



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	08/13
Applicant:	Jennifer MacDonald
Assessment Manager:	Toowoomba Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	42 Campbell Street Toowoomba and described as Lot 1 on RP 5661 (the subject site)

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against the giving of an Enforcement Notice for the building of a cubby house at the subject address.

Date of hearing:	10am on 24 April 2013
Place of hearing:	The subject site at 42 Campbell Street Toowoomba
Committee:	Greg Rust – Chair Desmond Lang -Referee
Present:	Jennifer MacDonald – Applicant Ross Vaschina – Applicant's Partner Grant Forde - Building Certifier from qpdb pty ltd Ross Ford - Council representative Hester Gerber - Council representative Gabe Woldt - Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with Section 564 of the SPA **sets aside** the Enforcement Notice dated 22 January 2013 given in respect of the cubby house at the subject address.

Background

The property is located on the western corner of Hickey Street at 42 Campbell Street East Toowoomba and is a low set timber and corrugated iron dwelling. It was renovated between July 2010 and January 2011 and is located under the Toowoomba Regional Planning Scheme in a Neighbour Character Area. The property has a 1.2m fence on the Campbell Street frontage and approximately half of the Hickey Street alignment when it steps up to 1.8m height for the balance.

In February 2011, the Applicant and her partner erected a timber and corrugated iron cubby house for their daughter approximately half way along the Hickey Street alignment. The cubby house measures 2.5 square metres including a small verandah on the northern side and 3 metre at its ridge. Approximately 1 metre of walls and roof can be seen above the existing timber boundary fence. The cubby house is well built and is sympathetic in design and construction to the house being sheeted in weatherboards and complimentary paint colours. The roof pitch appears similar to that of the house from the street. It is not out of character with other buildings in the vicinity.

Council inspected the property on 21 September 2012 and formed the opinion that a contravention of section 578 of the SPA had been committed in that assessable development had been carried out without an effective development approval for the cubby house.

A Show Cause notice dated 3 October 2012 was issued by Council requiring the Applicant to show cause why an Enforcement Notice should not be issued. The Show Cause notice required the Applicant to cease all building and development works on site immediately until she had obtained a planning approval for the siting and overall size of the outbuildings in accordance with the Toowoomba Planning Scheme 2003 and obtained siting discretion approval in accordance with the Queensland Development Code (QDC) and if approved, obtain a building development approval for building work.

If the cubby house was not approved the Applicant was required to dismantle and remove the cubby house or relocate it to comply with the Toowoomba Regional Planning Scheme, the QDC and the self-assessable provisions of the Building Regulation 2006 (BR).

The Applicant met with the Council and following this meeting, an Enforcement Notice was issued dated 22 January 2013. The Enforcement Notice is the subject of this appeal.

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 Registrar on 18 February 13.
2. Show Cause Notice dated 3 October 2012 issued by Toowoomba Regional Council to the Applicant.
3. Brief of Evidence from Toowoomba Regional Council emailed to Registrar on 18 April 2013.
4. Facsimile correspondence dated 23 April 2013 written on behalf of Darcy by Jennifer MacDonald (Darcy's mother).
5. Excerpts from Toowoomba Regional Council Planning Schemes (current and superseded).
6. Written submission from qpdb pty ltd emailed to Registrar on 14 May 2013.
7. Information on the interpretation of Toowoomba Regional Council's Planning Scheme from Toowoomba Regional Council emailed to Registrar on 17 May 2013.
8. Facsimile dated 24 May 2013 sent by the Registrar on behalf of the Committee to the Applicant requesting information.
9. Facsimile dated 27 May 2013 from the Applicant providing the information requested on behalf of the Committee.
10. Verbal submissions from appeal parties at the appeal hearing
11. *Sustainable Planning Act 2009* (SPA)_
12. *Sustainable Planning Regulation 2009* (SPR)
13. *Building Act 1975* (BA)

14. Building Regulation 2006 (BR)
15. Queensland Development Code (QDC)
16. Building Code of Australia (BCA)
17. Toowoomba Regional Planning Scheme 2003
18. *Integrated Planning Act 1997* (IPA)

Findings of Fact

The Committee makes the following findings of fact:

A cubby house approximately six square metres in area and three metres in height was built on the subject site for the enjoyment of the owners of the property.

The cubby house has been determined by the Council as assessable work and they issued an Enforcement Notice requesting that the necessary permits be obtained or the cubby house be removed.

The Applicant lodged an appeal with the Committee registry against the Enforcement Notice.

Reasons for the Decision

The Council argues that the cubby house is a class 10a building (i.e. a non-habitable building being a private garage, carport, shed or the like) as defined in the BCA. If this is the case then a siting relaxation would be required in addition to a development permit.

The Applicant proposed the following arguments regarding the building classification of the cubby house:

- ▶ the cubby house is playground equipment, not a shed etc. and that the correct classification for the building is a class 10b, namely a structure such as a fence or free standing wall being incidental to the main dwelling OR alternatively
- ▶ that the cubby house should be classified as a special structure under sections 120 and 121 of the BA and that playground equipment is an example of building work for the purposes of a class 10b.
- ▶ that it is the use of the structure which is paramount to its classification under the BCA and as it was erected to be used as a cubby house then its proper classification is class 10b.

With respect to the planning requirements the Applicant argues that the superseded 2003 Toowoomba Regional Planning Scheme is irrelevant to the present proceedings and reliance should be placed on the current 2012 Toowoomba Planning Scheme. In addition, she argues that as the 2012 planning scheme provisions relate only to carports and garages that the cubby house is therefore self-assessable and should be dealt with under the building approval process.

The Applicant further argues that the cubby house is not in conflict with the siting requirements because:

- The structure is small in scale (approx. 6m²)
- The structure is not located on a street frontage
- The structure is partially obscured by a 1.8m high screen fence
- The design and materials used are in keeping with the main dwelling and adjacent properties
- The structure does not detract from the streetscape
- The views from adjoining properties are not obstructed and there are no adverse amenity impacts

The Council argues that there has been a contravention of section 578 of the SPA. For this to occur a person must carry out assessable development without an effective development for the work. There is no dispute that the Applicant erected the cubby house and no permits were obtained.

The Council further argues that the cubby house is classified as a class 10b building. A class 10b building

in the BCA includes a garage, carport, shed or the like. The terms garage and carport are easy to understand. The term shed however is not further defined and may have numerous uses. Using normal statutory interpretation principles the term 'or the like' usually takes its meaning from the preceding words therefore it would usually mean a garage etc.

The parties agreed at the hearing that the key issues in this appeal are the BCA classification of the cubby house and the siting/planning requirements.

What is the cubby house's classification

The term cubby house is not defined in the BCA. While a shed may be a cubby house and vice versa it is not disputed that this particular building was designed and constructed to be used as a cubby house.

Part A3.1 of the BCA provides that the classification of a building is determined by the purpose for which it is designed and constructed to be used. The various legislations provide for situations where changes of use occur and allows for changes in classification where necessary and should this occur a new application to change the classification is required. In this appeal the use has not change from that of a cubby house.

It is the view of this Committee that the cubby house cannot be classified under Part A3 of the BCA and therefore must be classified as a special structure under section 120 of the BA which is defined as:

"special structure means a structure that can not be classified under the BCA, part A3."

Is the cubby house assessable development

Assessable development is defined in the SPA to generally be development prescribed under Section 232(1)(c) to be assessable development. Section 232(1) prescribes that a regulation may prescribe that development is either self-assessable, development requiring compliance assessment, or assessable development.

By virtue of section 9 and Schedule 3 of the Sustainable Planning Regulation 2009 (SPR) assessable development is defined to be building work that is not self-assessable under part of Schedule 3 or building work that is declared under the BA to be exempt development. In Part 2 of Schedule 3 self-assessable development is building work declared under that Act to be self-assessable.

Under section 7 of the SPA, carrying out building work is development. Building work is defined in section 10 of the SPA to mean a building or structure. A building is defined to be a fixed structure that is wholly or partly enclosed by walls and is roofed while a structure is not defined.

There is no dispute that the cubby house is a fixed structure enclosed by walls and a roof. It is therefore a building as defined in the SPA. Section 5 of the BA contains the same definition of building work while Schedule 2 contains the same definition of building as the SPA.

By virtue of the above definitions the cubby house is a building for the purposes of the BA.

Section 20 of the BA prescribes that all building work is assessable development unless under section 22 it is exempt development. Under section 22 and Schedule 2 of the Building Regulation 2006 (BR) a special structure is exempt development so long as it does not exceed 3m in height above the natural ground surface. The cubby house was measured at the hearing to be 3m high at its highest point. The Council did not raise any objection to this measurement.

Given the above, it is the view of the Committee that the cubby house is a building as defined in the SPA and BA and it is exempt development under those Acts because of its height and therefore not assessable development requiring a development permit. Therefore no contravention of the SPA has occurred and the Show Cause Notice and subsequent Enforcement Notice were erroneously issued.

Siting requirements.

Part 1.2 of the QDC prescribes the siting requirements for single detached houses and other buildings on sites over 450m². Under Figure 3 the acceptable siting requirements for a building are that for the nominated road frontage the setback is 6m while on the other road frontage the setback is 6m with no building or structure being allowed within a 9m truncation at the corner. A 2m high fence is allowable around all frontages.

In this appeal, Council has relied upon the siting requirements of its superseded 2003 Toowoomba Planning Scheme (during which time the cubby house was built) and the 2012 Toowoomba Regional Planning Scheme which commenced on 1 July 2012. The Applicant argued that the Committee should rely upon the current 2012 planning scheme even though the cubby house was constructed during the time of the 2003 superseded scheme.

However, neither scheme defines a cubby house. The 2003 scheme defines an outbuilding as a non-habitable garage, carport, shed or the like but does not further define the terms. The 2003 scheme defines minor building works as building works that result in an increase of not more than 55m² in the gross floor area of the premises. The Council does not allege the cubby house is habitable nor does it allege the cubby house adds to the gross floor area of the main dwelling.

The Building and Operational Works Assessment Table in the 2003 planning scheme lists numerous types of applicable development. For minor building works in the area, exempted works under the BA such as minor additions and sheds were listed as exempt from assessment under Schedule 8 of the *Integrated Planning Act 1997* (IPA). Even though IPA was repealed and replaced by SPA in 2009, those same works are exempt development under the SPA which means that the cubby house is exempt from the siting requirements of the 2003 planning scheme. If the cubby house was not minor building work then it would be exempt under the Building and Operational Works Assessment Table because it was not assessable development.

As the building was constructed during the 2003 planning scheme that scheme is the applicable scheme for this appeal.

In summary, the Committee holds the view that there is no reason why the cubby house can not be sited in its present position because:

- ▶ it is built outside the 9m prohibited truncated area preventing development under the QDC
- ▶ it is located beside an allowable 2m high timber fence
- ▶ no traffic concerns or other issues are alleged to be caused by its presence
- ▶ only a proportion of its height can be seen above the fence
- ▶ its design and construction are in accord with the principal dwelling and adjoining properties
- ▶ the only objection to its siting under the QDC is the proportion that can be seen above the fence therefore it is in substantial compliance with the QDC.

Greg Rust
Building and Development Committee Chair
Date: 6 June 2013

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
GPO Box 2457
Brisbane QLD 4001
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