



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	35-18
Appellant:	Project BA
Assessment Manager:	Luke Neller
Concurrence Agency: (if applicable)	Noosa Shire Council
Site Address:	63 Forest Acres Drive Lake MacDonald and described as Lot 25 SP RP 192080 – the subject site

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 of a development application for construction of a shed Class 10a structure on the subject site. The basis of Noosa Shire Council's (Council) refusal is that the proposed shed needs to be provided with greater side boundary setback to allow for landscaping.

Date and time of hearing:	22 November 2018 at 10:00 AM
Place of hearing:	The subject site
Tribunal:	Mr. Andrew Montgomery-Hribar– Chair Ms. Belinda Scott - Member
Present:	Mr. Luke Neller – Appellant Mr. Christopher Kennedy owner of the subject site and Ms. Joanne Hill Mr. Matt Adamson and Mr. Ian Wayth – Council representatives

1 Decision:

The Development Tribunal (Tribunal) in accordance with section 254 of the *Planning Act 2016* (PA) **changes** the decision of the Assessment Manager to refuse the development application for a shed as directed by the Referral Agency (on the basis that the proposed shed needs to be provided with greater side boundary setback to allow for landscaping); to a decision that the shed is to be constructed with a setback of 800mm from the northern side boundary and landscaping between the proposed shed and side boundary is not required.

An amended Planning Application is to be submitted to the Council for approval showing the following as agreed between Council representatives and the Appellant at the hearing on Thursday 22 November 2018:

- Setback for the shed from the side boundary is 800mm;
- Floor plan is to show the following 1) mezzanine floor, 2) wash basin, 3) shower, 4) toilet, and 5) hot water system;
- The shed Class 10a is to be shown on all documentation submitted to the Council and that it will not be converted to a habitable structure without prior approval of the Council; and
- The external colour of the sheeting for all walls and roof to be Colorbond "Woodland Grey".

2 Background

- 1) On 30 May 2018 Development Application (DA Form 2) for a Class 10a building was submitted by the Appellant on behalf of Mr. Christopher Kennedy owner of the subject site to the Council.
- 2) On 4 June 2018 the Appellant by letter to the Council set out the justifications of the proposal against the *Planning Regulations 2016* Referral trigger - Schedule 9, Part 3, Division 2 Table 3 - Building Work for Design and Siting. Description of the proposal stated that *"The Shed proposed to be constructed at 200mm on the side boundary, which is contrary to the Acceptable Solutions of the Noosa Plan 2016- Detached House Code 01 and therefore requires a Council referral"*. Acceptable solution for design and siting performance criteria for the construction of the shed were set out in the letter in accordance with Queensland Development Code (QDC) MP1.2.
- 3) On 8 June 2018 the Council acknowledged receipt of the application and allocated an Application Number RAP18/0098 for the project.
- 4) On 18 June 2018 the Council requested that the proposed shed needs to be provided with greater side boundary setback to allow for landscaping. The Council requested the Appellant to provide amended plans reflecting Council's required information to enable the proposal to be correctly assessed. No reference was made to any specific QDC nor were there any offset dimensions given from the side boundary fence.
- 5) On 7 August 2018 the Appellant advised the Council that the owner of the subject site did not want to comply with the Council's request to amend the drawings (no reasons were provided).
- 6) On 21 August 2018 the Council directed the assessment manager to refuse the application stating that development does not comply with the performance criteria:
c) Allow for landscaping to be provided between buildings;
There is not sufficient space for screening vegetation to be added between buildings and in particular the adjoining land owners as the proposed shed location shows a side boundary setback of 0.2 metres from the Northern side boundary with an eave height of 5.2 metres from finished ground level and is therefore recommended for refusal.
The Council did not provide any information in their letter of 21 August 2018 as to what would make the proposal acceptable.
- 7) On 23 August 2018 the Appellant by letter advised Total Span, the contractor engaged by the owner of the subject site, that the Council directed the Assessment Manager to refuse the application.
- 8) On 17 September 2018 the Appellant submitted to the Development Tribunal Registry a Form 10 to appeal the Council's direction to the assessment manager to refuse the development application. Included with the Form 10 application was the Authority to Act from Mr. Christopher Kennedy, owner of the subject site for Mr. Luke Neller from Project BA to act on his behalf at the Development Hearing Tribunal.
- 9) The following documentation was received by the Registrar from the Council post lodgement of the Form 10 which were not previously provided-
 - 9.1. Letter dated 17 September 2018 from Project BA to Total Span advising that the Council refusal of the Preliminary Approval for the shed had the following drawings attached - drawings of the floor plan and elevations of the proposed shed with a marked up aerial photograph of the subject site showing offset dimension from the site boundaries. Floor plans, elevation and the aerial photograph were stamped as refused. Site information stated that:- the land was zoned as Rural settlement; Building type as portal; Building size as 14.6 x 11.98 x 5.2 H; Land area 3998 m²; Additional Notes – Shed to be constructed on existing slab; Site address – 63 Forest Acres Drive Lake McDonald, Lot 25 Plan # RP1920080. Drawings are dated Friday 1 June 2018; Drawn by Jason Barton, QBCC# 1310345.
 - 9.2. Form 56 Notice of appointment of private certifier for the development at the subject site.
 - 9.3. Aerial photograph of subject site in 2016 and 2017. Photograph in 2016 shows no slab whereas photograph in 2017 shows a slab.
 - 9.4. DA Form 2 – Building work details date received by Luke Neller.

- 9.5. Form 20 – Lodgement of building work documentation no date shown.
- 9.6. Council letter date 13 June 2016 advises Alliance Building Approvals – Application No RAB16/0086 that approval has been given to construct a Class 10a structure with a setback of 0.8 m with conditions. Approved plans show a Class 10a structure which is 25m long parallel to the boundary with a skillion roof varying in height from 2.885m to 3.1m.
- 9.7. Record of email correspondence between the Council and Assessment Manager and between the Council and the Development Tribunal.

3 Jurisdiction

The appeal is brought pursuant to section 229 and schedule 1, section 1, table 1, item 1 of the *Planning Act 2016* (PA). Section 1(2) of schedule 1 effectively constitutes a precondition for the application of table 1 for development tribunal proceedings. The precondition is satisfied in this instance because the matter meets the description contained in section 1(2)(g) of schedule 1.

4 Decision framework

It is noted that:

- the onus rests on the appellant to establish that the appeal should be upheld (s. 253(2) 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 person who made the decision appealed against (s. 253(4) of the PA),
- the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under s.246 of the PA,
- the tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

5 The Parties' Positions

The Appellant's justification is based on the performance criteria based on s.253(2) of the PA which is replicated below -

- 1) The proposed shed is utilising an existing concrete slab. Alternative siting areas are limited without significantly impeding native vegetation, effluent disposal areas, or the private open space left available;
- 2) The adjoining owner Mr Sydney Trevor in his letter dated 17 April 2018 stated that he had no concerns with the proposed setback of 900mm. (Mr Trevor was asked by the Appellant in the presence of the Council representatives on 22 November 2018 if he had any objections to a 800mm setback, Mr Trevor stated that he had no objections);
- 3) The proposed shed is a non-habitable structure and unlikely to impose on the privacy of the neighbouring property, given its storage non-habitable use;
- 4) The proposed siting makes use of an existing pad where interference with native vegetation is not required;
- 5) The reduced side boundary will restrict the area available for landscaping between buildings and side boundary, however where landscaping is required for the neighbour to improve their own aesthetics, the neighbour has space to plant vegetation on his own side;
- 6) The reduction in the side boundary will not impact on the continuity and pattern of buildings within the street; and
- 7) Shed is at the rear of the site where it unlikely to dominate the street.

The Referral Agency's rejection is based on QDC 1.2 performance criteria on s.253 of the PA which is replicated below-

- 1) The proposed shed does not allow for landscaping to be provided between buildings;
- 2) Require greater side boundary setback to allow for landscaping;
- 3) The proposed development does not comply with and cannot be conditioned to comply with the following performance criteria; and

- 4) There is not sufficient space for screening vegetation to be added between buildings and in particular the adjoining land owners as the proposed shed location shows a side boundary setback of 0.2 metres from the Northern side boundary with an eave height of 5.2 metres from finished ground level and is therefore recommended for refusal.

6 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 Tribunals Registrar on 17 September 2018.
- 2) Referral Agency directing the assessment manager to refuse the application; date 21 August 2018.
- 3) Appellant received DA Form 2 Building work details; date 30 May 2018.
- 4) Engagement of private certifier Form 56; date 30 May 2018.
- 5) Form 20 Lodgement of building work documentation; undated.
- 6) Appellant letter to Council Justification of Proposal against the Performance Criteria; date 4 June 2018.
- 7) Appellant submitted a request for Referral Agency Response for Building Works; date 4 June 2018.
- 8) Council acknowledges receipt of application; date 8 June 2018.
- 9) Council requests further information to assess proposal; date 18 June 2018.
- 10) Appellant to Council provided information requested; date 7 August 2018.
- 11) Appellant to Total Span SC – Jecaba Pty Ltd advising of DA refusal; date 23 August 2018.
- 12) Christopher Kennedy advise to Development Tribunal Registrar appointment of Project BA to act on his behalf; date 12 September 2018.
- 13) Letter from Mr. Sydney Trever of 65 Forest Acres Drive Lake Macdonald stating that he has no objection to the shed being 900 mm from the adjoining fence.
- 14) Council approval of Application No RAB16/0086 approving 24 m long carport with conditions and a setback of 800 mm; date 13 June 2016.

7 Findings of Fact

Tribunal based its findings on the following key facts-

- 1) The subject site zoning is Rural Settlement with a land area of 3998m² (Refused plans Reference No RAB18/0098 part of Concurrence Agency Response dated 21 August 2018).
- 2) The location plan drawing #26995 shows that a carport measuring 25m in length is located 800mm from the northern side boundary (approved by the Council on 13 June 2016). Measurements taken on site confirmed that the carport was constructed 800mm from the northern side boundary. Measurement was taken by Tribunal Chair and witnessed by the other Tribunal Member, Appellant, Council Representatives and Owner.
- 3) The existing slab on which the proposed shed is to be constructed (see Refused plans Reference No RAB18/0098 part of Concurrence Agency Response dated 21 August 2018) was constructed 710mm from the north boundary. Measurement was taken by Tribunal Chair and witnessed by Tribunal Member, Appellant, Council Representatives and Owner.
- 4) The level of the top of the slab was estimated to be 1.8m below the slab of the existing carport and 1.7m below the slab of the Class 1a building of the adjoining property. These estimated measurements were witnessed and agreed to by all parties present.
- 5) The distance of the north east corner of the slab is approximately 38m from the front door of the Class 1a building on 65 Forest Acres Drive, the adjoining property. The distance of

approximately 38m was paced out by the Tribunal Chair and witnessed by the Tribunal member and Council representative.

- 6) During the site inspection the Tribunal Chair and all parties discussed the applicability of the following Performance Criteria (PC) of the Queensland Development Code 1.2 (QDC 1.2)-
 - PC P2 - Buildings and structures –**
provide adequate daylight and ventilation to *habitable* rooms;
allow adequate light and ventilation to *habitable* rooms of *buildings* on adjoining *lots*; and
do not adversely impact on the amenity and privacy of residents on adjoining *lots*.
 - PC P3 - Adequate open space is provided for recreation, service facilities and landscaping.**
 - PC P4 - The *height* of a *building* is not to unduly –**
overshadow adjoining houses; and
obstruct the outlook from adjoining *lots*.
 - PC P5 - Buildings are sited and designed to provide adequate visual privacy for neighbours.**
 - PC P6 - The location of a *building* or *structure* facilitates normal *building* maintenance.**
 - PC P7 - The size and location of *structures* on corner sites provide for adequate sight lines.**
 - PC P8 - Sufficient space for on-site carparking to satisfy the projected needs of residents and visitors,**
- 7) During the site visit discussions in general considered all of the above Performance Criteria.
- 8) The Tribunal Chair put to the Council representatives the question “if the existing carport was allowed a side boundary setback of 800mm (RAB16-008), why would a side boundary setback of 800mm for the shed not apply?” The Council representatives considered this question and agreed in principle to the 800mm side boundary setback for the proposed shed which would be conditional to conditions. Conditions which the Council would require would be discussed at the Tribunal meeting.
- 9) The Tribunal Chair considered that adequate time was taken for site inspection and discussions. The owner was requested by the Tribunal Chair to provide a place where the Tribunal meeting could continue and minutes could be taken.

8 Reasons for the Decision

- 1) Tribunal reasons for the decision are based on the Appellant’s and Referral Agency’s evidence which was directed to QDC MP1.2 performance criteria and acceptable solutions and the site conditions.
- 2) Prior to the start of discussions of the “boundary setback” and “landscaping” the Tribunal Chair sought clarification that the two Council representatives had the authority to make the decisions agreed at the Tribunal hearing. Both Council representatives agreed that they had the required authority.
- 3) The Tribunal’s focus was to resolve two issues on which the Referral Agency based its refusal-
 - i. Greater side **boundary setback** (200mm shown in submission).
 - ii. Insufficient space for **landscaping between buildings** and screening vegetation to be added and in particular the adjoining land owners.

Referring now with these two issues in turn:

- i. **Boundary setback-**
 - a) The Tribunal requested the Referral Agency to consider approving a boundary setback of 800mm for the shed. The reasoning is that the carport was approved with an 800mm boundary setback. An 800mm boundary setback for both structures would allow uniformity on the site.
 - b) The Referral Agency after consideration agreed to approve an 800mm boundary setback, with conditions.
- ii. **Landscaping between building**

- a) The issue of vegetation between buildings was discussed during inspection of the slab and its proximity to the side boundary.
- b) The following agreement was reached between the Council representatives, Assessment Manager and the owner-
 - i) Planting of vegetation between the slab and the boundary fence of 800mm width and 12m long was impractical.
 - ii) The visual impact of the shed on the adjoining property-
 - (1) Was considered to be minimal;
 - (2) situated approximately 38m from the proposed shed;
 - (3) There is considerable vegetation along the common boundary on the adjoining property side ;
 - (4) The existing carport which is 25m long has a greater visual impact than the proposed shed will have due to its closer proximity to the adjoining residence and its bright cream colour; and
 - (5) The owners of the adjoining property agreed to the shed's location of 800mm and considered that the existing vegetation was adequate.

9 Decisions agreed to by Appellant and Concurrence Agency

- 1) The Council representatives agreed that the requirement for landscaping between the shed and the boundary would be withdrawn.
- 2) Council's representative advised planning approval will be granted if an amended Planning Application was submitted with the following information included with the documentation-
 - a) Setback of 800mm for the shed from the side boundary;
 - b) Floor plan showing the following: 1) mezzanine floor; 2) wash basin; 3) shower; 4) toilet; and 5) a hot water system;
 - c) The shed classification being Class 10a is to be shown on all documentation;
 - d) Owner to provide an undertaking that the shed will not be converted to a habitable structure without Council approval; and
 - e) As an alternative to the planting of vegetation within the 800mm side boundary setback being regarded as impractical it was agreed by all parties that the colour selection of all walls and roof of the new shed to be Colorbond "Woodland Grey".
- 3) The Development Tribunal in accordance with section 254 of the *Planning Act 2016* changes the decision of the Assessment Manager to refuse the development application for a shed as directed by the Referral Agency (on the basis that the proposed shed needs to be provided with greater side boundary setback to allow for landscaping); to a decision that the shed is to be constructed with a setback of 800mm from the northern side boundary and landscaping between the shed and side boundary is not required.
- 4) An amended Planning Application is to be submitted to the Council for approval showing the following as agreed between Council representatives and the Appellant at the hearing on Thursday 22 November 2018:
 - a) Setback for the shed from the side boundary is 800mm;
 - b) Floor plan is to show the following 1) mezzanine floor, 2) wash basin, 3) shower, 4) toilet, and 5) hot water system;
 - c) The shed Class 10a is to be shown on all documentation submitted to the Council and that it will not be converted to a habitable structure without prior approval of the Council; and
 - d) The external colour of the sheeting for all walls and roof to be Colorbond "Woodland Grey".

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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