



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	71 - 10
Applicant:	Nathan Owen Green & Daniel Joseph Borrowman
Assessment Manager:	Building Surveying Professional Qld Pty Ltd
Concurrence Agency: (if applicable)	Bundaberg Regional Council
Site Address:	2 Avalon Street, Burnett Heads and described as Lot 94 on RP7181 — the subject site

Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of the assessment manager to refuse in part a development application about design and siting requirements of building work as the proposed development does not comply in accordance with the acceptable solutions of A1 of MP 1.2 of the Queensland Development Code.

Date of hearing:	29 October 2010
Place of hearing:	The subject site
Committee:	Ain Kuru – Chair
Present:	Daniel Borrowman – Applicant Nathan Green – Applicant Malcolm Green - Applicant Karen Green - Applicant Phillip Borg - Builder Brad Geaney - Bundaberg Regional Council Stephen Curran - Bundaberg Regional Council

Decision:

The Committee, in accordance with section 564 of the SPA, **sets aside** the decision appealed against and directs the assessment manager to assess the building application as if the Bundaberg Regional Council has given its concurrence to approve the application, subject to the following conditions being included in the Decision Notice:

- 1 Should the applicant wish to construct a fence along the Avalon Street boundary, a Landscaping Plan be prepared to Council's satisfaction which lessens the impact of the building and fence on that streetscape;
- 2 That the above landscaping be completed before the house is occupied; and

- 3 The landscaping be maintained in good order until it is fully established, a period of at least two years.

Background

The builder made an application to construct a dwelling on the subject property to Stewart Magill, Building Surveying Professionals Qld Pty Ltd acting as a private certifier and assessment manager under the *Sustainable Planning Act 2009* (SPA). The application was for a single storey detached house. The date of the application is unknown.

Construction of a house on the site required assessment under the Burnett Planning Scheme as it involves a Material Change of Use in a Historic Lot Precinct. The Certifier subsequently made an application on behalf of the builder to the Council on 29 March 2010. That application was approved on 13 May 2010. The Decision Notice references approved plans which show the west wall of the building located 4620 mm from the Avalon Street boundary. The Notice contains advice stating that the proposed siting has not been assessed against the requirements of the *Building Act 1975* and the *Building Regulations 2006*, including the Queensland Development Code (QDC).

A Compliance Permit for Plumbing and Drainage Work was issued on 30 March 2010.

The builder advised that sometime after this date construction of the house commenced, and that it was moved closer to Avalon Street on instruction by the applicant so as to provide greater privacy on the eastern boundary.

On or about the 31 August 2010 the Private Certifier, having obtained approval for the house under the Burnett Planning Scheme, referred the building work application to Bundaberg Regional Council requesting Concurrence Agency approval as also required by SPA as the proposed setback to Avalon Street was less than provided for under the QDC. The application was for a reduced setback of 4170 mm to Avalon Street. In summary, the grounds for approving the application were that the house was of modest proportions; that it did not impact on the outlook of neighbours; and did not compromise public safety.

On 6 September 2010 the Bundaberg City Council acting as a Concurrence Agency refused the application for a reduced setback on the following grounds:

- The bulk of the building does not facilitate an acceptable streetscape for the immediate vicinity;
- The siting of the dwelling is not consistent with other dwellings in the immediate vicinity;
- The dwelling has already been constructed;
- Work has been carried out prior to the issue of a development approval for building works;
- It appears that the dwelling has not been constructed in accordance with the proposed plans supplied with the request;
- There is adequate area available to site the dwelling in accordance with the acceptable solutions of A1 of MP 1.2 of the QDC;
- The Planning Scheme does not contain alternative siting provisions allowing a building to be sited closer to the road frontage.

The Private Certifier subsequently issued a Decision Notice advising that the application was refused.

An appeal was lodged by Nathan Green, Daniel Borrowman, Malcolm Green and Karen Green on or about 6 October 2010 which in summary states:

- The bulk of the building is similar to many other Council approved homes in the area;
- There is no definition for road setback in the QDC;
- The QDC provisions in respect of corner lots are ambiguous as they refer to both width and depth;
- That Council is concerned approval of the house will set a precedent;
- That works have commenced following discussions between the builder and Private Certifier;
- That the house is sited between 12 and 15 metres from the road itself;
- There is no encroachment of setbacks with neighbouring properties;
- The reduced setback allows greater utilisation of the lot;
- That manicured gardens on the corner of road reserves in the state encroach onto the property and that these can remain should the appeal be successful.

The Committee conducted a hearing and site visit on 29 October 2010.

Material Considered

The material considered in arriving at this decision comprises:

1. IDAS application for Building Work for a detached house lodged with Building Surveying Professionals by the builder Phillip Borg (undated, Building Surveying Professionals);
2. IDAS application for Material Change of Use for a detached house lodged with Bundaberg Regional Council by the Building Surveying Professionals (29 March 2010, Building Surveying Professionals)
3. Decision Notice (13 May 2010, Bundaberg Regional Council, ref 322.2010.28512.1);
4. Concurrence Agency application (31 August 2010, Building Surveying Professionals, ref 2010/1560);
5. Council Delegate Report (6 September 2010, Bundaberg Regional Council, ref 305.2010.504.1);
6. Decision Notice (10 September 2010, Building Surveying Professionals ref 2010/1560);
7. Form 10 Application for Appeal (10 September 2010, Building and Development Dispute Resolution Committee);
8. Sustainable Planning Act 2009;
9. Building Act 1975;
10. Burnett Planning Scheme; and
11. Queensland Development Code.

Findings of Fact

The Committee makes the following findings of fact:

- 1 The Bundaberg Regional Council issued a Decision Notice approval for a Material Change of Use for the purposes of a house on the subject land. The approved plans in that Notice show the west wall of the house setback 4620 mm from Avalon Street;
- 2 The Private Certifier acting as Assessment Manager refused an application for a reduced setback of 4170 mm (to outer most projection) under the QDC. This refusal was directed by the Concurrence Agency, being the Bundaberg City Council acting as the Concurrence Agency;
- 3 Despite the above, construction of the House is near completion.

Reasons for the Decision

Construction of the House is almost complete

It appears the house has been built despite the Certifier refusing the application due to Council's refusal as a Concurrence Agency to approve the siting. The Certifier did not attend the hearing therefore the facts and circumstances surrounding the construction of the house are not fully clear, however the Certifier subsequently advised in an e mail to the Committee that:

"there are no inspection documents as we have not issued approval, and unaware construction had commenced"

It therefore appears that the builder commenced work prior to the issue of a Decision Notice by the Private Certifier.

The conduct of the builder is outside the Committee's jurisdiction and this should be appropriately dealt with by the Certifier under sections 27 to 29 of the *Building Regulation 2006* by reporting the matter to the Building Services Authority if certificates of inspection for each stage of building work had not been given.

It is the Committee's view that unless the siting of the house severely compromises the character of the streetscape, and that the impact can be partly addressed through other measures such as landscaping, the owners of the house should not be unduly penalised by upholding the decision of the Certifier and the Council as Concurrence Agency to refuse the reduced setback. While the Committee finds that the house does compromise the character of the street, it is not severe and its impact can be addressed through other measures.

Decision Notice issued by Council under the Burnett Planning Scheme

The proposed development is defined as a Detached Dwelling under the Planning Scheme. If a proposed Detached Dwelling is located in the Historic Lot Precinct, it becomes Code Assessable and must be assessed under several Codes including the Development Infrastructure and Works Code, and the Detached Dwelling and Domestic Storage Code. According to Stephen Curran, the intent of this zoning measure is to ensure historic lots are properly serviced with infrastructure before being developed.

My view is that siting should have been addressed under the Planning Scheme for two reasons. Firstly, the Planning Scheme identified the Detached Dwelling and Domestic Storage Code as a relevant Code. The purpose of that Code is to ensure:

"dwellings are appropriately sited to ... (i) protect the amenity of adjoining residents and land owners..."

Table 8.5 of this Code states that for road setbacks, QDC Part 12, A1 applies.

Secondly the Decision Notice makes specific reference to approved plans which show the proposed house wall located 4620 mm from Avalon Street. At the hearing, Stephen Curran pointed to advice in the Decision Notice that:

“The proposed siting ... has not been assessed against the requirements of the Building Act 1975 and the Building Regulations 2006”

A further referral of the application to Council should not have been necessary, and it noted that under section 271 of SPA that a referral agency may give its response on a matter within its jurisdiction about a development before an application for the development is made to the assessment manager. Therefore its town planning decision could under this section be interpreted as a referral agency response.

In any case, one should have expected that Council would uphold its earlier decision made under the Planning Scheme. Therefore I find that, Council's response to the Certifier as the Concurrence Agency is inconsistent with its earlier Decision Notice as Assessment Manager in respect of the Material Change of Use.

When it comes to siting matters, the interaction between “town planning” and “building” laws is unclear. The practice by many local governments of not addressing QDC siting issues when dealing with other town planning aspects of a house may simplify the internal administration of these laws, however creates confusion for applicants having to interpret decisions made by assessment managers.

Queensland Development Code

As the siting of the building did not meet the Acceptable Solutions of the QDC, Council assessed it against the Performance Criteria. I will address each of these in turn:

The location of a building or structure facilitates an acceptable streetscape, appropriate for the bulk of the building or structure.

Measurements taken on site indicate that the building is setback 3.2 m to the eave and 3.8 to the wall, which is in fact 800 mm closer than shown on submitted plans.

The bulk of the building impacting on the streetscape is Council's primary concern as larger lots in the area mean that houses are easily able to be sited well back from road boundaries. Many lots are still vacant, however once the street has been fully developed, the location of the proposed house will be inconsistent with that of all other houses. Therefore its current location will not facilitate an acceptable streetscape. The impact however is lessened due to the width of the road reserve and the considerable setback from the road itself.

There was some discussion about how the impact of the building bulk could be ameliorated. A timber paling fence along the boundary is proposed however Council is concerned that the fence would further highlight the reduced setback. There was a suggestion at the hearing that a condition could be imposed requiring no fencing along this boundary. I agree this would lessen the impact of the building on the streetscape, particularly if this area was landscaped but also note that this side of the house includes a bathroom and access to the laundry and garage which the owners wish to screen from the street.

I have reservations about imposing a condition not requiring a fence as it is difficult for Council to enforce and unreasonably restricts use of the site. Therefore I propose that if the owner wishes to construct a fence on the Avalon Street boundary, a Landscape Plan be prepared to Council's satisfaction; that such landscaping be completed before the house is occupied; and such landscaping be maintained in good order until it is established. In assessing the Plan, Council will need to decide whether it facilitates an acceptable streetscape as required by the QDC. The type of fence the Committee has in mind is staggered with inserts which allow for the planting on site of large shrubs or small trees on the street side of the fence. This would soften the impact on the street. The Committee also acknowledges there may be other solutions which achieve similar outcomes.

The location of a building or structure facilitates an acceptable streetscape, appropriate for the road boundary setbacks of neighbouring buildings or structures

As above.

The location of a building or structure facilitates an acceptable streetscape, appropriate for the outlook and views of neighbouring residents.

While the house does not directly interfere with the outlook and views of neighbouring residents, the proposed condition will improve the streetscape.

The location of a building or structure facilitates an acceptable streetscape, appropriate for nuisance and safety to the public.

The proposed location has no apparent impact on nuisance and public safety.

Ain Kuru
Building and Development Committee Chair
Date: 10 November 2010

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
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