



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>19-037</b>
<b>Appellant:</b>	Stefan Koebisch
<b>Respondent (Assessment Manager):</b>	Luke Neller of Project BA
<b>Co-respondent (Concurrence Agency):</b>	Sunshine Coast Regional Council
<b>Site Address:</b>	95 Nothling Street Moffat Beach QLD 4551 and described as Lot 562 on RP 8430 – the subject site

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### **Appeal**

Appeal under section 229 and item 1 of table 1 of section 1 of schedule 1 of the *Planning Act 2016* (PA) against the refusal in part by the Respondent (as directed by the Concurrence Agency) of a development application for a new dwelling with integrated secondary dwelling, where the refusal related to the secondary dwelling only and the Appellant sought a preliminary approval for design and siting aspects AND against a condition imposed by the assessment manager (as directed by the Concurrence Agency) on the approval of the new dwelling.

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### **Date and time of hearing:**

**Place of hearing:** The subject site

**Tribunal:** James McPherson – Chair  
Lisa Lambie - Member

**Present:** Stefan Koebisch – Appellant  
Aned Koebisch - Owner  
Terry Frey – Emerge Planning & Development  
Luke Neller – Project BA  
Peter Chamberlain - Council representative

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### **Decision:**

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the PA, confirms the decision of the Assessment Manager made on 12 August 2019 in all respects.

## Background

The subject site is located within the local government area of the Sunshine Coast Council ('Council') and within the planning scheme area of the Sunshine Coast Planning Scheme 2014 ('the planning scheme'). Under the planning scheme, the subject site is included within the Low-Density Residential Zone and is also affected by various overlays under the planning scheme.

Under the applicable zone, the use of a premises for a dwelling house is accepted development subject to compliance with applicable requirements, or code assessable development where there is any non-compliance with an applicable requirement. The applicable requirements for accepted development are the acceptable outcomes set out under the Dwelling House Code. A dwelling house is defined under the planning scheme to include outbuildings and works normally associated with a dwelling house (such as a secondary dwelling).

Under the applicable zone, building work is accepted development subject to compliance with applicable requirements, or code assessable development where there is any non-compliance with an applicable requirement. The applicable requirements for accepted development are the acceptable outcomes set out under the Dwelling House Code and the Transport and Parking Code.

On 1 May 2019 Emerge Planning & Development made application to Sunshine Coast Regional Council for Concurrence Agency Request-Building works assessable against a planning scheme – detached dwelling house & secondary dwelling.

On 09 May 2019 Sunshine Coast Regional Council made an Information Request as Concurrence Agency to Emerge Planning & Development.

On 10 May 2019 Emerge Planning & Development responded to the Information Request from Sunshine Coast Regional Council.

On 11 June 2019 Sunshine Coast Regional Council responded to Emerge Planning & Development with a further Information Request.

On 3 July 2019 Emerge Planning & Development responded to the second Information Request from Sunshine Coast Regional Council.

On 11 July 2019 Sunshine Coast Regional Council responded to Emerge Planning & Development advising Part Approval/Part Refusal that any development response is only given in part. Council recommends refusal of the proposed secondary dwelling exceeding 60sq.m. on a residential lot smaller than 600sq.m.

On 30 July 2019 a DA Form 2 – Building work details with attached drawings was lodged with Luke Neller of Project BA for certification.

On 12 August 2019 Luke Neller Building Certifier at Project BA advised Stephen Koebisch that the preliminary approval was approved in part and refused in part, as directed by Sunshine Coast Regional Council as the concurrence agency.

On 28 August 2019 Form 10-Notice of Appeal was lodged with The Tribunal.

On 18 October 2019 a hearing was held at the subject site.

## **Jurisdiction**

This is an appeal under section 229 and item 1(a) of table 1 of section 1 of schedule 1 of the PA against the part refusal by Project BA of a development application to approve the building of a secondary dwelling – preliminary approval for building works (dwelling and secondary dwelling) on the subject site.

The question of jurisdiction has caused the Tribunal a good deal of concern in this matter. The only item in tables 1 and 3 of schedule 1 of the PA which potentially gives the Tribunal jurisdiction for this appeal appears to be item 1 of table 1. But table 1 does not apply for a Development Tribunal unless one of the preconditions in section 1(2) of schedule 1 is satisfied. The appeal seeks to challenge two distinct elements of the assessment manager's decision dated 12 August 2019, as follows.

- The condition imposed on the length and height of the built to boundary garage wall associated with the primary dwelling (the first issue).
- The refusal to approve a secondary dwelling (the second issue).

The Tribunal is concerned that these are distinct issues and that the second issue falls to be determined solely by a consideration of the relevant planning scheme provisions and not by reference to the *Building Act 1975* (BA) or any statutory instrument or subordinate legislation under the BA. This appears to be borne out by written submissions made by the Council and the assessment manager on 6 March 2020. Accordingly, the Tribunal was concerned that section 1(2)(g) of schedule 1 may not apply in this instance, at least as regards the second issue. No other paragraph of section 1(2) would seem to assist with regard to the second issue. In the end however, the Tribunal has come to the view that the BA does in fact come into play in so far as one needs to have regard to provisions of the BA (e.g. section 13 which established the Queensland Development Code (QDC), section 30(g) which makes the QDC a building assessment provision and section 33) to determine that the QDC does not govern the resolution of the second issue. Also, the resolution of the first issue would appear to require reference to QDC MP 1.1 (published 11 March 2010) (an instrument made under the BA) and given the close connection between the first issue and the second issue (both involving proposed building work at the same site) the Tribunal feels it would not be appropriate to view the second issue in isolation and to decline to exercise jurisdiction for that issue alone.

## **Decision framework**

Pursuant to section 253(2) of the PA, the onus in this matter rests on the appellant to establish that the appeal should be upheld.

Pursuant to section 253(4) of the PA, the tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the assessment manager in this case.

The tribunal may, nevertheless (but need not), consider other evidence presented by a party with leave of the tribunal, or any information provided under section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings).

The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

## **Material Considered**

The material considered in arriving at this decision comprises the following.

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 28 August 2019, including the following.

2. Letter dated 1 May 2019 from Emerge Planning & Development to Sunshine Coast Regional Council for Concurrence Agency Request-Building works assessable against a planning scheme – detached dwelling house & secondary dwelling – 95 Nothling Street, Moffat Beach QLD 4551 – Lot 562 on RP8430.
3. Letter dated 09 May 2019 from Sunshine Coast Regional Council to Emerge Planning & Development: ‘Information Request Concurrence Agency Planning Act 2016’.
4. Letter dated 10 May 2019 from Emerge Planning & Development to Sunshine Coast Regional Council: ‘Information Request response – Concurrence Agency Request – Building Works Assessable against a Planning Scheme – Detached Dwelling House & Secondary Dwelling – 95 Nothling Street, Moffat Beach QLD 4551 – Lot 562 on RP8430’.
5. Letter dated 11 June 2019 from Sunshine Coast Regional Council to Emerge Planning & Development: ‘Information Request Concurrence Agency Planning Act 2016’
6. Letter dated 3 July 2019 from Emerge Planning & Development to Sunshine Coast Regional Council: ‘Concurrence Agency Request – Building Works Assessable against a Planning Scheme – Detached Dwelling House & Secondary Dwelling – 95 Nothling Street, Moffat Beach QLD 4551 – Lot 562 on RP8430’.
7. Letter dated 11 July 2019 from Sunshine Coast Regional Council to Emerge Planning & Development advising ‘Part Approval/Part Refusal’ as ‘Referral Agency Response’ under the Planning Act 2016 that ‘any development response is only given in part’. Council recommends ‘refusal of the proposed secondary dwelling exceeding 60sq.m. on a residential lot smaller than 600sq.m. for the following reasons.’  
‘Dwelling House Code – Performance Outcome PO11(a) & (b) – any secondary dwelling established in association with the dwelling house is located on a lot with sufficient area to accommodate the secondary dwelling and associated access, parking, landscape and set-back requirements and is small in scale and clearly ancillary to the dwelling house.’
8. DA Form 2 – Building work details. Approved form (version 1.1 effective 22 June 2018) made under Section 282 of the Planning Act 2016. Received 30/07/2109 by Luke Neller QBCC Certification Licence number A1220960 of Project BA. Drawings 1811-1583-R1 to R11 inclusive prepared by Taylor’d Distinction were attached.
9. Letter dated 12 August 2019 from Luke Neller Building Certifier at Project BA to Stephen Koebsch headed ‘Preliminary Approval Decision Notice Planning Act 2016 advising that ‘The preliminary approval has been Approved in part and Refused in part by Project BA as directed by Sunshine Coast Regional Council as a concurrence agency.’
10. Email correspondence dated 21 August 2019 from Terry Frey of Emerge Planning & Development to The Tribunal and reply.
11. Email correspondence dated 26 August 2019 from Terry Frey of Emerge Planning & Development in response to email from The Tribunal.

12. Receipt number 4164113 of payment dated 26 August 2019 for payment of Development Tribunal Application Fees.
13. Email dated 29 August 2019 from The Tribunal: Notice of Appeal to other Parties – Section 230 of the Planning Act 2016.
14. Email dated 9 October 2019 from The Tribunal: Establishing a Tribunal – Section 242 of the Planning Act 2016: Appeal No. 19-037.
15. Email dated 14 October 2019 from The Tribunal: Confirmation of Time/Date for Hearing.
16. Email dated 5 March 2020 to All parties requesting a brief written submission
17. Email dated 6 March 2020 from Peter Chamberlain (SCRC): Written submission response
18. Email dated 6 March 2020 from Project BA: Written submission response
19. Planning Act 2016.
20. Planning Regulation 2017.
21. Sunshine Council Planning Scheme 2014.
22. Development Assessment Rules (version 1.1 effective 22 June 2018).
23. Transport and Parking Code
24. Dwelling House Code
25. Queensland Development Code (QDC).
26. Building Act 1975

**Note re item 9 above:** The Tribunal notes that in his letter (see item 9 above) the assessment manager refers to "...assessment provisions limited to Design and Siting (QDC MP 1.2 and relevant alternative provisions)...". The subject site is less than 450m<sup>2</sup>, therefore requiring assessment against QDC MP 1.1. The Tribunal is satisfied this is an error in transcription and has proceeded on the basis the assessment was made against the provisions of MP 1.1

#### **Findings of Fact:**

1. The proposal is for a new, detached, two level, four bedroom, dwelling on a 405m<sup>2</sup> allotment. One bedroom and its associated bathroom is accessed externally and has no direct connection to the rest of the dwelling. There is an additional two bedroom secondary dwelling with a living area and kitchen located under the primary dwelling. There is a three-car garage, part of which has a built-to-boundary wall 13.5m long and between 3.666m and 3.756m above natural ground.
2. The area of the proposed secondary dwelling is 87.5m<sup>2</sup>.
3. The combined site cover of the proposed primary and secondary dwelling is 60%.
4. Section 9.3.6.2 Purpose and overall outcomes of the Dwelling House Code states:-
  - (1) The purpose of the Dwelling house Code is to ensure dwelling houses achieve a high level of amenity for occupants, maintain the amenity and privacy of neighbouring

residential premises and are compatible with the character and streetscape of the local area.

- (2) The purpose of the Dwelling House Code will be achieved through the following overall outcomes:-
- (a) A dwelling house incorporates a high standard of design and makes a positive contribution to the streetscape character of the area in which it is located;
  - (b) A dwelling house is sited and designed to protect the amenity and privacy of neighbouring residential premises;
  - (c) A dwelling house provides a high level of amenity to the residents of the dwelling house; and
  - (d) A dwelling house is provided with an acceptable level of infrastructure and services.

5. Table 9.3.6.3.1 sets out the Performance outcomes and Acceptable outcomes for the Dwelling House Code. The relevant assessment criteria are listed below

AO2.1 (in part):

Where located in a residential zone a garage, carport or shed:-

(b) does not exceed a height of 3.6m

AO11.1:

The secondary dwelling is located on a lot with a minimum area of 600m<sup>2</sup>

AO11.2:

The secondary dwelling has a maximum gross floor area of

- (a) 90m<sup>2</sup> where located on a lot in the Rural Zone or Rural residential zone and;
- (b) 60m<sup>2</sup> where located on a lot in another zone.

AO11.3:

The dwelling house and the secondary dwelling have a combined maximum site cover of 50%.

In not complying with the Acceptable outcomes the proposal becomes assessable against the relevant performance outcomes.

6. Performance outcome PO11 states  
Any secondary dwelling established in association with the dwelling house is:-
- (a) Located on a lot with sufficient area to accommodate the secondary dwelling and associated access, parking, landscape and setback requirements;
  - (b) small in scale and clearly ancillary to the dwelling house; and
  - (c) provided with sufficient on-site car parking to meet user needs.
7. Acceptable solution A2(d) of QDC MP 1.1 'Design and Siting for Housing on Lots 450m<sup>2</sup> and Under' states:  
...class 10a buildings or parts may be within the boundary clearances nominated in A2 (a) and (b) where:
- (i) The height of a part within the boundary clearance is not more than 4.5m and has a mean height of not more than 3.5m, and
  - (ii) The total length of all buildings or parts within the boundary clearance is not more than 9m along any one boundary.

## **Reasons for the Decision**

The Tribunal confirms the decision of the Assessment Manager for the following reasons.

### **Built-to-boundary garage wall limiting the height to 3.6m**

The Tribunal is satisfied that given the proposed built-to-boundary wall is an uncontested 4.5m longer than the 9m required by QDC MP 1.1 A2 (d)(ii) and that there are no factors dictating the proposed non-compliant height, it is reasonable to limit the height to the maximum 3.6m for a garage as per AO 2.1 (b) of the Dwelling House Code.

### **Refusal of the secondary dwelling**

The subject site, at 405m<sup>2</sup> is 32.5% smaller than the minimum acceptable lot size considered suitable for a secondary dwelling.

The gross floor area of the proposed secondary dwelling exceeds that permitted by 48.5%.

The maximum site coverage of the combined dwelling house and secondary dwelling exceeds that permitted by 20%.

The required vehicular access and parking and landscape and pedestrian access to both the primary and secondary dwellings is limited only to the setbacks.

Useable landscape space is also limited only to the setbacks.

Access to useable recreational landscape space by residents of the secondary dwelling has compromised access by residents of the primary dwelling.

The Tribunal is not satisfied the lot is of sufficient size to accommodate a secondary dwelling.

The Tribunal is not satisfied the secondary dwelling is small in scale and ancillary to the dwelling house.

The Tribunal is not satisfied the proposal meets the requirements of PO11 (a) and (b) whilst PO11 (c) was not in contention.

The Tribunal is not satisfied the proposal is sited and designed to meet the privacy and amenity of neighbouring residential premises or provides a high level of amenity to the residents of the dwelling house.

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**James McPherson**

**Development Tribunal Chair**

**Date:** 17 March 2020

## **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:

The Registrar of Development Tribunals  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone (07) 1800 804 833**

**Email: [registrar@hpw.qld.gov.au](mailto:registrar@hpw.qld.gov.au)**