



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	12 - 16
Applicant:	Landmark Building & Developments
Assessment Manager:	Steve Bartley & Associates Pty Ltd (Certifier)
Concurrence Agency:	Moreton Bay Regional Council (Council)
Site Address:	78 Welsh Street, Burpengary and described as Lot 80 on SP267002 (subject site)

Appeal

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to refuse an application for a development permit (the Application) for alterations to an existing residential dwelling to include an attached secondary dwelling. The refusal was issued at the direction of the Moreton Bay Regional Council as a Concurrence Agency. Council refused the Application for reason of non-compliance with performance outcome PO21 of the Dwelling House Code.

Date and time of hearing:	1.30pm Thursday, 9 June 2016
Place of hearing:	Level 16, 41 George Street, Brisbane, following a site inspection by the Committee members prior to the off site hearing
Committee:	Shane Adamson - Chair Chris Buckley - Member
Present:	Nathan Bylund – Applicant Anthony Cregan – Certifier Steve Bartley – Certifier Suzanne Hembron – Certifier Representative Chris Trewin – Council Representative Amanda Dryden – Council Representative Lauren Fishburn – Council Representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **confirms** the decision of the Assessment Manager to refuse the Application for alterations to an existing residential dwelling to include an attached secondary dwelling (as constructed) because it does not comply with performance outcome PO21 of the Dwelling House Code, given the secondary dwelling has a Gross Floor Area (GFA) that exceeds 55m² for a lot with a primary frontage of greater than 15m.

Background

The subject land is located on the north east corner of Welsh Street, near Seebohm Street and has an area of about 780m². At the time the site inspection was undertaken by the Committee the existing (primary) and secondary dwelling had been constructed. The dwelling has been designed to have primary frontage to Welsh Street.

Both the secondary and primary dwelling are single storey in height. The primary dwelling has a main building setback of about 6m to the porte-cochere at the main entry with the secondary part of the dwelling setback being greater than 6m from Welsh Street.

The secondary dwelling setback is about 8.7m from Welsh Street and is positioned about 2.2m behind the front building line of the primary dwelling. The secondary dwelling has a setback of about 3m to the northern boundary and the primary dwelling is setback about 6.7m to southern boundary, which also fronts another part of Welsh Street.

The primary and secondary dwelling front, and gain vehicular access from Welsh Street to the two garages located side by side. Whilst both the primary and secondary dwelling form the one building, both are separated by the two garages with the secondary dwelling being located at the northern end of the allotment and the primary dwelling being located at the southern end.

External access to the secondary dwelling is obtained from the northern side of the building and is not visible from Welsh Street. Access to the primary dwelling is clearly visible from Welsh Street and faces this primary frontage with a porte-cochere located at the entry point.

The Application

The background to this appeal is complicated.

The Application seeks to provide a secondary dwelling on the property having a Gross Floor Area (GFA) of 59m². The Applicant states in the grounds of appeal documentation that the secondary dwelling is to be located within an existing primary dwelling on an allotment with a frontage greater than 15m. The GFA of the secondary dwelling exceeds the 55m² GFA under the self-assessable provisions (SAO22) of the Dwelling House Code under the Moreton Bay Regional Council Planning Scheme 2016. The note provided with SAO22 of the Dwelling House Code states:

“...this is a quantifiable standard that relates to matters identified in section 26, table 1 schedule 7 of the Sustainable Planning Regulation. Non-compliance with this provision for a Dwelling house requires a concurrence agency response from Council.

On 16 February 2016, the initial IDAS Application was lodged with Council by Landmark Building and Developments (QLD) PTY LTD ATF as the developer for the proposal and Applicant in this appeal. On the IDAS Application, Steve Bartley and Associates Pty Ltd, was engaged as the private building certifier for the proposal, being the Assessment Manager.

The Application was required to be referred to the Council as Concurrence Agency because of the non-compliance with the abovementioned self-assessable provision under the Dwelling House Code.

Under the Dwelling House Code, the corresponding performance outcome for SAO22 is PO21 which is reproduced below:

PO21 - Secondary Dwellings:

- a. are subordinate and ancillary to the primary dwelling in size and function;*
- b. have a GFA that does not exceed:*
 - i. 45m² for a lot with a primary frontage of 15m or less; or*
 - ii. 55m² for a lot with a primary frontage of greater than 15m.*

- c. *have the appearance, bulk and scale of a single dwelling from the street;*
- d. *maintain sufficient area for the siting of all buildings, structures, landscaping and car parking spaces for the Dwelling house on the lot.*

On 11 March 2016, Council issued their original Concurrence Agency response in which they directed the Assessment Manager to refuse the Application.

On 23 March 2016, the Assessment Manager issued a Decision Notice refusing the Application.

On 19 April 2016, the Applicant lodged an appeal with the Committee's Registrar against the Decision Notice and provided the following justification in the grounds of appeal:

The proposed secondary dwelling complies with this acceptable outcome.

- a. *The secondary dwelling will be located wholly within the existing dwelling floor area, the section of the building that is to contain the attached secondary is setback 2.26m from the front of the primary dwelling. The setback of the secondary dwelling is subordinate to the primary dwelling setback.*
- b. *The secondary dwelling is wholly within the existing dwelling, there is no extension to the existing dwelling footprint.*

On 9 June 2016, the Committee members undertook a site inspection of the property prior to an off site appeal hearing commencing at 1.30am in Mineral House, 41 George Street, Brisbane.

Following the hearing, a number of written submissions were received from the Applicant and Council regarding technical difficulties with the original Concurrence Agency referral lodged by the Assessment Manager, which potentially meant that the Application had been incorrectly referred to Council.

On 20 June 2016, subsequent to the above submissions, all parties agreed in writing (via email) to the following:

- The Applicant would lodge a fresh Application to Council for a Preliminary Approval for Building Work;
- The Applicant would not be charged by Council for the fresh Application;
- The appeal would be suspended temporarily to allow Council to assess the new Application;
- Each party would be provided, under natural justice, with the opportunity of providing written submissions to the Committee on the outcome of Council's assessment of the new Application should this result in a refusal by Council; and
- The appeal would be decided based on the new Application; the outcome of the assessment of Application by Council; and the content of any subsequent written submissions by the parties.

On 22 June 2016, the Assessment Manager, instead of lodging a Preliminary Approval for Building Work as had been agreed, lodged a new Concurrence Agency Referral for Non-compliance with the Moreton Bay Regional Council Dwelling House Code.

The above mentioned new referral included a copy of the development approval for the original dwelling on the land issued on 3 June 2015. The dwelling had the same bulk and scale and building setbacks as the Application and as constructed on the land. The garages are in the same location being centrally located with access to each part of the dwelling to the north and south being obtained internally through the garage area. It is understood that the original approval for the dwelling complied with the Dwelling House Code.

The proposal plans show a dividing wall in the garage area separating the secondary dwelling from the primary dwelling, with a new kitchen also provided within the secondary dwelling.

External access to the secondary dwelling is obtained from the northern side of the building. Access to the primary dwelling remains the same and is obtained from Welsh Street.

On 30 June 2016, Council issued an amended Concurrence Agency response refusing the Application because of non-compliance with performance outcome PO21 for the following reasons:

The proposed secondary dwelling is 59m² in GFA, so clearly it does not satisfy subsection b. ii. of performance outcome PO21. Also, Council is of the view that the building does not have an appearance characteristic of a single dwelling when viewed from the street. Guidance on this appearance/function issue is provided in Planning Scheme Policy 18 - Residential Design Guidelines, within the MBRC planning scheme which makes it clear that secondary dwellings are considered to be subordinate in function and appearance when they are "...sited to appear as one with the primary dwelling house from the street". The segregating effect of the two garage doors in the middle of the building gives the appearance of two separate dwellings from the street. This is accentuated further by the fact that the roof line over the two garages is set back further from the street frontage than the roof line over the primary dwelling and the secondary dwelling.

Therefore, any building development application for the proposed building work will need to be refused in accordance with s287(2)(b) of the Sustainable Planning Act 2009 (the Act).

On 30 June 2016, subsequent to Council's refusal, the Assessment Manager issued a Decision Notice refusing the Application.

On 5 July 2016, the Assessment Manager provided a written submission to the Committee in response to Council's amended Concurrence Agency response. In this submission, it was argued that the Application should be assessed against the Overall outcomes of the Dwelling House Code and not just performance outcome PO21 of the Dwelling House Code.

On 13 July 2016, Council provided a written submission to the Committee in response to the Assessment Manager's submission above, providing the counter argument, that the Application can only be assessed against PO21, because it is only the 'rules' for code assessable development in section 5.3.3(1)(c) that trigger assessment against the 'Overall Outcomes'. Consequently, noncompliance with SAO22 does not trigger code assessment. Therefore, this means that the 'Overall Outcomes' are not to be considered in the assessment of the Application.

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 19 April 2016;
2. Agreement by all parties - email dated 20 June 2016;
3. Steve Bartley & Associates Pty Ltd (Assessment Manager) new Concurrence Agency Referral request dated 22 June 2016 and associated information and plans;
4. Steve Bartley & Associates Pty Ltd (Assessment Manager) Decision Notice dated 30 June 2016;
5. Moreton Bay Regional Council (Concurrency Agency) amended response dated 30 June 2016;

6. Steve Bartley & Associates Pty Ltd (Assessment Manager) Decision Notice dated 30 June 2016;
7. Oral submissions by the Applicant, the Assessment Manager and the Council representatives at the hearing held 9 June 2016;
8. Applicant's written submission to the amended Council refusal dated 5 July 2016;
9. Council's written response to the Applicant's submission, dated 13 July 2016;
10. *Sustainable Planning Act 2009* (SPA);
11. The Moreton Bay Regional Council Planning Scheme 2016, in particular the Dwelling House Code.

Findings of Fact

The Committee makes the following findings of fact:

1. The appeal involves an Application for a development permit for building work for alterations to an approved dwelling (Class 1a) to allow for a secondary dwelling. The Application does not comply with the self-assessable provisions SAO22 of the Dwelling House Code under the Council planning scheme. Consequently, the Application required referral to Council as a Concurrence Agency pursuant to section 26, Table 1 of Schedule 7 of the *Sustainable Planning Regulation 2009*.
2. The Application was referred to Council who refused the request because the Application did not comply with performance outcome PO21 of the Dwelling House Code.
3. In considering the level of compliance with performance outcome PO21, it is reasonable to have regard to the acceptable outcomes (AO21.1-AO21.4). Importantly, the assessment of the Application is against the performance outcome PO21 only, and is not an assessment against any other provisions of the Dwelling House Code, in particular, the overall outcomes. This is because the Application requires a concurrence agency response and is not an Application that is code assessable against the Dwelling House Code.
4. According to the documentation provided, a dwelling was approved on the land by the Certifier on 3 June 2015. The approved dwelling is single storey and has the same floor area as the Application under appeal; however the approved dwelling has a different internal configuration compared to the current Application. The approved dwelling provides for a double garage in the middle of the frontage, which also provides internal access to either end of the dwelling. Therefore, the approved dwelling has the same scale, bulk and building setbacks as the current Application.
5. Under the performance outcome PO21, in particular part (a), the secondary dwelling is to be subordinate and ancillary to the primary dwelling in size and function. The siting and design of the secondary dwelling is not located in front of the primary dwelling and is annexed to the primary dwelling and therefore the Application complies with acceptable outcome AO22.1. No more than one secondary dwelling is located on the subject land and therefore the Application complies with AO21.2. Further, under acceptable outcome AO21.4, car parking spaces for both the primary and secondary dwelling are to be co-located and thus appear as a single dwelling from the street, which is the case here. Consequently, the Application complies with acceptable outcome (A)21.4). It is noted that the approved dwelling has the same vehicle arrangements with the double garage being generally centrally located on the site as constructed.

6. Given the primary and secondary dwelling maintain the same development footprint as the approved dwelling, the proposed development must have the same appearance, bulk and scale as the approved dwelling when viewed from the street. Further, the secondary dwelling is setback from the primary dwelling and external access is provided from the northern end of the building and not from Welsh Street. Consequently, given the location and size of the secondary dwelling, it is considered to be subordinate to and ancillary to the primary dwelling.
7. Under acceptable outcome AO21.3, the GFA for the secondary dwelling cannot exceed 55m². This outcome is the same as the requirement under part (b) of the performance outcome PO21. The Applicant has advised that the GFA of the secondary dwelling is 59m², which has not been questioned by the Council.
8. The Committee is satisfied that the increase in GFA of 4m² would not have an adverse impact upon the appearance and bulk and scale of the dwelling from the street if circumstances allowed. Despite this, the Application does not comply with part (b) of performance outcome PO21. Further, because an assessment is not able to be made against the higher order provisions of the Dwelling House Code, the proposal must be refused.

Reasons for the Decision

The proposal plan for a secondary dwelling having a GFA of 59m² does not comply with performance outcome PO21 of the Dwelling House Code, in particular (b), because the GFA exceeds 55m² for a lot having a primary frontage of 15m or more and no performance based assessment is able to be made.

Shane Adamson

Building and Development Committee Chair

Date: 18 August 2016

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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