



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	16 - 13
Applicant:	John Jansen Van Vuuren
Assessment Manager:	Rockhampton Building Approvals
Concurrence Agency: (if applicable)	Mackay Regional Council (Council)
Site Address:	7 Maryvale Circuit, Beaconsfield and described as Lot 67 on SP 237257 — the subject site

Appeal

Appeal under Section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of Rockhampton Building Approvals as the Assessment Manager to refuse a Development Application for Building Works (Application).

Date and time of hearing:	Not Applicable
Place of hearing:	By written submission
Committee:	Gordon Heelan – Chair Peter Marles – Committee Member
Present:	Not Applicable

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 (1) of the SPA **confirms** the decision appealed against being the refusal of the Application.

Background

The Site and Shed

The subject site has 2 (two) road frontages as defined in the Queensland Development Code MP1.2 (QDC MP1.2). The South-East boundary is adjacent to Norwood Parade and the North-West boundary is adjacent to Maryvale Circuit.

Norwood Parade is the only road entry to the estate in which the subject site is located. The estate will have approximately 500 houses when completed. A proposed bus stop is positioned on Norwood Parade at the Norwood Parade frontage of the subject site.

The shed is 9m long by 7m wide and 3.6m to the apex of the roof above natural ground when viewed from Norwood Parade (the “Shed”). The site plans shows the Shed has been constructed 0.6m from Norwood Parade road frontage.

First Appeal related to this property

The property and associated Shed involved in this appeal were first appealed to the Committee Registry on 9 August 2012 (Appeal 36-12). During the 2012 appeal a site inspection was undertaken by the Committee and a Decision issued on 20 November 2012. The 2012 decision is relevant to the current appeal and is therefore attached to this decision (**Attachment: Appeal 36-12**).

The property owner purchased a Shed from Sunstate Garages & Sheds in early 2012 which included seeking the relevant approvals and construction. Sunstate Garages & Sheds applied for a development permit for building works (the "Application") to the Assessment Manager who approved the Application and the owners proceeded to build the Shed. The Applicant for the Development Application for Building Works was Sunstate Garages and Sheds (the shed builder). The Assessment Manager did not consider a Concurrency Agency application to Council was required.

Sometime in June 2012, the Shed came to the attention of the Council town planning officers whilst conducting a routine inspection of the subdivision. Council notified the Assessment Manager the Shed required Council approval as the Concurrency Agency. The Assessment Manager subsequently submitted an Application to Council on 4 July 2012 and Council approved the Application with Conditions on 18 July 2012. The Assessment Manager issued a Decision Notice refusing the Application subject to conditions on 6 August 2012.

An appeal was lodged by the Assessment Manager against the Council conditions with the Committee Registrar on 9 August 2012. A hearing was held on the subject site on 26 September 2012 at 9.30am. The appeal was dismissed on the 19 November 2012 on the grounds that the statutory Form 10 - Application for Appeal/ Declaration was invalid and a valid Form 10 is required under section 527(2) of the SPA.

Current appeal

The Assessment Manager engaged legal representation -Swanwick Murray Roche Solicitors (the Solicitors) to submit a new Building Work Application – Boundary Setback for Shed (the Application). The Application sought approval for the Shed in its as constructed location.

The Solicitors were named as the Applicant for the Building Application which was received by Council on 7 February 2013. A Concurrency Agency response was provided to the Solicitors on 15 February 2013.

The Council response did not refuse the Application but required the following conditions to be attached to any development Application Approval.

1. *The proposal plan (attached) shall be amended to show a setback to Norwood Parade which is accepted by Council in writing and shall be generally in accordance with the attached sketch plan.*
2. *The existing structure must be dismantled and relocated within 3 months of this approval.*
3. *A building permit for the shed must be obtained prior to the erection of the structure.*

The Assessment Manager, following Council's response, then issued a Decision Notice dated 13 March 2013 to Sunstate Garages and Sheds who were not the Applicants on the development Application however a copy was provided to the property owners.

The Assessment Manager's Decision Notice advised that the Application has been refused for the following reason:-

"This application is refused as a result of Mackay Regional Council acting as a concurrence agency for Queensland Development Code MP 1.2. It is their view that this development will impact on the amenity of the area."

A Notice of Appeal was lodged against the Assessment Manager's Decision Notice by the property owners (Mr John Jansen Van Vuuren and Mrs Amanda Jansen Van Vuuren) under correspondence

from the Assessment Manager's legal representatives. This Appeal was received by the Committee Registrar on 8 April 2013.

Given the Committee in Appeal 36-12 had inspected the subject site the parties agreed to the current appeal being decided by written submission in accordance with section 558 of the SPA. Submissions and responses from all parties were required by Friday 24th May 2013.

Material Considered

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal received by the Committee Registrar on 8 April 2013.
2. Drawings and plans submitted with the Appeal Notice.
3. Decision Notice issued by the Assessment Manager dated 13 March 2013.
4. Concurrence Agency Response from Council addressed to Swanwick Murray Roche solicitors dated 15 February 2013.
5. Written correspondence from Swanwick Murray Roche solicitors on behalf of the Assessment Manager on 2 May 2013.
6. Written submissions from Council dated 16 May 2013
7. Letter from the Committee to the Applicants dated 27 June 2013 seeking agreement to vary the Building Application requiring a response by 15 July 2013.
8. The *Sustainable Planning Act 2009* (SPA).
9. The *Building Act 1975* (BA)
10. The Queensland Development Code (QDC) Part MP 1.2 – Publication Date: 11 March 2010 (QDC MP 1.2)
11. Division 21 Residential Storage Sheds Code - Mackay City Planning Scheme (24 March 2006), Consolidated Planning Scheme (24 April 2009)(the "Scheme")

Findings of Fact

The Committee makes the following findings of fact:

- The subject site has 2 (two) road frontages and is generally flat. The South-East boundary is the frontage to Norwood Parade and the North-West boundary is the frontage to Maryvale Circuit. Norwood Parade is the only road entry in to the estate.
- An Application was lodged on 7th February 2013 with the Council for a boundary setback for a Shed after a building permit had been issued. The Application notes the Shed is an existing structure.
- The Shed is 9m long by 7m wide and 3.6m to the apex of the roof above natural ground when viewed from Norwood Parade. The site plans shows the Shed has been constructed 0.6m from Norwood Parade road frontage. The setback from a road frontage, in this instance, under both the QDC MP1.2 and the relevant planning scheme is 6m.
- The previous site inspection of the subject site revealed that the Shed was visually prominent from Norwood Parade, had not been designed to mitigate any impact on the amenity of the area and that no allowance had been made for landscaping to mitigate the impact on the amenity of the area. The submissions of the Applicant did not demonstrate how the impact on the amenity of the area could be mitigated with the Shed in its present location and orientation.

- For completeness the following discussion regarding the issue of Road Frontage is provided. The definition of road frontage is clear in both the town plan and the QDC MP1.2 which provided the following definitions:
 - a. Frontage means the road alignment of a lot.
 - b. Road means –
 - i. An area of land dedicated to public use as a road; or
 - ii. An open area to or used by the public and developed for, or has, as one of its main uses, the driving or riding of motor vehicles.

There is no exclusion of any particular boundary from that definition where a parcel of land abuts 2 road boundaries.

Further, the Consolidated Planning Scheme (Scheme) defines “Frontage” to mean:

“any boundary line, or part thereof, of a lot which coincides with the alignment of a road”.

Accordingly the term “Frontage” must include all roads that are a road alignment to a lot and on that basis the subject site has a road frontage to Maryvale Circuit and a road frontage to Norwood Parade.

- Council’s written submission states that the requirement for its conditions was based on the provisions of the Consolidated Planning Scheme (24 April 2009), in particular Division 21 Residential Storage Sheds Code (the “Code”), and more particularly Acceptable / Probable Solutions S1.1 in Table 9-20 of that Code. The specific provisions of the Code relied upon by the Council are as follows:

S1.1

A shed located on a lot that was created on a survey plan and registered on or after the 24 March 2006 and included in the Village Zone, Urban Residential Zone, Urban Expansion Zone or Higher Density Residential Zone has a minimum setback from the road frontage in accordance with Table 9-20.1 Minimum Setback From Road Frontage

	Shed
Access Place / Street	6.0 m
Collector	6.0 m
Sub-Arterial	10.0 m
Arterial	10.0 m

Note: The minimum setbacks for a corner lot are the same for each road frontage as stated above.

The subject site is on Norwood Parade which is a Minor Collector Street and Maryvale Circuit which is an Access Street as defined in the planning scheme. This once again confirms that the subject site has two road frontages.

- Given the above, the Shed therefore does not comply with the QDC MP1.2 or the Scheme.
- The Assessment Manager referred the Application to the Council regarding a siting matter which did not comply with the acceptable solutions in the Division 21 Residential Storage Sheds Code - Mackay City Planning Scheme (24 March 2006), Consolidated Planning Scheme (24 April 2009)
- Council did not refuse the Application but imposed conditions on the Development Approval in their response dated 15 February 2013.

Reasons for the Decision

Validity of appeal.

A number of parties were involved in the lodging of the Application, seeking the Concurrence Agency response and lodging of the appeal. On each occasion, a matter was not attended to by the Applicant, Mr Van Vuuren however it is clear same was attended to by his agent, be it Sunstate Garages and Sheds or Swanwick Murray Roche solicitors on his behalf. The Committee's view is that the appeal is in accordance with the provisions of Section 514 of the SPA. Further, given the Committee's decision in the matter, even if this is not the case, the outcome would be no different.

Basis upon which the appeal must be decided

Whilst much of the submissions in this matter have focused on the Council response, the appeal pursuant to s527 of the SPA can only be with respect to the matters set out in that section. It is not possible to appeal against the conditions required by a Concurrence Agency unless those conditions form part of the Decision Notice issued by the Assessment Manager. That decision was to refuse the Application for the following reason:-

"This application is refused as a result of Mackay Regional Council acting as a Concurrence Agency for Queensland Development Code MP1.2. It is their view that this development will impact on the amenity of the area."

The Council as Concurrence Agency did not direct the Assessment Manager to refuse the Application but rather required the imposition of particular conditions. The Assessment Manager did not provide any reason other than as set out above for the refusal of the Application.

The reason provided by the Assessment Manager was incorrect. The Assessment Manager was not entitled to rely on the Council response to refuse the Application but rather should have (in the absence of any other reasons justifying refusal, none of which were cited) approved the Application subject to condition including the Concurrence Agency conditions.

As a result of the Assessment Manager refusal, the appeal cannot be decided on the basis of the Council conditions as no conditions were referred to by the Assessment Manager in the Decision Notice. The appeal can only be based on the Assessment Manager refusal of the Application.

Despite the refusal being made on an incorrect basis by the Assessment Manager, the Committee has the jurisdiction to make any one of the types of decision set out in Section 564(2) of SPA.

The Committee may with the consent of the Applicant vary an Application (see section 564(e) SPA) and with this in mind, the Committee wrote to the Applicants on 27 June 2013 requiring a response by 15 July 2015. The Applicant did not respond to that correspondence.

Therefore, the Committee confirms the decision appealed against being the refusal of the Application on the basis that the Shed:-

- does not comply with the Acceptable / Probable Solutions S1.1 in Table 9-20 of Division 21 of the Residential Storage Sheds Code;
- is 0.6 metres from the Norwood Road frontage which is the main access to the estate;
- is a colorbond shed;
- is visually prominent from Norwood Parade; and
- is not designed to mitigate any impacts on the amenity of the area.

Gordon Heelan
Building and Development Committee Chair
Date: 7 August 2013

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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