



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

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| <b>Appeal Number:</b>                         | <b>19- 10</b>  |
| <b>Appellants:</b>                            | <b>Haldane and Shannon Ing</b>   |
| <b>Assessment Manager:</b>                    | <b>N/A</b>   |
| <b>Concurrence Agency:</b><br>(if applicable) | <b>Bundaberg Regional Council (Council)</b>  |
| <b>Site Address:</b>                          | <b>117 Woondooma Street, Bundaberg described as Lot 91 on B15876 – the subject site.</b> |

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### **Appeal**

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against a concurrence agency response from Council refusing a request to vary siting requirements for alterations to dwelling within the prescribed side boundary clearance.

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| <b>Date of hearing:</b>  | 10.00am - Wednesday 23 June 2010   |
| <b>Place of hearing:</b> | The subject site   |
| <b>Committee:</b>        | Mr Don Grehan – Chair  |
| <b>Present:</b>          | Mr Haldane Ing - Appellant<br>Mrs Shannon Ing - Appellant<br>Mr Stephen Curran - Council representative. |

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### **Decision:**

The Committee, in accordance with section 564(1) of the SPA **confirms** the decision appealed against and **dismisses** the appeal. The Committee also makes the following direction:

- (a) Council is directed to review, and amend as appropriate, its written advice in relation to appeal rights associated with concurrence agency responses.

### **Background**

Council issued a response refusing a request from the appellant for a reduced side boundary clearance in relation to alterations to an existing dwelling on the subject site.

The request to Council, as the concurrence agency, was required as the siting and dimensions of the

proposed building works would result in an increased height of the existing dwelling to approximately 7.3 metres above the level of natural ground while retaining the existing clearance from the side boundary of 1.08 metres contrary to Acceptable Solution A2(a)(ii) of MP1.2 of the Queensland Development Code (QDC).

Council, in rejecting the proposal, considered that the appellant had not demonstrated compliance with Performance Criteria P2 of the QDC, MP 1.2, namely that there was no justification to support that the proposed building work would not adversely impact on the amenity and privacy of residents on adjoining lots.

The appellant, dissatisfied with the refusal lodged an appeal with the Building and Development Dispute Resolution Committees.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. Form 10 – Appeal Notice' and appellant's correspondence accompanying the appeal lodged with the Registrar on 30 March 2010.
2. The concurrence agency response, dated 9 March 2010.
3. Verbal submissions from the appellant at the hearing.
4. Verbal submissions from Council representatives at the hearing.
5. The SPA, Reprint No. 1A, as applicable at the date of application for the concurrence agency advice.
6. The *Sustainable Planning Regulation 2009* (SPR), Reprint 1B, as applicable at the date of application for the concurrence agency advice.
7. The *Building Act 1975* (BA).
8. The Building Code of Australia 2009, Volume 2 - Housing Provisions (BCA).
9. The QDC, MP 1.2 - Design and Siting Standard for Single Detached Housing - On Lots 450m<sup>2</sup> and Over (MP1.2).
10. Letters of support submitted by the appellant at the hearing.
11. Assessment documents submitted by the Council at the hearing.

## **Findings of Fact**

The Committee makes the following findings of fact:

- An existing, high set timber clad dwelling, circa 1930, sits upon the subject site.
- The existing siting and dimensions of the dwelling are such that the clearance from the western allotment boundary to the outer most projection of the building is 1.08 metres and the height of the building from ground level to the relevant gable apex is 6.2 metres (as scaled from submitted drawings).
- The existing siting was validated by subdivision circa 1937 (previous Title Ref. 1195515), is considered to be lawfully constructed prior to the commencement of the BA and, in its existing configuration relating to siting and building height, is afforded protection in accordance with section 226 of the BA.
- The appellant proposes to raise the height of the existing dwelling to facilitate the partial enclosure of the existing sub floor space for habitable purposes and car accommodation and to permit vehicular access to the rear of the allotment.
- Section 5 of the BA clarifies that the appellant's proposal does constitute building work by definition.

- Section 20 of the BA clarifies that all building work is assessable development, unless it constitutes self assessable or exempt development.
- The nature and extent of the appellant's proposal is such that it does not constitute either self assessable or exempt development in accordance with sections 21 or 22 of the BA.
- Section 238 of the SPA clarifies that a development permit is necessary for assessable development.
- Section 30 of the BA clarifies the relevant laws and other documents for the assessment of building work including MP 1.2 - Design and Siting Standard for Single Detached Housing - On Lots 450m<sup>2</sup> and over, of the QDC.
- Section 33 of the BA permits, with qualifications, a local authority planning scheme to include alternative provisions that are alternative or different to the boundary clearance and site cover provisions of MP 1.2.
- The Bundaberg City Plan, as applicable to the subject site, does not adopt alternate planning scheme provisions in relation to boundary clearance and, as the area of the subject site exceeds 450m<sup>2</sup>, MP1.2 is the applicable building assessment provision in this regard.
- In relation to side boundary clearance, Acceptable Solution A2(a)(ii) of MP1.2, Element 1, Design and Siting of Buildings and Structures, states, in part:
  - MP1.2, A2(a)(ii):
  - The side and rear boundary clearance for a part of the building or structure is:
    - (ii) Where the height of that part is greater than 4.5 metres but not more than 7.5 metres - 2 metres.
- The appellant's proposal, based upon the deemed to satisfy ceiling heights of the BCA, will result in an increase of height of the building from ground level to the relevant gable apex to 7.3 metres (as scaled from submitted drawings) while retaining the existing clearance from the western allotment boundary to the outer most projection of the building of 1.08 metres. This is contrary to the Acceptable Solution A2(a)(ii) of MP1.2.
- Where development is proposed contrary to an Acceptable Solution, MP1.2 clarifies that the local government is the referral agency (concurrence) for the assessment of the relevant aspects against the Performance Criteria of Element 1, Design and Siting of Buildings and Structures as per item 19 of Schedule 7 of the SPR.
- A request from the appellant to Council seeking a response in relation to the proposed siting was received by the Council on 11 February 2010.
- Assessment against Performance Criteria P2 of MP1.2, Element 1, Design and Siting of Buildings and Structures requires the concurrence agency to consider that:
  - Buildings and structures –
    - a. provide adequate daylight and ventilation to habitable rooms; and
    - b. allow adequate light and ventilation to habitable rooms of buildings on adjoining lots.
    - c. do not adversely impact on the amenity and privacy of residents on adjoining lots.
- The concurrence agency response in relation to the appellant's request was formally resolved at the meeting of Council's Planning Committee on 4 March 2010. On 9 March 2010, Council gave a written concurrence agency response to the appellants refusing the proposal.
- The concurrence agency response states the following grounds for refusal:
  1. The justifications provided by the applicant did not adequately demonstrate compliance with the performance criteria of P2 of the QDC
  2. The existing building is already located too close to the adjoining property boundaries
  3. The proposed building height, length and associated bulk is considered excessive for the existing boundary setback
  4. The building will cause nuisance to adjoining properties with respect to overshadowing

5. The additional building height will further impact on the privacy of adjoining properties.

- Section 508 and sections 518 through 535 of the SPA clarify that, save for nominated circumstances, rights of appeals to the Building and Development Dispute Resolution Committee are predicated upon a development application being made to, or being decided by, an assessment manager.
- At the date of the hearing a development application has not been made to, or been decided by, an assessment manager.
- This appeal arises solely from the concurrence agency assessment.

### **Reasons for the Decision**

With consideration of section 508 and sections 518 through 535 of the SPA, as a development application has not been made to, or been decided by, an assessment manager and, as this appeal relates solely upon the response given by a concurrence agency, a right of appeal to the Building and Development Dispute Resolution Committees does not exist at this time.

### **Comment**

Following consideration of the information presented during the hearing, the Committee wishes to advise the appellant that sufficient grounds exist to suggest that the response of the concurrence agency may be confirmed should the matter be brought to appeal once a development application had been decided by an assessment manager.

Notwithstanding, from observation of the site conditions and structure, scope exists for the Appellant to achieve their desired outcomes without raising the existing structure and consideration should be given to alternate methods of construction in combination with the performance provisions of the BCA.

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**Don Grehan**  
**Building and Development Committee Chair**  
**Date: 5 August 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  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**