



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	<b>3—09—016</b>
<b>Applicant:</b>	William and Kay Millett
<b>Assessment Manager:</b>	Jeff Evans for and on behalf of GMA Certification Group
<b>Concurrence Agency:</b> (if applicable)	Tablelands Regional Council ('Council')
<b>Site Address:</b>	11 Wensley Avenue, Yungaburra and described as Lot 57 on SP114572 — the subject site

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### **Appeal**

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the Assessment Manager to refuse a development application for building works, namely a proposed shed which is ancillary to an approved dwelling which is currently under construction. The decision followed a concurrence agency response from the Council, as the proposed works required a siting variation in relation to the side boundary setback.

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<b>Date of hearing:</b>	11.30am – Thursday, 5 March 2009
<b>Place of hearing:</b>	Hearing was held by way of teleconferencing
<b>Tribunal:</b>	Debbie Johnson – Chair Martin Clark – Member
<b>Present:</b>	William and Kay Millett – Applicant's Jeff Evans – Assessment Manager Peter Pattison – Council representative Steven Ripper – Council representative

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### **Decision:**

The Tribunal, in accordance with section 4.2.34 (2) (a) of the IPA, **confirms** the decision appealed against and the appeal is dismissed.

### **Background**

The Applicant's lodged a building application with GMA Certification Group. The application sought to erect a shed as an ancillary structure to a dwelling currently under construction on the subject site.

GMA Certification Group referred the application to the Council as a concurrence agency for advice in relation to siting. In this instance, the self assessable side boundary setback for buildings and structures is prescribed in the Eacham Town Planning Scheme as 1.5m. However, the application proposed a reduced setback of 200mm.

Council delivered a concurrence agency response on the 9 February 2009 allowing a siting variation from 1.5m to 1.0m with regards to the shed.

Subsequently on the 24 February 2009 GMA Certification Group refused the building application as the Applicant's did not wish to accept the nominated setback of 1.0m.

On the 26 February 2009, the Applicants lodged an appeal against the refusal of their building application with the Building and Development Tribunal.

### **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 26 February 2009.
2. Council's concurrence agency response, dated 9 February 2009.
3. The Assessment Manager's Notice of Refusal, dated 24 February 2009.
4. Property details, including mapping and the Eacham IPA Planning Scheme as available through Council's website.
5. The application material including drawings detailed by 'N Jones Drafting' and 'Totalspan'.
6. The applicant's grounds for appeal against the Council's reasons for refusal submitted with the application.
7. Verbal submissions made by the Applicant at the hearing.
8. Verbal submission made by the Assessment Manager at the hearing.
9. Verbal submissions made by the Council's representative at the hearing.
10. Written submission of support for the application by the applicant provided after the tribunal hearing.
11. Written submission in support of the application by a neighbouring property owner.
12. The IPA.
13. The *Building Act 1975*.
14. The *Building Regulation 2006* (BR).
15. The QDC.
16. The BCA.

### **Findings of Fact**

The Tribunal makes the following findings of fact:

The subject site falls gently away from the road and is rectangular in shape with a total site area of 800sq/m. The site is partially constrained by a 3.0m wide stormwater easement inside the rear boundary.

The lot has a street frontage of 20.0m and an allotment depth of 40.0m which effectively runs North-East to South-West.

The lot is part of a new release within a staged residential estate. As such, the owners of this site appear to be the first to commence development in this stage as there are no other dwellings built or under construction on their side of the street.

The Applicant's have only just commenced building a single storey, slab on ground, concrete block dwelling. The home will encompass a double lock up garage which faces the street on the North-East corner of the building.

The approved architectural drawings for the residence indicate that the 'L' shaped dwelling will be approximately 30.0m long, 14.30m wide across the street frontage and 8.0m wide across the rear boundary.

The house is to sit 6.0m from the street boundary and it extends to approximately 2.2m from the rear boundary. As viewed from the street frontage the house will run parallel to the left hand side or Eastern boundary with an offset of 1.5m. Effectively the house is therefore built to minimum setbacks for the front, rear and along one side boundary. However, as the house is 'L' shaped there will still be a large area approximately 10.0m wide and 20.0m deep available in the rear right hand side, or Western corner of the site. This is where the proposed shed is to be sited. Together the dwelling and the shed will occupy 48% of the site area.

The steel framed, colourbonded steel clad shed is to be 7.0m wide and 8.0m long with a gable roofline pitched at 15 degrees from a wall height of approximately 3.0m.

The shed is to be completely separate from the dwelling and will house two boats used for recreational pursuits by the owners of the site. The engineering drawings that have been prepared for the shed's construction show a 4.8m garage door along the 7.0m front or gable end. There is also an additional pair of garage doors on the side wall which will face bedrooms at the rear of the dwelling. The architectural drawings indicate less detail in this regard however they illustrate a shower, toilet, vanity and a sink is to be located within the shed.

To provide the best possible outcome for manoeuvring the boats or vehicles in to the shed from the street, the Applicant's propose to position the shed 200mm inside the Western side boundary alignment for a length of 8.0m. A driveway is to be installed such that the easiest access is available to both the double garage and the shed, by driving down the Western side of the dwelling to the shed at the rear. There will be approximately 3.5m clearance between the wall of the house and the side boundary to allow this access to the rear.

Similarly, as the available width of the site between the dwelling and the boundary in the Western corner is around 10.0m and the shed is 7.0m wide there is less than 3.0m available between the bedroom windows along this wall and the roller doors on the opposite shed walls. It is primarily for these two reasons that the applicants wish to position the shed as close to the Western side boundary as possible.

Regardless of the side boundary setback, there will be insufficient site area to turn cars or boats on the site. All access for boats and other vehicles will be one way, causing a reverse manoeuvre either on, or off the site. However, it should be noted that the total length of this driveway which will be 29.0m (as measured from the property boundary) and a further length of 8.0m being the depth of the shed will severely constrain the site's ability to provide landscaping along this entire Western boundary.

Although, the current owners of the adjoining site who are likely to be most affected by any buildings along this Western boundary have provided a letter of support for the proposal.

The Council has three (IPA) planning schemes which determine development in their region. The subject site is covered by the Eacham Shire Planning Scheme gazetted for use in November 2006. In this instance the siting of residential buildings and other structures is potentially determined by both the requirements of the Queensland Development Code (QDC) and the Eacham Shire Planning Scheme.

To elaborate on the Eacham Shire Council (ESC) Planning Scheme provisions relative to the Queensland Development Code MP 1.2 and the provisions of s.33 of the BA the Tribunal notes the following:-

Section 33 of the BA states:

**“33 Alternative planning scheme provisions to QDC boundary clearance and site cover provisions for particular buildings—**

(1) This section applies for work (*relevant work*) that—

(a) is building assessment work or self-assessable building work; and

(b) is for a single detached class 1 building or a class 10 building or structure located on the same allotment as a single detached class 1 building.

(2) A planning scheme may include provisions (*alternative provisions*) that, for relevant work, are alternative or different to the QDC boundary clearance and site cover provisions.

(3) However, a planning scheme may include alternative provisions only if the provisions are a qualitative statement or quantifiable standard.

(4) If there are alternative provisions for relevant work, the QDC boundary clearance and site cover provisions only apply to the extent the alternative provisions do not apply to the work.

(5) Alternative provisions can not be made other than under a planning scheme.

(6) In this section—

**qualitative statement** means a statement about a performance or outcome sought to be achieved when applicable buildings or structures are completed.

**quantifiable standard** means a standard that achieves a performance or outcome sought under a qualitative statement”.

This section of the BA was introduced in the version of the Act that came into force on 1 September 2006.

The ESC Scheme makes alternative provisions in Part 4 – Planning Scheme Codes 4-30. Under the heading of ‘Building Design and Density’ there are Performance Criteria, Probable Solutions applying to assessable development, and Acceptable Solutions applying to self-assessable development. Table 2.4.3.1 specifies (inter alia) a minimum side boundary setback of 1.5 metres.

Since the Scheme passed State Interest Check and was gazetted in November 2006, it has to be assumed that the specific requirements of s.33 of the BA are met. However, in contrast to QDC MP 1.2, the Scheme does not differentiate according to the class of building to which the alternative solutions apply, and must therefore be taken to apply to all buildings.

This is not the only alternative provision in the Scheme overriding the QDC.

The Eacham Shire Council Planning Scheme defines “setback” as:-

“the minimum horizontal distance between any part of the wall of a building or other structure and the lot boundary or wall of another building or other structure on the same lot excluding roof overhangs, sun hoods and cantilevered awnings”.

However, the QDC definition includes overhangs:

“*Side and rear boundary clearance* means:-

for a building or structure other than a swimming pool, the shortest distance measured horizontally from the *outermost projection* of the *building* or *structure* to the vertical projection of the boundary of the *lot*”.

and further:-

“*Outermost projection* means the *outermost projection* of any part of a *building* or *structure* including, in the case of a roof, the outside face of the fascia, or the roof *structure* where there is no fascia, or attached sunhoods or the like, but does not include retractable blinds, fixed screens, rainwater fittings, or ornamental attachments”.

The ESC Scheme therefore provides a considerable relaxation of the QDC requirements for buildings that normally have an overhang such as a dwelling, allowing, for example, a setback of 0.9m to outermost projection where there is a standard 600mm overhang. However, the Scheme does not distinguish between Class 1a (dwellings) and Class 10a (non-habitable) structures such as sheds, and removes all the concessions provided by the QDC for Class 10a structures. This is a significant reduction in entitlements.

It is common practice for small sheds and lawn lockers to be located inside the side and rear setbacks. In locations where the QDC prevails, small "kit" structures up to 3.0 x 3.0m can be located with the gable against the boundary, since this type of structure is usually designed to be assembled before being lifted into position on the slab. The shed is then sealed around the bottom rail, plated and bolted to the slab from the inside, and internal cyclone bracing added as required. The height of the gable is around 1.9m at the verge and 2.1m at the ridge. A shed of this type is therefore barely visible above the maximum 2.0m boundary fence height prescribed under the BR, does not provide space for the accumulation of material, saves otherwise useless space.

However, under the Scheme provisions applying at the subject site, a Concurrence Agency determination from the Council is required for the type of structure described above.

It is noted that there is a strong case for not creating an inappropriate precedent given that this is the first development to commence on the south side of the road. The subject building is fairly large by urban residential standards and there has been a clear intention to design it to the limits of the QDC. However, it is possible that further problems will occur when other owners lodge applications for less substantial buildings, given the blanket restrictions imposed by the Scheme.

### **Reasons for the Decision**

The proposed siting for the garage structure does not afford an acceptable outcome, given the likely detraction to the adjoining site and considering neighbouring street's amenity for this emerging community.

The Tribunal found that the Applicant's needs could be otherwise met without constraining or compromising the amenity on the neighbouring lot. The 1.0m setback nominated by the Tablelands Regional Council provides a design that will accommodate the Applicant's needs for the security and general protection of their vehicles and other possessions.

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**Debbie Johnson**  
**Building and Development Tribunal Chair**  
**Date: 24 March 2009**

## **Appeal Rights**

Section 4.1.37 of the *Integrated Planning Act 1997* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals  
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