



## Building and Development Dispute Resolution Committees—Decision

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### ***Sustainable Planning Act 2009***

<b>Appeal Number:</b>	15 - 15
<b>Applicant:</b>	Building Approvals United QLD
<b>Assessment Manager:</b>	Building Approvals United QLD (Assessment Manager)
<b>Concurrence Agency:</b> (if applicable)	Moreton Bay Regional Council (Council)
<b>Site Address:</b>	35-41 Church Street, Caboolture South, Queensland and described as Lot 1 on RP 811839 – the subject site

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### **Appeal**

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to refuse a request to change an existing development approval to include a Class 10a structure, being two shade sails (Application). The decision followed a concurrence agency response by the Council, directing refusal of the Application due to conflict with the character and amenity of the area in relation to the visual impact of the proposed shade sail structure.

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<b>Date of hearing:</b>	10.00am Wednesday 17 June 2015
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Samantha Hall - Chair Ain Kuru - Member
<b>Present:</b>	Ed Tarazona - Applicant Caroline Quinn – Joint Owner of the subject site Chris Trewin – Building and Plumbing Manager, Council Sigrid Pembroke – Compliance Officer, Council Nick Cooper – Compliance Officer, Council

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### **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.

### **Background**

The subject site is located in a residential area and has been developed for such purposes with a two storey brick house and associated landscaping. The surrounding area contains predominantly a mix of post war weatherboard and contemporary lowset brick housing. All the housing in the immediate vicinity is set back about six metres from the road frontage, and some have modest single carports within the setback area, which are softened by landscaping such as hedging, shrubs and larger trees. Front fences of varying height and materials bound most of the residences fronting Church Street. Church Street itself is wide and moderately trafficked. A pedestrian pathway is located in the road reserve fronting the subject site, which runs the length of the northern side of Church Street.

The proposed shade sails will be attached to two black columns that have already been installed on the front boundary of the subject site, located at approximately either side of the existing driveway. The shade sails will be attached to columns on the road boundary at heights of 3800mm and 2400mm on one column and 3000mm on the other column. Four brackets also appear to have been installed on the front wall of the house above the garage doors at heights of 2400mm, 2700mm, 3000mm and 2400mm to which the proposed shade sails will be attached. No evidence was presented to the Committee regarding the intended colour of the proposed shade sails. A form 15 – Compliance Certificate for building Design or Specification was submitted to the Assessment Manager that certified the foundations and fixings to the shade sails.

The Application was lodged with the Assessment Manager seeking a request to change an existing development approval for the subject site to include the shade sail structure.

The Assessment Manager referred the Application to the Council in accordance with Item 17 of Table 1 of Schedule 7 of the *Sustainable Planning Regulation 2009* (SPR).

On 15 May 2015, in its concurrence agency response, the Council advised the Assessment Manager that it “did not support” the Application (Concurrence Response).

On 20 May 2015, the Assessment Manager refused the Application for the reason that the Council acting as a concurrence agency refused the Application in accordance with section 287(2)(b) of the SPA and the Assessment Manager issued a Decision Notice dated 20 May 2015.

On 28 May 2015, the Applicant filed an appeal with the Building and Development Dispute Resolution Committees against the decision to refuse the Application.

### **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for appeal/declaration', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 28 May 2015.
2. Written submissions provided by the Applicant at the hearing.
3. Oral submissions by the Applicant, the Joint Owner of the subject site and the Council representatives at the hearing.
4. A request for further information made by the Council in respect of the Application dated 9 April 2015 provided by the Council at the hearing (Council's Request).
5. The Committees' on site inspection of the subject site and immediate locality.
6. The Council's response to the Committee's request for further information regarding the Council's concurrence agency response (Committee Response).
7. The *Building Act 1975* (BA).
8. The *Sustainable Planning Act 2009* (SPA).
9. The *Sustainable Planning Regulation 2009* (SPR).
10. *Acts Interpretation Act 1954* (AIA).
11. Queensland Development Code (QDC) MP 1.2 – Design and Siting Standard for Single Detached Housing – on Lots 450M<sup>2</sup> and over.
12. The Caboolture Shire Plan.
13. Photographs taken during the site inspection.

## Findings of Fact

The Committee makes the following findings of fact:

### Referral jurisdiction

Table 1 of Schedule 7 of the SPR identifies referral agencies and their jurisdictions. Item 17 of Table 1 of Schedule 7 of the SPR (Item 17 of the SPR) is headed "Amenity and aesthetic impact of particular building work". Column 1 of Item 17 of the SPR provides that the local government is a concurrence agency for:

- "17 *Building work for a building or structure if it is –*
- (a) *a single detached class 1(a)(i) building, class 1(a)(ii) building comprising not more than 2 attached dwellings or a class 10 building or structure; and*
  - (b) *in a locality and of a form for which the local government has, by resolution or in its planning scheme, declared that the form may –*
    - (i) *have an extremely adverse effect on the amenity, or likely amenity, of the locality; or*
    - (ii) *be in extreme conflict with the character of the locality."*

As the Council identifies in its Committee Response, pursuant to column 2 of Item 17 of the SPR, any building application for building work for a building or structure to which Item 17 of the SPR applies must be referred to the Council as a concurrence agency. The referral jurisdiction of the Council is set out in column 3 of Item 17 of the SPR as "*The amenity and aesthetic impact of the building or structure if the building work is carried out*".

By resolution adopted by the Council on 25 February 2014 (number 14/226), the Council adopted policy number 14-2150-076 titled *Amenity & Aesthetics – Impact of Proposed Building Work* (Council Policy) which has the following objective:

*"to identify forms of building work that Council considers may have an extremely adverse effect on the amenity or character of the locality in which the work is proposed to be carried out."*

The Council Policy relevantly identifies the following buildings or structures for the purposes of column 1 of Item 17 of the SPR (emphasis added):

- "(7) *The following buildings or structures located either wholly or partly within 1.5m of the side or rear boundary of a property, or within the road boundary clearance required for building work on a property:-*
- (a) *...*
  - (b) *Shade sail structure;"*

"Road boundary clearance" is defined in the Council Policy to mean:

*"The minimum distance between a building or structure and the road boundary of a property, required by:-*

- (1) *The acceptable solutions of a code under the planning schemes for Moreton Bay Regional Council; or*
- (2) *If (1) above does not apply, Parts MP1.1 or MP1.2 of the Queensland Development Code."*

A Policy Statement provided in the Council Policy relevantly provides that (emphasis added):

*"For the purposes of exercising the powers available under Schedule 7 of the Sustainable Planning Regulation 2009, Council has resolved to declare that the forms of buildings and structures listed in the Application Statement of this policy may:-*

- (1) *have an extremely adverse effect on the amenity or likely amenity of one or more localities within the Moreton Bay Regional Council area;*
- (2) *be in extreme conflict with the character of one or more localities within the Moreton Bay Regional Council area."*

So, for the purposes of column 1 of Item 17 of the SPR, the Council has declared that a shade sail structure may have an extremely adverse effect on the amenity, or likely amenity, of the locality or that it would be in extreme conflict with the character of the locality.

The proposed shade sail structure in the Application falls within the road boundary clearance prescribed under the QDC and identified in the Council Policy. Therefore, pursuant to column 2 of Item 17 of the SPR, the Council is a concurrence agency for the Application. Column 3 of Item 17 of the SPR then identifies the Council's referral jurisdiction to be "the amenity and aesthetic impact of the building or structure if the building work is carried out."

In its Committee Response, the Council identified that the criteria it used to assess the Application was that set out in the Policy Statement of the Council's Policy. In particular, this criteria uses a test of the proposed development having an "extremely adverse effect" on amenity and being in "extreme conflict with the character" of the locality.

The Committee, with respect, disagrees with the criteria used by the Council. Pursuant to Item 17 of the SPR, the Council's referral jurisdiction is a less onerous test of "the amenity and aesthetic impact of the building or structure if the building work is carried out" which is set out in column 3 (referral jurisdiction) of Item 17 of the SPR.

The "extremely adverse effect" and "extreme conflict with the character" of the locality are tests to be used by a local government pursuant to column 1 of Item 17 of the SPR to establish its referral jurisdiction by identifying the building work for a building or structure to which Item 17 of the SPR applies, that is, those applications for building work for a building or structure which are to be referred to the local government as a concurrence agency to consider the amenity and aesthetic impacts of that particular building work.

The drafting of the Policy Statement in the Council Policy supports this interpretation of Item 17 of the SPR, as the introductory wording states "For the purposes of exercising the powers available under Schedule 7 of the [SPR] ... Council has resolved to declare that the forms of ... structures listed in ... this policy may ...". The powers available under Item 17 of the SPR are for the Council to have concurrence agency jurisdiction (see column 2 of Item 17 of the SPR) to assess the amenity and aesthetic impact of the proposed shade sail structure if it was to be erected (see column 3 of Item 17 of the SPR).

#### Additional Referral Jurisdiction

The Council specified in its Committee Response that that its referral jurisdiction arose from Item 17 of the SPR.

The Committee has identified an additional referral jurisdiction arises pursuant to Item 19 of Table 1 of Schedule 7 of the SPR (Item 19 of the SPR). Item 19 of the SPR is headed "design and siting". Column 1 of Item 19 provides that the local government is a concurrence agency if:

- (a) the Queensland Development Code, part 1.1, 1.2 or 1.3 applies for building work; and*
- (b) under the part, the proposed building or structure does not include an acceptable solution for a relevant performance criteria under the part".*

Pursuant to schedule 1 of the BA, part MP 1.2 of the QDC MP 1.2 applies to the building of the proposed shade sail structure, being a class 10a structure associated with a single detached dwelling on a lot 450m<sup>2</sup> or over.

Under QDC MP 1.2, the proposed shade sail structure is a "carport", being a class 10a building other than a garage that provides vehicular parking. More specifically, the proposed shade sail structure would be an "open carport", given that all sides of the structure would be open.

Acceptable solution A1(a) of QDC MP 1.2 relevantly provides that for a carport, the minimum road setback is 6 metres or less, depending upon the setback of dwellings on adjacent properties. Further, acceptable solution A1(c) of QDC MP 1.2 relevantly provides that for open carports, the minimum road setback may be even less than the setback required by A1(a) where there is no alternative on-site location for a garage or carport.

The proposed shade sail structure fails to meet the requirements of acceptable solution A1(a) and A1(c) of QDC MP 1.2, as it is to be located within 6 metres of the road boundary and there is both an existing on-site two car garage located under the dwelling and also sufficient area for a carport to be constructed between the side of the dwelling and the eastern side boundary.

Therefore, both requirements of column 1 of Item 19 are satisfied and the Council would also be a concurrence agency pursuant to this item. Column 3 of Item 19 identifies the Council's referral jurisdiction as being whether the proposed structure complies with the performance criteria.

The performance criteria is set out in P1 of QDC MP 1.2, being:

*“The location of a building or structure facilitates an acceptable streetscape, appropriate for –*  
*(a) the bulk of the building or structure; and*  
*(b) the road boundary setbacks of neighbouring buildings or structures; and*  
*(c) the outlook and views of neighbouring residents; and*  
*(d) nuisance and safety to the public.”*

### The Council's Request

The Council's Request acknowledged receipt of the Application and identified that in order for the Council to properly assess the Application, the Council required the following additional information/documentation:

*“1. An elevation of the proposed shade sails showing total height and other relevant dimensions.”*

The Applicant provided an elevation in response to the Council's Request on a drawing titled Proposed Elevations, plan number 14.1882/09 Rev B, dated 6 May 2015 (the Elevation). The Elevation identified the total height of each corner of each shade sail as fixed to the two columns on the front boundary of the subject site and to the four brackets attached to the residence. The Applicant also provided an amended Site Plan, plan number 14.1882/02 Rev B, dated 6 May 2015 (Site Plan) and an undated hand drawn plan which identified not only the heights of the shade sails but also additional information regarding the two columns on the front boundary of the subject site and the post holes, as well as additional information with respect to the three brackets attached to the residence (Hand Drawn Plan).

In oral submissions, the Council's representative stated that the Elevation provided in response to the Council's Request was inadequate, as it did not provide all elevations of the proposed shade sail structure. The Council's representative indicated that this contributed to the Council's reasoning for deciding to direct a refusal of the Application as the Council did not have sufficient information to approve the Application.

In oral submissions in response, the Applicant stated that in his view the Elevation, along with the Site Plan and the Hand Drawn Plan, complied with the Council's Request in that the Elevation provided an elevation which identified the total height of the proposed shade sail structure and the Site Plan and the Hand Drawn Plan identified other relevant dimensions.

The Committee agrees with the Applicant that the Council Request simply asked for what could be considered a basic elevation showing the height and other relevant dimensions. The Elevation provided by the Applicant provided the information requested by the Council. The accompanying Site Plan and Hand Drawn Plan provided other relevant dimensions and information. If the Council required additional information, it should have clearly requested that information in the Council Request. While there is no indication in the Concurrence Response or the Committee Response that the Council did not consider it had insufficient information about the shade sail structure to approve the Application, if that was in fact the case, then the Applicant was disadvantaged by the lack of specificity in the Council's Request.

The Committee suggests that in future, the Council should ensure that its requests for further information are worded so as to clearly identify the information that it requires to properly assess that application.

### Concurrence agency response of the Council

Section 287 of the SPA relevantly provides a concurrence agency's response powers. In particular, section 287(2)(b) of the SPA provides that a concurrence agency's response must, within the limits of the concurrence agency's jurisdiction, "tell the assessment manager to refuse the application".

The Council's concurrence agency response however, provided that the "Council does not support the proposal". This response does not "tell the Assessment Manager to refuse the application" as required by section 287(2)(b) of the SPA. Further, this response does not purport to exercise any of the other powers of a concurrence agency provided by section 287 of the SPA.

It is clear from the Assessment Manager's decision notice that the Assessment Manager assumed the Council's concurrence agency response was directing the Assessment Manager to refuse the application pursuant to section 287(2)(b) of the SPA.

Given that the Council's concurrence agency response does not purport to exercise any of the other powers provided by section 287 of the SPA, the Committee agrees with the Assessment Manager's interpretation of the Council's concurrence agency response. The Committee further suggests that in future concurrence agency responses, the Council clearly identifies which of the powers in section 287 of the SPA it is exercising and in particular, when directing an assessment manager to refuse a development application, that it clearly states that this is the direction being given by the Council.

### Reason's for the Council's refusal

Pursuant to section 289(1) of the SPA, the refusal of the Application by the Council as concurrence agency must be accompanied by the reasons for which the Council issued a refusal.

The Council's concurrence agency response to the Assessment Manager gave the following reasons for the Council's refusal of the Application:

- *"The proposed building work is not consistent and is in extreme conflict with the character of the locality.*
- *The proposed building work will not achieve a high standard of amenity and will be a dominant feature of the streetscape.*
- *The proposed building work is not of a scale or form which is compatible for the area."*

Section 289(1) of the SPA must be read in conjunction with section 27B of the AIA, which relevantly requires that "reasons" must be accompanied by a statement of the findings on material questions of fact and references to the evidence or other material upon which those findings were based.

Section 289(1) of the SPA has not been considered by the Courts, however, the Courts have considered the quality of reasons given by decision makers under Queensland planning law which has resulted in an accepted rule that *"The grounds of the Council decision should be clear, specific and unambiguous so that an applicant whose application has been refused will be able to decide or obtain advice whether he should institute an appeal against the Council's decision"* (*Butterfield Projects Pty Ltd v Brisbane City Council* (1975) 31 LGRA 236 at 239; *Symons v Mackay City Council* [1998] QPELR 486 at 487).

Within this context of the quality of reasons that should be given by a decision maker, it is questionable whether the reasons provided by the Council for its refusal of the Application are in fact clear, specific and unambiguous. It seems to the Committee that the Council's reasons are not clear and are ambiguous to the extent that the Council's choice of the words "Council does not support the proposal" is not a clear or unambiguous direction to the Assessment Manager to refuse the Application pursuant to section 287(2)(b) of the SPA.

Further, the three reasons given for the Council's refusal of the Application do not identify clearly the scope of its referral jurisdiction or the criteria used to make the Council's decision. Further, the

Council's reasons state that the Application is not consistent and is in extreme conflict with the character of the locality, it will not achieve a high standard of amenity and will be a dominant feature of the streetscape and is not of a scale or form which is compatible for the area, but the Council does not identify why it has formed the view that the Application offends these principles.

These are hardly "clear, specific and unambiguous" reasons such that the Applicant could easily understand that the Council was directing a refusal nor easily understand why the Application had been refused and then decide whether or not to appeal. In this case, to identify the criteria used by the Council to make its decision, the Applicant would need to examine item 17 of table 1 of Schedule 7 of the SPA and then locate the Council's Policy No: 14-2150-076 (Amenity and Aesthetics – Impact of Proposed Building Work. This would however only identify the criteria used by the Council to assess the Application and not the reasons as to why the Council decided that the Application did not comply with these criteria.

It is noted that this is not the first time that the adequacy of reasons given by a local government as a concurrence agency have been called into question by a Building and Development Dispute Resolution Committee (see Appeal No. 46-2011 at page 3 and appeal No. 08-14 at pages 4-5). In future the Council should be mindful to clearly discharge its concurrence agency response powers under the SPA and its broader obligation as a planning authority to give reasons which are clear, specific and unambiguous.

#### Subject site and surrounding locality

In accordance with Schedule 7, Table 1, Item 17 of the SPR, the Council has pursuant to Policy No: 14-2150-076 decided that a shade sail structure within the road boundary clearance may have an extremely adverse effect on the amenity of the locality or be in extreme conflict with the character of the locality. The referral jurisdiction of Council prescribed in Item 17 is to consider the amenity and aesthetic impact of the proposed shade sail structure. As mentioned previously, the Council's reasons for not supporting the application are not clear.

Amenity can be described as:

*“the pleasant or normally satisfactory aspects of a location which contribute to its overall character and the enjoyment of residents or visitors”* (Part 1: Understanding the Planning System 2011).

The Committee considers the location to be that part of Church Street between Morayfield Road and Mingaye Street. The Committee believes the key aspects of amenity in that location to comprise an open streetscape with low density housing consistently setback six metres from the road boundary; predominantly post war weatherboard homes and contemporary lowset brick houses; established landscaping in front of houses and the moderately busy road. A few properties in the immediate locality have single carports within the six metre road frontage setback, though these are modest structures well screened by mature landscaping.

The impact the proposed shade sail structure will have on the amenity and character of the locality will be the height and area of the shade sail structure within the road frontage setback. The structure ranges in height from 3 to 3.8 metres at the street, and has a cover area of approximately 40 square metres. This is considerably larger than other nearby single carports within the road frontage setback, and also larger than one would anticipate could be built in this location. Also, the height and cover area of the proposed shade sail structure is such that landscaping will not be able to effectively screen the structure as it has done the single carports elsewhere in the street. As a result the Committee considers the proposed shade sail structure will have a detrimental impact on the amenity of the locality as it will diminish its open streetscape appearance and the established setbacks of buildings. In addition, landscaping will not be able to ameliorate these impacts as has been the case for nearby carports built within the road frontage.

Aesthetic can be described as attractiveness, and in this case Council has under its Policy resolved that it considers shade sail structures may have an undesirable aesthetic impact in its area. Given the height and cover area of the proposed shade sail structure, and the inability for landscaping in the road frontage to effectively screen the structured, the Committee considers it will also impact detrimentally

on the amenity and character of the area.

The Council did not consider its referral jurisdiction under Item 19 of the SPR, which required the Council to assess whether the proposed structure complies with the performance criteria in QDC MP 1.2. The performance criteria in P1 of QDC MP 1.2 requires a consideration of whether the location of the proposed shade sail structure facilitates an acceptable streetscape when considering matters such as the bulk of the proposed structure, the setbacks of neighbouring properties, the outlook and views of neighbouring residents and questions of nuisance and public safety. These are all matters that are considered when looking at the amenity and aesthetic impact of the proposed shade sail structure pursuant to Item 17 of the SPR.

### **Reasons for the Decision**

At the date of the hearing, the proposed shade sail structure had been partially constructed to such an extent that two steel poles had been installed and brackets to hold the ropes stringing up the shade sails had been attached to the front of the house. This assisted the Committee in understanding what the visual impacts might be.

Pursuant to section 564(2)(a) of the SPA, the Committee confirms the decision of the Assessment Manager to refuse the Application for the following reasons:

- Pursuant to Schedule 7, Table 1, Item 17 of the SPR, the Council's referral jurisdiction is "*the amenity and aesthetic impact of the building or structure if the building work is carried out*".
- Houses in the locality present consistent frontages to Church Street comprising six metre setbacks from the road, fencing and established landscaping. There are some single carports within the six metre road frontage, however these are modest structures well screened by mature landscaping.
- If the proposed shade sail structure were erected, it would have the following amenity and aesthetic impacts:
  - The proposed shade sail structure would have a negative impact on the amenity and character of the area due to the height and covered area of the shade sail structure being significantly larger than nearby carports located within the six road frontage setback.
  - The impact of the shade sail structure cannot be adequately ameliorated by landscaping, as has been the case for other structures in the locality that are built in the road frontage setback area.
  - The proposed shade sail structure will also have a negative aesthetic impact due to its overall size that cannot be adequately ameliorated by landscaping.
- Pursuant to Schedule 7, Table 1, Item 19 of the SPR, the Council's referral jurisdiction is to consider whether the proposed shade sail structure complies with the performance criteria in QDC MP 1.2.
- The Committee considers that the location of the proposed shade sail structure does not facilitate an acceptable streetscape as required by P1 of QDC MP 1.2, given:
  - the height and the area of the shade sail structure within the road frontage setback;
  - that neighbouring residences and structures respect the required 6 metre road frontage setback; and
- the height and the area of the proposed shade sail structure is such that it would impact upon the outlook and views along Church Street of neighbouring residents and also vehicles moving along Church Street.



## **References**

Part 1: Understanding the Planning System. 2011. [Web Page]. The Planning Academy. 27/11/2011 Accessed 8/7/2015, <http://theplanningacademy.com.au/planning-language>.

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**Samantha Hall**  
**Building and Development Committee Chair**  
**Date: 17 July 2015**

## **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  
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