



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal number:	18-10
Applicant:	Karen Ashburn
Assessment manager:	GMA Certification Group
Concurrence agency:	Gold Coast City Council (Council)
Site address:	718 Currumbin Creek Road, Currumbin Creek and described as Lot 14 on WD348 – the subject site

Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of the assessment manager to approve extensions to an existing dwelling, including a deck with a reduced setback to Currumbin Creek. The decision included a condition imposed by Council as concurrence agency to the application, which is the subject of the appeal. The condition being appealed against is condition No 1A(b) requiring restoration and rehabilitation of the creek setback due to intrusion of the deck.

Date of hearing:	2pm on Thursday, 8 April 2010
Place of hearing:	The subject site
Committee:	Paul Smith – Chair Jennifer Hutcheon – Referee
Present:	Karen Ashburn – Applicant Andrew Bentley – GMA Certification Group Andrew Powell – Council representative Michael Banks – Council representative Kellie Parker – Council representative

Decision:

The Committee, in accordance with section 564 2(b) of SPA, **changes** the decision of the assessment manager and the condition subject of the appeal and replaces it with the following condition to provide greater clarity of the requirements:-

1 A b) In order to compensate for the incursion of a structure (deck) into the setback of Currumbin Creek, a basic landscape plan (which may be prepared by the applicant) identifying landscaping works adjacent to Currumbin Creek must be submitted to and approved by Council. The landscaping works will include weed control and planting of 50 plants of a variety of native riparian species. The landscape plan shall include:

- i. Details of proposed landscaping works including dimensions.
- ii. Details of proposed native riparian species, indicative location of 50 plants, being seedlings of trees, shrubs, and / or grasses, and mulch.
- iii. Notation of proposed weeding of groundcovers, vines, and shrubs.

All works identified within the final stamped approved landscape plan must be completed prior to the issue of the Final Building Certificate.

Background

The Committee conducted an on-site hearing and the opportunity was taken to view the setback area to Currumbin Creek.

The site is located at 718 Currumbin Creek Road, Currumbin Valley, and shares an extensive boundary to the creek. The site slopes towards the river and there is evidence of erosion. There are a number of exotic and native trees (including palms and camphor laurels) and some weeds along the riverbank, however 10m behind the line of trees is covered in lawn grass only. The opposite side of the river is edged with native riparian grasses and clusters of native trees.

The site has an area of 3920m² and contains a dwelling located approximately 30m from the riverbank. It has been assumed for the purposes of this appeal that all existing buildings on the site are lawful. The application which is the subject of this appeal involved extensions to the dwelling, including a new deck located at the north-eastern corner of the existing dwelling.

The new deck extends approximately 7m into the 30m setback stipulated as an acceptable solution under the Rural Domain Code of the Gold Coast Planning Scheme 2003, and hence was subject to referral to Council as the concurrence agency.

Council provided a concurrence agency response requiring the assessment manager to impose a number of conditions on the approval. The following condition is the subject of the appeal:

"1 A b) In order to compensate for the incursion of a structure (deck) into the setback of Currumbin Creek, a basic landscape plan identifying restoration works adjacent to Currumbin Creek must be submitted to and approved by Council. The restoration works will include weed control and planting. The landscape plan shall include:

- i. Details of proposed rehabilitation works including dimensions, proposed species and planting palette.*
- ii. Planting modules to demonstrate planting densities.*
- iii. All weeding works required.*

All works identified within the final stamped approved landscape plan must be completed prior to the issue of the Final Building Certificate."

The applicant asserted the following reasons for her decision to appeal the condition of approval, both within the written submission and during the hearing:

- The deck is a minor intrusion into the setback.
- It would not result in the loss of any trees or riparian vegetation, and therefore there is no need for rehabilitation or compensation.
- The area is grassed and has been for a great many years.
- The area floods and seedlings will most likely be washed away.
- Digging for planting would result in instability of the bank and erosion.

- The bank is subject to minimal erosion in its current state.
- The request is unreasonable given the minor extent of the deck and the lack of existing plants in the setback.

In response to the applicant's submission of 15 March 2010, Council made the following written submissions:

- the acceptable solution requires a 30m setback to the tip of high bank to any waterway.;
- the proposed development does not comply with the qualitative statement, being the performance criteria in this instance;
- the performance criteria was assessed against the following characteristics of Currumbin Creek:
 - dominance of the introduced camphor laurel in this riparian setback area;
 - evidence of regional ecosystem RE: 12.3.1 and natural regeneration occurring along the creek;
 - classification of the ecological community as a 'referable wetland';
 - location within the state bioregional corridor, with identification of rare and threatened flora and fauna in proximity to the site;
 - the role of the creek as a functional ecological link for fauna movement and ecological processes;
 - increased impacts upon the ecological function of the corridor from the deck, including impacts of lighting, human movement, runoff; construction activities, and reduction of the setback;
 - the need to support natural ecological processes, including movement of fauna, regeneration, and bank stability;
- a condition was imposed to ensure compliance with the performance criteria;
- the condition is supported by planning scheme intents for waterways such as Currumbin Creek, including:
 - Rural Domain Place Code.
 - Natural Wetland Areas and Natural Waterways Overlay Map OM11.
 - Natural Wetland Areas and Natural Waterways Constraint Code.
 - Conservation Strategy Plan Overlay Map OM20.
 - Nature Conservation Constraint Code.

During the hearing, Council identified the following points:

- they had accepted the proposed variation to the setback (as well as other setback relaxations);
- they had assessed the environmental impacts of the intrusion into the setback;
- they had imposed conditions to mitigate the impact of that intrusion;
- they had outlined in subsequent discussions and meetings that 50 plants (seedlings) of grasses, trees, shrubs, and mulch would be acceptable, as would plans prepared by the applicant rather than a professional landscape architect.

Both the applicant and Council's environmental representative confirmed that an on-site meeting had been held to discuss Council's position on the required planting for the rehabilitation. Council advised that 50 plants would be required, and could be a number of species, ranging from trees, shrubs, and grasses.

Council advised during the hearing that clearing of any vegetation within 10m of an approved structure was 'as of right'. This advice was subsequently confirmed (via email dated 9 April 2010) as an acceptable solution (AS1.1.6) under the Vegetation Management Specific Development Code applicable to the rural domain. In addition to the 7m intrusion into the 30m setback, this section of the planning scheme allows for clearing that would potentially extend the intrusion up to 17m into the setback.

Council representatives noted that the intrusion into the setback has a number of effects that can be detrimental to the waterway, such as light, noise, and movement on and around the deck that would discourage wildlife.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal, including plans, photographs, and written submission, as lodged with the Registrar on 15 March 2010.
2. Decision notice issued by the assessment manager, dated 10 March 2010.
3. Council's referral agency response, dated 7 January 2010, and its submission to the Committee received on 8 April 2010;
4. Verbal submissions from the applicant, assessment manager, and Council representatives at the hearing on 8 April 2010;
5. Council's further information submission dated 9 April 2010;
6. The Gold Coast Planning Scheme 2003;
7. SPA.

Findings of Fact

The Committee makes the following findings of fact:

1. The site is a large block, area approximately 3920 m², with an irregular triangular shape that results in a boundary of approximately 95m to Currumbin Creek.
2. The land is zoned rural, and subject to the Rural Domain Place Code under the Gold Coast Planning Scheme 2003.
3. The proposed extensions do not comply with relevant acceptable solution AS4 of the Rural Domain Place Code, which requires a minimum setback of 30m to the creek, and references the Overlay Map OM11 – Natural Wetland Areas and Natural Waterways.
4. The non-compliance has the potential to impact upon the water quality in the river and riparian vegetation associated with river.
5. Council is a concurrence agency to the application, and imposed a reasonable and non-onerous condition upon the approval in accordance with the 'qualitative statement', being the performance criteria.

Reasons for the Decision

The relevant acceptable solution and performance criteria read as follows:

Building Setback

<p>PC3</p> <p>All buildings must provide for setbacks from the street frontage and the side and rear boundaries of the site, which are appropriate for the:</p> <ol style="list-style-type: none">efficient use of the site;rural character of the area;separation from neighbouring properties and from frontages to roads.	<p>AS3</p> <p>All buildings are set back not less than ten metres from the frontage and six metres from the side and rear boundaries of the site.</p>
<p>PC4</p> <p>All buildings must provide for setbacks from water courses/waterways which are appropriate to ensure the protection of water quality in those watercourses and riparian vegetation associated with those watercourses.</p>	<p>AS4</p> <p>All buildings are setback not less than 30 metres from the tip of the high bank of a waterway as identified on Overlay Map OM11 – Natural Wetland and Waterway Areas. (Where no definable bank is present the setback is to be measured from the normal water level).</p>

All parties confirmed that the proposed deck intruded into the 30m setback, and therefore does not comply with the relevant acceptable solution. Where a development does not comply with an acceptable solution, reference is then made to the performance criteria. In this instance, the performance criteria is considered imprecise and requires interpretation.

The ambiguity of the performance criteria raises the question of what is an ‘appropriate’ setback to a water course, and what ‘protection’ means in this instance. The setback is intended to achieve two outcomes:

- protect water quality in the watercourse; and
- protect riparian vegetation associated with a watercourse.

The question then arises as to whether the reduced setback in this instance may worsen water quality or degrade riparian vegetation.

With respect to water quality, the assessment manager confirmed that roof water did not drain from the proposed deck or existing dwelling into the setback. The reduced setback does decrease the area in which natural filtration can occur before it enters the creek, however in the Committee’s opinion it would be of such negligible effect that it could not be considered to worsen water quality.

The vegetation lining the creek would not be considered to be native riparian vegetation. The area into which the deck is proposed to intrude is largely turfed and includes palm trees, although none will be removed.

The performance criteria do not advise whether ‘associated with’ means existing riparian vegetation or riparian vegetation normally associated with the healthy functioning of a watercourse.

As the performance criteria are generally unclear as to its precise intention, the Committee has referred to the purpose of the Rural Domain Place Code, which reads in part:

“This Place Code seeks to maintain and enhance the open landscape character, natural features ...”

This statement shows an intention to protect and improve natural features such as Currumbin Creek.

As the acceptable solution refers to Overlay Map OM11 – Natural Wetland Areas and Natural Waterways, the Committee has referred to the associated Constraint Code to seek clarity on the intention of the setback. It is noted that the Code is not applicable to the assessment process undertaken by assessment manager, and reference is made only to assist in the interpretation of the acceptable solution and performance criteria that apply under the Rural Domain Code. It is noted that were the deck to have been built as part of the original structure, it would have been subject to Code Assessment (due to the fact that the site contains two dwellings, as evident on site and shown on the site plan provided by the Applicant), and therefore to this Code.

The purpose of the Natural Wetland Areas and Natural Waterways Constraints Code (as associated with the Overlay Map OM11 referenced in the acceptable solution) includes:

- *“long term protection, enhancement and management of natural waterways and wetlands for their ecological, fishery, shore line and bank stabilisation, hydro-geological, open space, recreational, environmental, scientific and cultural value”*
- *“maintenance of effective and functional buffers between development and natural waterways and wetland areas to ensure that ecological and hydrological conditions can be continued and protected and natural processes can occur, without impacting on the residential amenity of those areas”*
- *“maintenance and creation, or enhancement, of viable linkages between wetlands and natural waterways, their associated ecosystems and other natural areas”*

Considering the planning scheme as a whole, the Committee has formed the opinion that the condition imposed by Council as a concurrence agency is reasonable and in accordance with performance criteria PC4 of the applicable Rural Domain Place Code under the Gold Coast Planning Scheme 2003, although some minor amendments are necessary to clarify the intention of the condition.

Hence, in accordance with the provisions of section 564 2(b) of the *Sustainable Planning Act 2009*, the Committee changes the decision of the assessment manager and the condition imposed by Council to provide greater clarity of the requirements of the condition.

Paul Smith
Building and Development Committee Referee
Date: 10 May 2010

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 Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248