



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-027
Appellant:	Lyle & Co Pty Ltd T/As Spartan Sheds
Respondent (Assessment Manager):	Wal Kenney of Procert Building Solutions Pty Ltd
Co- Respondent (Concurrence Agency):	Bundaberg Regional Council (Council)
Site Address:	2 Kepnock Road, Kepnock QLD 4670 and described as Lot 5 on RP66968 (the subject site)

Appeal

Appeal made under Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(c) of the *Planning Act 2016* (PA) against approval conditions advised by the assessment manager, as directed by the concurrence agency, in accordance with provisions of Schedule 9, Division 2, Table 1 of the Planning Regulations 2017 (Amenity and Aesthetics - Council 'Amenity and Aesthetics, Building Works involving Removal and Rebuilding Policy) (Council Policy).

Date and time of hearing:	1.15pm on 9 December 2020
Place of hearing:	The subject site and Council offices
Tribunal:	John Bright - Chair David Job - Member
Present:	Shauna Hough - Appellant Representative/Applicant Paula Neil-Brown - Owner Richard Jenner - Council Representative Katrina Peardon - Council Representative

Decision

The Development Tribunal (Tribunal) in accordance with section 254(2)(b) of the *Planning Act 2016* (PA) changes the conditions of development approval as advised by the Assessment Manager by:

1. Removal of Item 7, as contained in Attachment 1, Part 2 – Concurrence Agency Conditions.
2. Removal of the requirement for windows (two in number) from the street elevation 'View 2', where indicated on the Council 'Approved Plan' (Dwg No. Q03340.3:B).
3. Removal of that section of landscaping behind the proposed shed adjacent to the SW side boundary, where indicated on the Council 'Approved Plan' (Plan No. 985-1A).

Background

1. The subject site at 2 Kepnock Road, Kepnock, described as Lot 5 of RP66968, has an area of 1298 sqm and is zoned Low Density Residential. The site's configuration is proportionally long (approx. 72 metres) and narrow (approx. 18 metres) and its topography is flat. The road frontage is angled to the side/rear boundaries and located about 50 metres from the intersection with Elliot Heads Road. Currently, on-site development comprises a lowset, brick veneer, gable roofed dwelling (190 sqm GFA approx.). This is setback about 19 metres from the road frontage and 1.5 metres from the SW side boundary and has a roof ridge height of about 4.2 metres. An existing freestanding shed (49 sqm GFA approx.) is located at the rear of the dwelling. This is sited adjacent to the NE side boundary and setback about 49 metres from the frontage.
2. The Applicant sought approval to develop an additional freestanding Class 10a gable roofed, partially enclosed building to be located in front of the existing dwelling, setback ≥ 7.5 metres setback from the road frontage and 10 metres/1.5 metres from respective NE/SW side boundaries. The proposed building was to be pre-painted metal clad, prefabricated, kit type construction with an enclosed floor area of 49 sqm and additional unenclosed roofed area of 21sqm. The roof ridge height was to be approx. 4.26 metres above ground level.
3. A development application (DA3603-20) was received by Wal Kenney, (Private Building Certifier - Procort Building Solutions Pty Ltd) on 20 July 2020. In processing the DA Form 2, Part 7, the Assessment Manager incorrectly noted the floor area of the proposed building as 70sqm (the covered roofed area). (*'Floor Area' for a building, as defined by the Building Act (BA), means '....the gross floor area of all floors in the building measured over the enclosing walls...').
4. A 'Request for Concurrence Agency Assessment' was lodged to Bundaberg Regional Council (Council), dated 3 August 2020. Referral was triggered by Council Policy Table 4.2 (referencing Table 5.2). Table 5.2 *Acceptable outcome* AO1.3 (3) nominated 90 sqm as the combined maximum floor area for all 'Domestic outbuildings' on lot size <2000 sqm. The development proposed a new Class 10a shed of 49 sqm GFA which was additional to the existing shed (49sqm GFA). The combined outbuilding floor area was therefore to be 98 sqm on lot size 1298 sqm.
5. On 11 August 2020, Council requested further information noting that officers '*are minded to refuse the proposal in its current form*'. Amendments requested included that:
 - The proposed structure be located at the rear of the property, or alternatively
 - Cladding type be amended and additional landscaping be provided.
6. On 17 August 2020, the Applicant corresponded with Council advising that:
 - Landscaping to the front boundary would be provided
 - Siting of the proposed shed to the rear of the lot would be incompatible with the owner's usage of the property.
7. On 21 August 2020, the Applicant provided Council with amended drawings indicating alternative horizontal cladding and two (2) windows to the Kepnock Road elevation of the proposed building.
8. On 31 August 2020, Council formalised its concurrence response advising approval subject to conditions (13 in number) and advices (three in number) as contained in Schedule 1 of the Referral Notice. Conditions included:
 - '7. Provide horizontal external cladding (hardiplank, primline or linea board or similar products) to the northern (Kepnock Road) elevations, western (side) elevation and eastern (side) elevation of the approved Class 10 shed.'
 - '11. Establish landscaping for screening purposes as amended in red by Council on the endorsed site plan. Landscaping must consist of a minimum of one (1) tree and/or shrub per three (3) lineal metres, growing to a minimum height of four (4) metres.'

9. On 6 October 2020, the Assessment Manager confirmed approval of the Development Application subject to Assessment Manager Conditions (Attachment 1 – Part 1) and Concurrency Conditions (Attachment 1 – Part 2).
10. On 19 October 2020, the Applicant lodged Form 10 – Notice of Appeal to the Tribunal.
11. On 9 December 2020, the Tribunal hearing was conducted at Council offices following an inspection of the subject site.

Jurisdiction

1. The Tribunal has jurisdiction to hear this appeal under Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 1(c) of the PA. The precondition in section 1(2) of Schedule 1 for the application of Table 1 is satisfied in this instance because the matter relates to the *Building Act 1975* and accordingly paragraph (g) of section 1(2) applies.

Decision Framework

It is noted that:

1. In this matter the appellant must establish that the appeal should be upheld (s. 253(2) of the PA).
2. The tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (s. 253(4) of the PA).
3. The tribunal may, but need not, consider other evidence presented by a party with leave of the tribunal or any information provided to the registrar (S253(5) of the PA).
4. The tribunal must decide the appeal by either confirming, changing, replacing or setting aside the appealed decision (as per section 254(2)(a) to (d) of the PA).

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 – Notice of Appeal, including grounds for appeal and associated correspondence received by the Registrar on 19 October 2020.
2. Development Application (DA 3603-20) received by the Assessment Manager on 20 July 2020.
3. Applicant's Request for Concurrence Agency Assessment lodged to Council on 3 August 2020, together with subsequent correspondence between the parties, as follows –
 - a. 11 August 2020 – Council RFI to Applicant.
 - b. 17 August 2020 – Applicant to Council (RFI Response – Landscaping).
 - c. 21 August 2020 – Applicant to Council (RFI Response – Cladding).
4. Council's Referral Notice – pre-application response, dated 31 August 2020.
5. Development Approval subject to conditions as issued by Wal Kenney, (Private Building Certifier - Procort Building Solutions Pty Ltd) dated 6 October 2020.
6. Verbal representations to the Tribunal hearing on 9 December 2020 from the Appellant and Owner stating their case substantially as previously outlined in the Form 10 – Notice of appeal. Other matters raised by the Appellant included that:

- a. The proposed finish to all external elements of the new building was confirmed as Colorbond – ‘Deep Ocean’.
 - b. The requirement to provide horizontal sheeting to three (3) sides of the proposed building would increase construction costs by >30% (from \$25.5k to \$32.5k).
 - c. Horizontal sheeting of the type nominated required painting. This would be an additional ongoing maintenance expense.
 - d. The requirement to provide windows (two in number) to the building’s street elevation served no functional purpose was considered an ongoing security risk.
 - e. Landscape planting adjacent to the SW side boundary served no useful purpose and would be difficult to maintain.
 - f. There had been reluctant agreement to provided windows and horizontal sheeting to the building’s street elevation in the belief that this would satisfy Council Policy and could be achieved at reasonable cost (approx. \$2.3k additional). However, the requirement for additional horizontal wall sheeting was both uneconomical and impractical for prefabricated kit type shed construction.
 - g. The Appellant sought approval to now proceed to construction on the basis of the original application (i.e. Colorbond metal sheeted kit building without windows – 49 sqm floor area/70 sqm roofed area).
7. The Assessment Manager did not seek to make any submissions for the appeal. Verbal representations from the Co-Respondent/Council Representatives to the Tribunal hearing on 9 December 2020 provided a general outline of the aims and objectives of Council’s Policy and an explanation of the specifics of its implementation in this instance. Other matters raised by the Council included:
 - a. Confirmation that approved profile, Colorbond metal cladding would be an acceptable option for use as external horizontal sheeting, where required.
 - b. Confirmation that additional landscape planting adjacent to the SW side boundary would no longer be a requirement.
 8. An inspection of the subject site and surrounding properties by Tribunal members to assist the Tribunal in understanding the evidence and submissions in conjunction with the 9 December 2020 hearing.
 9. Bundaberg Regional Council Planning Scheme 2015.
 10. Bundaberg Regional Council ‘Amenity and Aesthetics and Building Work involving Removal or Rebuilding Policy (November) 2017’.
 11. Queensland Development Code mandatory part – MP1.2.
 12. Planning Act 2016.
 13. Planning Regulation 2017.
 14. Building Act 1975.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The Applicant sought approval to erect a new freestanding Class 10a prefabricated, gable roofed, kit type building. The said building was to have a maximum height of 4.26 metres and floor area of 49 sqm. Existing on-site development included a lowset dwelling (Class 1a) and another freestanding shed (Class 10a) of 49 sqm floor area, located towards the rear of the property. The proposed new shed was to be sited in front of the existing dwelling, setback ≥ 7.5

metres from the frontage and 10 metres/1.5 metres from respective side boundaries. The lot size was 1298 sqm (approx 72L x 18W) and zoning 'Low Density Residential'.

2. The design and siting of the proposed development was fully compliant with the requirements QDC-MP1.2.
3. Council Policy Table 5.2 – '*Domestic outbuildings*' set out both '*Performance outcomes*' and '*Acceptable outcomes*' to regulate the amenity and aesthetics of particular Class 10a buildings within the Bundaberg region.
Performance outcomes P01 (1) to (5) advised general criteria for *domestic outbuildings* as follows:

- (1) *do not appear to be industrial in scale and appearance;*
- (2) *do not adversely impact on the solar access, privacy, outlook and amenity of adjoining premises;*
- (3) *do not adversely impact on the prevailing or intended character of the locality;*
- (4) *if located on a lot that does not have a dwelling, is sited and is of scale that is consistent with the surrounding built environment and will allow a suitably sized house to be located on the site; and*
- (5) *if located on the same lot as a dwelling, is subservient in scale and bulk to the dwelling.*

Table 5.2 '*Acceptable outcomes*' AO1.1 and AO1.2 are not relevant in this matter. '*Acceptable outcome*' AO1.3 (1) to (4) advise specific criteria for domestic outbuildings, as follows:

- (1) *(excluding carports, lawn lockers (max 9m²), awnings, and annexes) has a roof pitch between 9 and 26 degrees, or a minimum 5 degrees where a skillion roof;*
- (2) *has a maximum building height of 5.5m in a Rural or Rural residential zone or 4.8m when located in any other zone;*
- (3) *has a combined maximum floor area of all Domestic outbuildings of 90 sqm for Lot size <2000 sqm.*
- (4) *has a maximum horizontal dimension (length or width) of 16m when in a Rural or Rural residential zone or 12m when located in any other zone.*

Council Policy allowed discretion to approve a '*Domestic outbuilding with a floor area greater than that nominated in AO1.3 when the development has demonstrated that the building bulk has been appropriately addressed*'.

4. The proposed development, as originally submitted on 20 July 2020, was non-compliant with Council Policy '*Acceptable outcome*' A01.3(3) because the proposed 98 sqm combined floor area of *Domestic outbuildings* exceeded the 90 sqm combined maximum floor area allowable. This necessitated referral of the application to Council as a concurrence agency.
5. Subsequent to negotiations between the Applicant and Council, on 21 August 2020, an amended proposal was submitted for concurrence approval. This indicated horizontal cladding and windows to the street elevation only.
6. On 31 August 2020, Council advised its concurrence agency approval, subject to conditions. Condition Item 7 required – '*Provide horizontal external cladding (hardieplank, primeline or linea board or similar products) to the northern (Kepnock Road) elevation, western (side) elevation and eastern (side) elevation of the approved Class 10 shed*'.
7. On 6 October 2020, the Assessment manager confirmed development approval subject to both *Assessment Manager Conditions* and *Concurrence Agency Conditions*.
8. Form 10 – *Notice of appeal* was lodged on 19 October 2020. This sought the amendment of approval conditions to permit construction of the new Colorbond metal, freestanding, prefabricated kit type building as originally proposed.

Reasons for the Decision

After reconsideration of the evidence that was before the person who made the decision appealed against, the Tribunal amends the conditions of approval as advised by the concurrence agency to the assessment manager.

The Tribunal's rationale for its decision is as follows:

1. The stated intent in Council Policy 1.0(1) references –
'particular types of Class 1a and Class 10 development where Council considers those types of development may have an extreme adverse effect on the amenity, likely amenity or may be in conflict with the character of a particular locality'

- 'Extreme' (as defined by Merriam-Webster, on line) is "existing in a very high degree; going to great or exaggerated lengths; exceeding the ordinary, usual, or expected".
- 'Adverse' (as defined by Merriam-Webster, on line) is "hostile; unfavourable; harmful".

The Tribunal notes that the development, as originally proposed, is fully compliant with all building design and siting requirements of QDC MP1.2 and considers that its effect on the amenity and character of the Kepnock Road locality will be neither extreme nor adverse.

2. The Tribunal considers that the development, as originally proposed, is compliant with all relevant criteria of Council Policy Table 5.2 '*Performance outcomes*' P01(1),(2),(3) and (5) (P01(4) being not relevant in this instance).

These relevant '*Performance outcomes*' require that '*Domestic outbuildings*':

- P01(1) – '*do not appear to be industrial in scale and appearance*'.

The Tribunal considers that:

- The proposed and existing Class 10a sheds are sited well apart from each other. As such, one building will not visually reference the other, so that the cumulative effect of their scale and appearance will be minimal.
 - The gable roof of the proposed shed is compatible with both form and height of the roof to the existing dwelling
 - The dark, monocolour scheme proposed for external finishes will ameliorate the visual impact of the proposed shed
 - The proposed larger than required building setbacks from the road frontage (≥ 7.5 metres) and NE side boundary (10 metres) will facilitate provision of effective landscape screening
 - The current vegetation along the adjacent SW side boundary is substantially higher than the proposed shed and will provide an overshadowing backdrop
- P01(2) – '*do not adversely impact on the solar access, privacy, outlook and amenity of adjoining premises*'.

The Tribunal considers that:

- Although the subject site shares common boundaries with six (6) other properties, the respective siting and orientation of development on each ensures a high degree of mutual separation and privacy.
- P01(3) – '*do not adversely impact on the prevailing or intended character of the locality*'.

The Tribunal considers that:

- Although freestanding shed structures within the immediate locality are generally located at the rear of the properties, the subject site is unusual in that the dwelling has a substantial setback to the road frontage (min 19 metres). This allows scope for effective landscape screening to be provided along the road frontage and NE side boundaries.

- P01(5) – *‘if located on the same lot as a dwelling, is subservient in scale and bulk to the dwelling’.*

The Tribunal considers that:

- The ridge roof heights of both the proposed shed and existing dwelling are each about 4.2 metres above ground. The floor area of the dwelling is however about four (4) times larger, thereby ensuring it will remain the visually dominant building on site.

3. The Tribunal recognises that the development, as originally proposed, is non-compliant with Council Policy Table 5.2 *‘Acceptable outcome’* A01.3(3) (i.e. the proposed combined floor area of 98 sqm exceeds the nominated maximum of 90 sqm).

In accordance with Council Policy Table 4.2 the development was therefore referable for concurrence agency review. Council Policy Table 5.2 also notes that – *‘Council may approve a Domestic outbuilding with building height or floor area greater than that nominated in AO1.3 when the development has demonstrated that the building bulk has been appropriately addressed through greater setbacks or appropriate landscaping or another measure acceptable to Council’.*

- *‘Appropriate’* (as defined by Merriam-Webster, on line) is *“especially suitable or compatible; Fitting”.*

The Tribunal considers that Council was correct in using this discretion to approve the proposed development, with conditions. Notwithstanding, the Tribunal is not satisfied that all concurrence agency conditions are appropriate in this instance. Accordingly, the Tribunal removes the following condition:

- *‘7. Provide horizontal external cladding (hardiplank, primline or linea board or similar products) to the northern (Kepnock Road) elevations, western (side) elevation and eastern (side) elevation of the approved Class 10 shed.’*

The Tribunal considers this condition to be not appropriate, because:

- The aesthetic merits of substituting horizontal external wall cladding in lieu of pre-painted metal sheeting are considered to be of little consequence. This alternative cladding does not reference other on-site building elements (the existing dwelling being brick veneer).
- The requirements for fixing horizontal cladding are not compatible with the structural configuration of prefabricated kit buildings of the type proposed.
- Colorbond metal clad, prefabricated kit freestanding shed construction of the type and scale proposed is a structurally coherent, low maintenance building form, now widely accepted within the urban context.

The Tribunal also modifies the *‘Approved Plans’* as follows:

- Removal of the requirement for windows (two in number) indicated on the street elevation *‘View 2’*
- Removal of landscaping where indicated behind the proposed shed adjacent to the SW side boundary

The Tribunal considers these requirements to be not appropriate, because:

- The aesthetic merits of providing windows to enhance street presentation are considered to be of little consequence.
- The owner’s verbal representation at the hearing that the windows represented a potential security risk is considered to have merit.

And

- The owner’s verbal representation at the hearing that this section of landscaping would serve no useful purpose and would be difficult to maintain is considered to have merit.

- The Council's verbal representation at the hearing conceded that this section of landscaping would no longer be a requirement.

John Bright

Development Tribunal Chair
Date: 12 March 2021

Appeal Rights:

Schedule 1, Table 2(1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of-

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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