



**Building and Development Tribunals**

**Queensland Government**

Department of **Local Government and Planning**

**APPEAL**

*Integrated Planning Act 1997*

**File No. 03-06-092**

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**BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Assessment Manager:** Miriam Vale Shire Council

**Site Address:** *Withheld* – “the subject site”

**Applicant:** *Withheld*

**Nature of Appeal**

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* against the decision of the Miriam Vale Shire Council to refuse an application for Material Change of Use – proposed shed - on land described as “*withheld*” and situated at “the subject site”.

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**Date and Place of Hearing:** Hearing was by way of written submissions only. Each party was invited to comment on submissions by the other party, with the responses due by Monday 13<sup>th</sup> November, 2006.

**Tribunal:** Mr Chris Schomburgk

**Submissions Received From:** “*Withheld*” – for the applicant  
Ms Natalie Katona – Miriam Vale Shire Council representative

**Decision:**

The Building and Development Tribunal does not have the jurisdiction to decide the appeal against the decision of the Miriam Vale Shire Council as contained in its written Decision Notice dated 25<sup>th</sup> September 2006, to refuse an application for relaxation of the boundary setback.

**Material Considered**

The material considered in arriving at this decision comprises:

- Building and Development Tribunal Appeal Notice – Form 10, supporting plans and documentation;
- The relevant provisions of the Town Planning Scheme for Miriam Vale Shire Council, including Policy 4.30;
- The Queensland Development Code (“QDC”);
- Council’s Decision Notice dated 25<sup>th</sup> September 2006; and

- The relevant provisions of the *Integrated Planning Act 1997*.
- Written submissions from the applicant and the Council.

### **Findings of Fact**

I make the following findings of fact:

- The site is located at “the subject site”, and contains an area of approximately 809m<sup>2</sup>. The site is zoned “Urban” under the Planning Scheme in force at the time of lodgment and at the time of the decision.
- The subject application sought a Development Permit for a Material Change of Use to allow a shed on the subject site. The application sought approval for a shed on the site, to be used for storage of a boat and gardening equipment. The shed is proposed to be located at the rear of the property, approximately 27m from the front boundary and 1.5m from the side boundary. The shed is proposed to be approximately 52.5m<sup>2</sup> in area and approximately 4.2m high at its highest point.
- A shed on an allotment with an area of 2 hectares or less where there is no dwelling house on the lot is an “incompatible use of premises” requiring impact assessment by virtue of section 2.3.4.3 of the Miriam Vale Shire Planning Scheme. That Scheme provides that a building such as proposed, where there is no house on the lot, represents a Material Change of Use of premises – an unusual approach in Planning Schemes in Queensland, where such buildings usually require only a Building Approval.
- The application was received by the Council on 24<sup>th</sup> March 2006, and was considered to be “properly made” as per the *Integrated Planning Act 1997* (“IPA”). The application required impact assessment and, when publicly notified, attracted no submissions.
- The Council adopted a Planning Scheme Policy on 18<sup>th</sup> April 2006 – Policy 4.30 “Structures on Rural Land Under 35ha and Temporary Homes Permits”. The Objectives of the Policy include, of relevance to this appeal, to:
  - ...
  - *Control structures on land without an approved dwelling to protect the amenity of localities and the health and safety of persons;*
  - *To determine appropriate criteria for permitting structures on land without a dwelling and to control the issuance of Temporary Homes Permits relating thereto;*
  - *To ensure that urban areas are not developed contrary to the high visual amenity objectives and expectations of these areas.*
- The Policy contains, of relevance, clause B5 which states that, for Structures on Vacant Land Without a Dwelling, such structures will be “*only permitted on land zoned Rural within the Town Planning Scheme*”. That is, the Policy purports to prohibit the building or use of structures on land zoned Urban unless there is a dwelling on the property. This Policy position is clearly in conflict with section 2.1.23(4) of IPA which sets out the only matters that a Planning Scheme Policy can address. Regulating the use of land is not one of those matters. Section 2.1.17A of IPA also provides that a Planning Scheme prevails over a Planning Scheme Policy.

- Notwithstanding the above, the application was lodged prior to the adoption and commencement of this Policy.
- The Council’s Decision Notice provides two grounds for the refusal, being:
  1. *The shed is not in accordance with Council’s Policy 4.30 in that the policy does not permit sheds on vacant land within the Urban zone; and*
  2. *Within a low density normal residential environment such as that proposed, sheds on vacant land are not visually appropriate and will detrimentally impact upon the character and amenity of the streetscape.*
- Section 4.2.7(2) of IPA provides that “an appeal to a Tribunal ... may only be about a matter under this Act that relates to the *Building Act 1975* or the *Plumbing and Drainage Act 2002*; or a matter prescribed under a regulation”. This appeal to the Tribunal relates to an application for Material Change of Use as per the Planning Scheme. Section 4.2.9 provides that an applicant for a development application may appeal to a tribunal against, inter alia, the refusal of a development application, however this must be read together with section 4.2.7(2) above.
- As such, it is the opinion of the Referee that this Tribunal does not have the power or jurisdiction to hear and decide this appeal. Accordingly, the appeal must be dismissed on this basis.
- However, given that the matter has been referred and that the material available is sufficient to consider the merits of the matter, I have provided this assessment, which may be of assistance to a higher Court should the matter be taken further.

Based on my assessment of the facts and the material considered, and with particular regard to the specific grounds of refusal identified by the Council, it is my opinion that, were it within the jurisdiction of the Tribunal to hear and determine the appeal, the appeal would have been allowed, subject to the following conditions:

- The shed is not to be used for any residential purpose and the use of the shed for residential purposes, including the installation of plumbing and similar domestic fittings, will be in breach of this approval unless prior separate Council approval has been obtained.
- The approval has a currency period of 12 months from the date this decision takes effect.
- The approval does not imply structural building approval, which may need to be required separately.

**Reasons for the Opinion**

- The Council has relied in part for its decision on Policy 4.30. That Policy did not apply at the time the application was lodged. While an assessment manager can give weight to instruments that came into effect after the lodgment of the application, for the reasons set out below, I am not inclined to give the Policy any weight.
- The Policy purports to regulate the use of land by effectively prohibiting the establishment of sheds on urban zoned land unless there is a dwelling house on the property. That is, in my opinion, an unlawful use of a Planning Scheme Policy, given the limits on what a Policy can do as set out in section 2.1.7 of IPA. To the extent of the conflict with these provisions of IPA, the Policy is, in my opinion, of no lawful effect. Council has erred in seeking to adopt a Policy that

purports to regulate the use of land.

- The proposed shed is to be set well back from the street (approximately 29m) and will have minimal, if any, negative visual impact on the streetscape of this locality.
- It is not unreasonable to allow a shed to be erected on an urban allotment in advance of the construction of a dwelling house, especially when the shed is intended to be used partly for the storage of materials related to the future construction of a house. Conditions can be imposed to ensure that the shed is not used as a temporary house until the dwelling is constructed and/or that dwelling house is constructed within a reasonable time frame.
- The shed is not to be for any residential purpose, and the use of the shed for residential purposes, including the installation of plumbing and similar domestic fittings would be in breach of the approval.

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**Chris Schomburgk**  
**Building and Development Tribunal General Referee**  
**Date: 28<sup>th</sup> November 2006**

## **Appeal Rights**

Section 4.1.37. of the *Integrated Planning Act 1997* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Local Government and Planning  
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