



## Building and Development Dispute Resolution Committees—Decision

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*Sustainable Planning Act 2009*

<b>Appeal number:</b>	<b>38-10</b>
<b>Applicant:</b>	<b>Mark and Lurlene Tripcony</b>
<b>Assessment manager:</b>	<b>Sunshine Coast Regional Council</b>
<b>Concurrence agency: (if applicable)</b>	N/A
<b>Site Address:</b>	151-171 Lefoes Road, Bli Bli and described as Lot 2 on RP100909 — the subject site

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### Appeal

Appeal under section 532 of the *Sustainable Planning Act 2009* (SPA) against the decision dated 18 May 2010 by Sunshine Coast Regional Council, as the assessment manager, to refuse a development application for building works for the siting of a dwelling.

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Date of hearing:	2:00pm on Thursday 24 June 2010
Place of hearing:	The subject site
Committee:	Ms Kari Stephens – Chairperson
Present:	Mr Mark Tripcony – Applicant Mr Fred Vicary – Sunshine Coast Regional Council representative Mr David Licence – Neighbour (147 Lefoes Road, Bli Bli)

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### Decision

The Committee, in accordance with section 564 of the SPA **sets aside** the decision of the assessment manager to refuse a development application for the siting of a dwelling; and replaces it with the following decision:-

The Committee, in accordance with section 564 of the SPA **directs** the assessment manager to **approve** the development application, subject to compliance with the following conditions:-

1. The dwelling shall be sited and located in accordance with the site plan (drawing no.1017 [issue a]) dated 28 March 2010.
2. A 1.8m timber paling fence shall be constructed on the south-west side boundary adjacent to the location of the proposed dwelling, for a length of not less than 40m. All expenses associated with the construction of the fence shall be borne by the owner/applicant.
3. A 2.5m wide landscape bed shall be provided adjacent to the fence described in point 2 above and shall be landscaped to comply with Council's Code for Landscaping Design. Trees and shrubs are to have a minimum height of 1m at planting, and be of a type/species to achieve a height of 3m within three years.

## Background

The site is located to the north-east of the Bli Bli township, on the northern side of Lefoes Road. It is located in a rural setting, and the land has the classification (under the Maroochy Plan 2000) of "Sustainable Rural Lands".

The site comprises approximately 2.036 ha and has a long frontage to Lefoes Road of approximately 219.3 metres. The eastern half of the site is flat and low-lying and is mapped as "flood prone and drainage constraint land" in the Maroochy Plan. The south-western half of the site is more elevated, rising from 5m Australian Height Datum (AHD) to 12m at its highest point, located adjacent to the side boundary on the south-western side of the property.

The proposal is to construct a dwelling 10m from the side property boundary. The proposed location for the dwelling is within the elevated area of the site, at approximately 10m AHD.

The subject site is occupied by a shed comprising 72m<sup>2</sup> of floor area, located towards the rear (west) of the property. Vehicular access to the site is via an unsealed driveway from Lefoes Road.

A dwelling is located on the adjacent property ("the neighbour's house") to the west of the subject site. The neighbour's house is setback approximately 20m from the shared side boundary. The neighbour's house is oriented towards the north-west, taking advantage of rural views across the valley. It should be noted that these views will not be impinged by the proposed dwelling, which would be located to the north-east of the neighbour's house. It is also relevant to note that the floor level of the proposed dwelling would be located some 5m lower than the floor level of the neighbour's house, and that a large, mature mango tree is positioned between the neighbour's house, and the area of the proposed dwelling.

The owner of the neighbour's house (Mr David Licence) made a submission to the Council regarding the reduced setback.

The Maroochy Plan, specifically Element 1 of the "Code for the Development of Detached Dwellings and Display Houses" contains an acceptable measure for side setbacks in rural areas, viz a viz:

- A3.4** *In Rural Precincts the minimum side and rear boundary setback (including garages and carports) is:*
- (a) On sites less than or equal to 2.0 hectares – 3m for all buildings; and*
  - (b) On sites greater than 2.0 hectares – 20m for residential buildings (i.e. buildings containing habitable rooms) and 10m for all other buildings.*

The subject site is just over 2 ha (2.036ha) and as such the planning scheme's preferred outcome is a setback of 20m from the side boundary.

It is relevant that the Maroochy Plan 2000 is a performance-based planning scheme, and the acceptable measure represents just one way to satisfy the performance criteria. In this case, the performance criteria for Element 1 is as follows:

*P3 Buildings are sited to maintain the amenity of adjacent land and dwellings having regard to:*

- (a) overshadowing;*
- (b) privacy and overlooking;*
- (c) views and vistas;*
- (d) building character and appearance;*
- (e) building massing and scale as seen from neighbouring premises;*
- (f) the typically open or forested rural landscape in which buildings are a minor element;*
- (g) maintaining an open visual landscape dominated by natural elements; rather than built structures; and*
- (h) buffering from unsealed roads, heavily trafficked roads and existing or likely future heavy vehicle haul routes in order to avoid or minimise noise and dust nuisance.*

## Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 1 June 2010.
2. A site inspection of the site and the locality, undertaken by the Chairperson.
3. The assessment manager's decision notice dated 18 May 2010.
4. Verbal and written submissions from the parties at the hearing.
5. The 2000 Planning Scheme for the former Maroochy Shire Council (the Maroochy Plan 2000) – in particular, Code 4.1 Code for Development of Detached Houses and Display Homes.
6. The Queensland Development Code (QDC) – Part MP1.2.
7. The SPA
8. The *Sustainable Planning Regulation 2009*

## Findings of Fact

The Committee makes the following findings of fact:

The assessment manager's decision to refuse the application is based on alleged non-compliance with provisions of the Code for the Development of Detached Houses and Display Homes, in particular Element 1, Performance Criterion P3, which states:

*P3 Buildings are sited to maintain the amenity of adjacent land and dwellings having regard to:*

~~(a) overshadowing;~~

(b) *privacy and overlooking;*

(c) *views and vistas;*

~~(d) building character and appearance;~~

(e) *building massing and scale as seen from neighbouring premises;*

(f) *the typically open or forested rural landscape in which buildings are a minor element;*

~~(g) maintaining an open visual landscape dominated by natural elements; rather than built structures; and~~

~~(h) buffering from unsealed roads, heavily trafficked roads and existing or likely future heavy vehicle haul routes in order to avoid or minimise noise and dust nuisance.~~

In addition to the above, at the hearing, the assessment manager produced a written submission which made the following points:

1. The assessment manager based its decision primarily on clause (b) privacy and overlooking and (c) views and vistas. Clause (e) was considered as minor, as the massing of the building was not considered to be significant.
2. The siting variation is not considered necessary as the dwelling could be located in accordance with the prescribed setback requirements.
3. There are several sites in the immediate area with lesser setbacks due to site areas of less than 2ha, 10m setbacks for class 10a buildings (garages or similar) and buildings constructed prior to the commencement of the planning scheme.
4. The proposed dwelling (being single storey) is 5m lower than the neighbour's house, and views will not be significantly impacted upon.

The neighbour, Mr David Licence, made a number of verbal submissions at the hearing, including:

1. the purchase of their property (about 3½ years ago) was based on an understanding that any future dwelling on the subject site would require a side setback of 20m;
2. concern that reduction in the spaces between houses would impact on rural amenity (noise, lighting, privacy) and lifestyle choice;
3. that the building will be there for at least the next 50 years, and decisions should transcend the desires of the current owners; and
4. upholding setback provisions generally.

Mr Licence agreed that the primary views from his house were towards the north-west, and not over the area where the proposed dwelling would be sited. Whilst it was acknowledged that the mango tree would stand between the views of the two houses, Mr Licence made the point that trees and landscaping do not last forever.

At the hearing, the appellant made a number of points to support the location of the proposed house including:

1. The northern half of the property was flood prone, meaning the usable component of the site was about 1 ha (rather than 2.036ha);
2. Other constraints such as a Council drain and an access easement, further reduced the usable area of the site;
3. The driveway crossover location is constrained due to flooding impacts, the location of a spring, and visibility and safety issues along Lefoes Road. The proposed siting of the house intends to use the existing driveway;
4. An effluent disposal system, which includes subsurface soakage trenches, already exists on the site. The proposed house needs to be located at a higher level than the existing trenches to allow the effluent to be gravity fed to the trenches;
5. The location for the proposed house was specifically chosen to lessen impacts on the neighbouring house, being screened by the existing mango tree;
6. The proposed house is single storey;
7. There is approximately 5m difference in the natural ground level between the neighbour's house and the site for the proposed dwelling.

It is relevant to note that if the subject site area was equal to or less than 2ha (ie 360m<sup>2</sup> smaller than its current size) the acceptable measure for the side setback would be 3m.

Based on an assessment of these facts, it is the Committee's decision that the decision notice being appealed against be **set aside** and that the building works application for siting of a dwelling house be **approved**, subject to compliance with the following conditions:

1. The dwelling house shall be sited and located in accordance with the site plan (drawing no.1017 [issue a]) dated 28 March 2010.
2. A 1.8m timber paling fence shall be constructed on the south-west side boundary adjacent to the location of the proposed dwelling, for a length of not less than 40m. All expenses associated with the construction of the fence shall be borne by the owner/applicant.
3. A 2.5m wide landscape bed shall be provided adjacent to the fence described in point 2 above and shall be landscaped to comply with Council's Code for Landscaping Design. Trees and shrubs are to have a minimum height of 1m at planting, and be of a type/species to achieve a height of 3m within three years.

## **Reasons for the Decision**

The Committee accepts that the Maroochy Plan 2000 is a performance-based planning scheme, and compliance with an acceptable measure is only one way of meeting the performance criteria.

The assessment manager's submission stated that its decision was based primarily on clauses (b) and (c) of the performance criteria. Clause (b) relates to privacy and overlooking, and clause (c) relates to views and vistas.

In terms of privacy and overlooking, the Committee was not convinced that these were problematic. A large mango tree is located between the neighbouring house and the proposed house, and the difference in level between the neighbouring house and the proposed house (of approximately 5m) substantially reduces any impacts on privacy and overlooking. Furthermore, the proposal is for a single storey dwelling. The committee believes that issues relating to privacy and overlooking would not be substantially increased by reducing the setback from 20m to 10m.

In relation to clause (c) – views and vistas, the Committee found the neighbouring properties would not be negatively impacted by a reduced setback of 10m. The neighbouring property is orientated towards the north-west, and enjoys views to that direction. In addition, the existing mango tree effectively reduces views towards the proposed dwelling. The inclusion of conditions requiring a screening fence and landscaping are considered to mitigate any impacts that may result.

The Committee finds the acceptable measures include rather arbitrary setback distances based on a criterion of whether the site is greater than or less than 2 ha in area. It is relevant to note that a reduction in site area of only 361 square metres would allow the dwelling house to be located as close as 3m to the side boundary. In addition, there are several site-specific criteria including the flood prone land (which constrains about half of the site), the existing driveway location and the position of the existing sewerage absorption trenches, which provide mitigating circumstances justifying a relaxation of the side setback.

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**Kari Stephens**  
**Building and Development Committee Chair**  
**Date: 2 July 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  
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