



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	09-17
Applicant:	Captain Cook Holdings Pty Ltd (Appellant)
Assessment Manager:	Gladstone Regional Council (Respondent)
Concurrence Agency: (if applicable)	N/A
Site Address:	2873 Round Hill Road, Agnes Water and described as Lot 214 on SP 262272 – the subject site

Appeal

Declaration under Section 510 of the *Sustainable Planning Act 2009* ('SPA') about whether a development application (superseded planning scheme) for a development permit for a material change of use ('MCU') for a service station (proposed development) was properly made.

Date and time of hearing:	Appeal decided by written submissions
Place of hearing:	N/A
Committee:	Neil de Bruyn – Chair Samantha Hall – Member
Parties:	Captain Cook Holdings Pty Ltd, represented by Zone Planning Group - appellant Gladstone Regional Council – respondent

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 566 of the SPA declares that the development application for the proposed development was ***not properly made***.

Background

On 27 April 2016, representatives of the appellant attended a pre-lodgement meeting with various representatives of the respondent to discuss a proposal to develop a parcel of land (at that time described as lot 213 on SP257657 but now described as the subject site), for a multi-faceted development that included a catering premises, commercial premises, medical centre, shop, showroom, veterinary facility, childcare centre, indoor recreation ('multi-faceted development') and a service station (being the proposed development), all to be assessed against the respondent's superseded planning scheme.

Relevantly, the minutes of that pre-lodgement meeting, prepared and issued by the respondent, stated that:

- the multi-faceted development, including the proposed development, would be code assessable; and
- the proposed road forming part of the broader development under discussion was to be designed and aligned as an arterial road, because of the proximity of that road to the respondent's future second arterial road.

On 20 October 2016, the respondent sent a letter to the appellant notifying the appellant that the respondent had agreed to the appellant's request that the proposed multi-faceted development, including the proposed development, be considered under the *Superseded Planning Scheme for Miriam Vale Shire 2009* ('superseded scheme').

On 9 March 2017, a development application for the proposed development was made to the respondent by Zone Planning Group on the appellant's behalf. The development application was a development application (superseded planning scheme) and sought a development permit to use part of the subject site for a service station.

The Committee understands that a separate development application (superseded planning scheme) has been lodged with the Council for the balance of the subject site for the remainder of the uses proposed in the pre-lodgement meeting, being the multi-faceted development ('multi-faceted development application'). The Committee has not been provided with any information in respect of the multi-faceted development application.

The development application for the proposed development states that the proposed service station is to operate in conjunction with a proposed district shopping centre (the multi-faceted development), and that an arterial/bypass road is to be constructed as part of the district shopping centre development (naturally, assuming development approval for this development).

The development application for the proposed development was made as a code assessable application and accompanied by the following:

- the relevant application fee for a code assessable development application;
- assessments against the applicable codes identified for a code assessable development application for a material change of use for a service station on part of the subject site; and
- a planning report that contended that the part of the subject site upon which the service station was proposed was a corner site, on the basis that an arterial/bypass road proposed as part of the separate development application for the multi-faceted development ('proposed road') would result in the subject site becoming a corner site, with frontages to both Round Hill Road and the proposed road.

On 10 March 2017, the respondent issued a not-properly made development application notice, stating that the development application for the proposed development was not properly-made.

The non-properly made development application notice relevantly stated the following reasons for the respondent's decision:

- The incorrect application fee (for a code assessable, rather than an impact assessable application) had been paid, and the correct fee was to be paid.
- The submitted IDAS Form 1 incorrectly identified the development application as being code assessable, and an amended form was to be submitted.
- The submitted planning report had addressed only the applicable codes for a code assessable development application, and an expanded report, addressing the entire superseded planning scheme, was to be submitted.

The part of the subject site on which the proposed development was to be constructed, was included in the District Business Zone in the superseded scheme. Table 3.2.7.1 (District Business Zone – Making a Material Change of Use) of the superseded planning scheme provides that a development application for a material change of use for a service station in the District Business Zone is code assessable if on a corner site, and impact assessable otherwise. The superseded planning scheme does not define the term ‘corner site.’

At the present time, the subject site is clearly not a corner site, as it has one frontage only, to Round Hill Road. However, the Committee understands that an integral part of the multi-faceted development application was the proposed road, being a section of arterial road over the western part of the subject site that will intersect with Round Hill Road at the south-western corner of the subject site. Thus, it was the appellant’s intention to make the subject site a corner site, as part of the multi-faceted development application, and hence the appellant submitted the development application for the proposed development as a code assessable application.

Material Considered

The material considered in arriving at this decision comprises:

1. ‘Form 10 – Appeal Notice’, grounds for appeal and correspondence and other documentary material accompanying the appeal lodged with the Committee’s Registrar on 15 March 2017.
2. Written submissions provided by the respondent on 10 April 2017.
3. Written submissions provided on behalf of the appellant on 12 April 2017.
4. *Sustainable Planning Act 2009* (SPA).
5. Superseded Planning Scheme for Miriam Vale Shire 2009 (superseded scheme).

Findings of Fact

The Committee makes the following findings of fact:

Corner site

- The proposed development is for a service station to be located on part of the subject site.
- Drawing number DA001 and drawing number DA002 identify that the proposed development is to be located in the vicinity of the south-western corner of the subject site, but is not in the corner (‘service station site’). Land identified as “not part of this DA application” separates the service station site from the intersection of the western and southern boundaries of the subject site.
- The superseded scheme does not define the term ‘corner site’.
- Division 4 (Interpretation) of Part 1 (Administration and Assessment) of the superseded scheme defines the term “site” to mean:

“the land on which development is carried out or is proposed to be carried out whether such land comprises:

- *The whole of any one lot, or parcel of land; or*
- *Part of one lot; or*
- *More than one lot where each lot is contiguous to the other or another lot; or*
- *Co-jointly used lands that are not adjoining lands.”*

- As identified in a letter from Wilson Ryan Grose lawyers dated 17 February 2017 provided to the Committee by the appellant ('legal advice'), the word 'corner' is similarly defined in several dictionaries and can reasonably be taken to mean a site that is located at an intersection or junction of two roads, or that has at least two intersecting road frontages to the same or different roads.
- The Committee therefore finds that to be a 'corner site' under the superseded scheme, the land on which the service station is proposed (whether that is the whole of a lot or part of a lot) must be located at the intersection of two roads.
- The service station site is therefore currently not a corner site, as it only has one lot boundary or side abutting a road, being its southern lot frontage to Round Hill Road.

Does 'corner site' include 'future corner site'?

- The Agnes Waters Locality – Zoning Plan of the superseded scheme relevantly identifies an indicative future road connection, aligned to intersect Round Hill Road some distance to the west of the subject site.
- The minutes of the pre-lodgement meeting held on 27 April 2016 ('minutes') confirmed that the respondent was supportive of the development of the proposed road as part of the multi-faceted development application to be located along the western boundary of the subject site, provided the proposed road was designed and aligned to form a segment of the respondent's intended arterial road.
- The Committee understands from the material provided by the appellant that the multi-faceted development application includes the provision of the proposed road, however, the multi-faceted development application has not been approved, nor has the proposed road been constructed.
- It is the appellant's contention that if the multi-faceted development application is approved subject to a condition that the appellant construct the proposed road within the subject site and this new public road is subsequently constructed and dedicated, it would make the service station site a corner site.
- The legal advice, after considering the principles identified by the Court in *Westfield Management Limited v Pine Rivers Shire Council and Anor* [2004] QPELR 337 at 342 for the construction of a planning scheme, suggests that the superseded scheme should not be given a pedantic or narrow interpretation in determining whether the intent of the words 'corner site' is that the site be a 'corner site' currently or in the future. The legal advice suggests that a reference to 'existing buildings' in other parts of Table 3.2.7.1 (District Business Zone – Making a Material Change of Use) of the superseded scheme can be used to extrapolate that the absence of the word 'existing' (or similar) from the term 'corner site' allows for an interpretation that the site could be a corner site in the future.
- The legal advice also states that "*the approach that a future road to be provided as part of the development can be relied upon to create a 'corner site' is also consistent with other development outcomes identified in the various codes and the way in which the proposed development will meet those outcomes*". The legal advice does not go on to explain this assertion or identify the other development outcomes. Accordingly, the Committee cannot accept this assertion.
- The written submissions provided by the respondent identify that the respondent's view is that:

- The respondent *“is required to consider the site based on the nature of the proposal and the form of the subject site at the time of lodgement”*.
 - *“at this current point in time, the subject site only has frontage to Round Hill Road and therefore it is not considered to be a corner lot in its current form”*.
 - The proposal to open a road as part of the multi-faceted development application *“holds no weight in determining the nature of the lot as it currently exists”*.
 - Any potential approval of the multi-faceted development application does not automatically create a corner lot.
 - *“It is at the Applicant’s discretion as to whether and when they act on the approval, and therefore the subject site may remain in its current form for several years post approval”*.
- The written submissions provided by the appellant state that the development application for the proposed development includes the construction of a bypass/arterial road, being the proposed road and that this road would result in the service station site becoming a corner site. This submission is not accepted, as the development application for the proposed development clearly referred to the proposed arterial/bypass road being constructed as part of the multi-faceted development (in both the executive summary and in section 3.1 Development Description). In addition, while the relevant IDAS forms referred to the subject site in its entirety as being the subject of the development application for the proposed development, the accompanying plans clearly identify that part of the subject site forms the service station site and these plans do not include the land upon which the proposed road would be constructed. As such, the Committee finds that the development application for the proposed development does not include the proposed road and therefore the service station site will not become a corner site as a result of the proposed development.
- The Committee accepts the position put forward by the respondent that the words ‘corner site’ in Table 3.2.7.1 (District Business Zone – Making a Material Change of Use) of the superseded scheme mean the form of the site at the time of lodgement of the relevant development application for the following reasons:
 - Table 3.2.7.1 (District Business Zone – Making a Material Change of Use) of the superseded planning scheme provides that a Service Station is code assessable where on a corner site or impact assessable where not on a corner site.
 - The dictionary definitions of ‘corner’ identified in the legal advice, clearly refer to the intersection of two streets.
 - The service station site is not located at the intersection of two streets as it currently only has frontage to Round Hill Road.
 - The proposed development doesn’t provide for a second road frontage to the service station site.
 - The superseded scheme doesn’t contemplate a future road along the western boundary of the subject site, but instead identifies a future arterial road to the west of the subject site.
 - The definition of ‘site’ in the superseded scheme, refers to the land on which development is proposed to be carried out and provides further particulars with respect to that land, including whether that land comprises the whole or part of a lot. This definition only refers to a lot as it currently exists and does not include future land.
 - The multi-faceted development application includes the proposed road along the western boundary of the subject site; however, the multi-faceted development application has not been approved by the respondent.

- While the minutes identified that the respondent's officers were supportive of the proposed road along the western boundary of the subject site, these minutes are not binding upon the respondent or any decision that the respondent makes in respect of the multi-faceted development application.
 - There is no certainty that the respondent will approve the multi-faceted development application.
 - If the respondent approves the multi-faceted development application, there is no certainty as to the location or timing of the construction and dedication of the proposed road. This is a matter entirely at the discretion of the applicant, as is whether any approval of the multi-faceted development application is ultimately developed.
 - Given the lack of certainty as to where, when or even if the proposed road will be constructed and with reference to the principles identified by the Court in *Westfield Management Limited v Pine Rivers Shire Council and Anor* [2004] QPELR 337 at 342, the most sensible and practical approach is that the proposed road should not be taken into consideration in deciding whether the service station site is a 'corner site'.
 - Within this context, the absence of any words such as 'existing' to describe the 'corner site' is therefore not indicative of the respondent's intended meaning. Indeed, the example given in the legal advice of 'existing buildings' is used in the superseded scheme in an entirely different context to differentiate between a material change of use for shops and other commercial uses to be located either in 'existing buildings' (a self-assessable use) or 'not in existing buildings' (a code assessable use).
 - Accordingly, the service station site is not a 'corner site' for the purposes of Table 3.2.7.1 (District Business Zone – Making a Material Change of Use) of the superseded scheme.
- While having no bearing on the Committee's decision given its reasoning above, it should be noted the Committee also questioned whether the service station site would be a 'corner site' if the multi-faceted development application was to be approved and the proposed road constructed and dedicated. The reason for this is that there is land identified as 'not part of this DA application' between the service station site and the location of the proposed road. On this basis, the service station site would not appear to be strictly located at the intersection of the two streets.

Reasons for the Decision

The subject site is not a 'corner site' and accordingly the proposed development would require impact assessment under Table 3.2.7.1 (District Business Zone – Making a Material Change of Use) of the superseded planning scheme.

On this basis, the Committee declares that the development application for the proposed development was not a properly made application.

Neil de Bruyn
Building and Development Committee Chair
Date: 13 April 2017

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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