comply with the following performance criteria:

...provide amenity for users of the premises as well as preserve the visual and acoustic privacy of adjoining and nearby land uses; maintain the visual continuity and pattern of buildings and landscape elements within the street...

The Council further stated the following:

- the building, if built in the form shown in the application, would have an adverse effect on the visual privacy of the adjoining land user;*
- the building, if built in the form shown in the application, would be in conflict with existing building setbacks within the street;*
- it should be noted that there are no physical or geographical constraints which would prevent the proposed development from complying with the acceptable solutions.*

Section 289(1) of the SPA must be read in conjunction with section 27B of the *Acts Interpretation Act 1954* which requires that "reasons" must be accompanied by a statement of the findings on material questions of fact and references to the evidence or other material upon which those findings were based.

While section 289(1) of the SPA has not been considered by the Courts, other judicial consideration of the quality of reasons given by decision makers under Queensland planning law has resulted in an accepted rule that *"The grounds of the Council decision should be clear, specific and unambiguous so that an applicant whose application has been refused will be able to decide or obtain advice whether he should institute an appeal against the Council's decision"* (*Butterfield Projects Pty Ltd v Brisbane City Council* (1975) 31 LGRA 236 at 239; *Symons v Mackay City Council* [1998] QPELR 486 at 487).

Within this context of the quality of reasons to be given by a local government, it is questionable whether the reasons provided by the Council for its refusal of the Application are adequate. The Council's reasons refer to "performance criteria" but do not identify what the performance are or within which document they are located. Further, the Council's reasons merely restate the performance criteria and do not identify why the Council has formed the view that the proposed shed does not comply with the performance criteria that have been identified.

These are hardly "clear, specific and unambiguous" reasons such that the Applicant could easily understand why the Application had been refused and then decide whether or not to appeal. In this case, to identify the performance criteria specified by the Council, the Applicant would need to closely examine The Noosa Plan to find the relevant section in which the performance criteria quoted by the Council is located. This would not, however, enlighten the Applicant as to why the Council decided the proposed shed did not comply with the stated performance criteria.

It is noted that this is not the first time that the adequacy of reasons given by the Sunshine Coast Regional Council as a concurrence agency have been called into question by a Building and Development Dispute Resolution Committee (see Appeal No. 46-2011 at page 3). In future the Council should be mindful of its statutory obligation as a planning authority for the giving of reasons which are clear, specific and unambiguous.

Subject site and surrounding locality

The subject site and surrounding lots are steeply undulating, affording distant sea views in several areas, however the views are largely constrained by the extent of mature native vegetation.

As the proposed shed has been partially constructed to such an extent that the steel framed walls and roof have been erected, the visual impacts can be clearly observed.

The proposed shed has been situated 13m back from the road boundary frontage with a building platform at least 5m lower than the street level. Given this setback from the road and the steep slope of the subject site which falls away from the road, only one neighbouring property is able to see the shed, being the adjoining property to the west of the subject site.

The neighbouring property is a corner lot and is currently undeveloped, and there is no built form on this land. The neighbouring property is considerably higher than the subject site, sloping up the hill away from the subject site, with sea views from the higher parts of the land and given the slope, its logical point of access would be from a different street frontage to the subject site. By contrast, the proposed shed is 1.3m from the boundary between the subject site and the neighbouring property, which is at the lower part of that land.

Due to the very steep slopes and scale of these allotments together with the fact that there is no fencing in place, it is difficult to determine exactly where the boundaries are between these allotments.

At the hearing the Applicant stated the reason why the proposed shed is located only 1.3m from the boundary is due to the steep slope of the subject site and the ability to achieve a driveway of an appropriate grade between the proposed shed and the street without having to cut and fill the subject site which would result in consequent loss of vegetation.

Reasons for the Decision

As at the date of the hearing, the proposed shed had been partially constructed to such an extent that the steel framed walls and roof were erected it was clear to the Committee what the visual impacts might be.

The Committee finds that the siting of the proposed shed 1.3m from the side boundary, while not complying with acceptable solution S1.1 of Table 14-28 of The Noosa Plan's Detached House Code, does comply with specific outcome 01, for the following reasons:

- The subject site and those properties immediately adjoining the subject site are well landscaped and orientated to maintain effective visual and acoustic privacy for neighbouring homes from the proposed shed;
- The slope of the subject site from the road down to the location of the proposed shed, the design of the shed and the construction materials (comprising non-reflective, corrugated iron material of a neutral colour), along with the screening plantings by the Applicant, would maintain the visual continuity and pattern of buildings and landscape elements within the street;
- Any negative amenity impact associated with the siting of the proposed shed is negligible due to the size of the allotments, the naturally steep contours of the subject site and the extent of

vegetation on all allotments;

Had the proposed shed been sited at 6m from the western side boundary instead of 1.3m, it's visual appearance to adjoining and neighbouring residences, as well as to the street, would be no different.

Debra Johnson
Building and Development Committee Chair
Date: 11 June 2014

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
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Brisbane QLD 4001
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