



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 22-004

Appellant: McNally Constructions Pty. Ltd.

**Respondent:
(Assessment Manager):** Southern Downs Regional Council

Site Address: 127 Gentle Road, Dalcouth described as Lot 1 on SP 317327 – the subject site

Appeal

Appeal under Section 229 and Schedule 1, Table 1, Item 2 of the Planning Act 2016 against the decision of the Assessment Manager to refuse a change application for the location of a secondary dwelling.

(For clarity, Council imposed a condition for a change in location of the proposed dwelling in the Development Permit applied for as a Material Change of Use (Decision Notice Approval TC/MCU/02294 dated 22 December 2021 Southern Downs Regional Council. Application Number MCU/02294 received on the 23 August 2021 by the Southern Downs Regional Council). The Appellant (applicant) has proposed an alternative location for the proposed dwelling different to that proposed in the original application and different from the location in the condition set out in Council's Decision Notice Approval).

Date and time of hearing: Wednesday 4 May 2022 at 1.30 pm

Place of hearing: The subject site

Tribunal: Derek Kemp – Chair
Henk Mulder – Member

Present: Ian McNally (Builder, Applicant and Appellant)
Janelle Harris (owner)
Reginald Harris (owner)
Tonya Collier (Planning Officer, Southern Downs Regional Council for the Respondent)
Scott Riley (Director Planning and Environmental Services, Southern Downs Regional Council for the Respondent)
Angela O'Mara (Manager, Planning and Development, Southern Downs Regional Council for the Respondent).

Decision:

1. The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the *Planning Act 2016* (Planning Act) confirms the recommended conditions set out in the report from Council's Development Assessment Coordinator prepared for Council's meeting on 9 February 2022 with the exception of the condition requiring the proposed second dwelling to be located where the Council proposed.
2. The Tribunal, in accordance with section 254 (2)(b) of the *Planning Act 2016* (Planning Act) changes the decision by conditioning the proposed second dwelling to be located as described below.

The proposed dwelling should be located where shown in red on the amended site location plan prepared by ReziCAD Design and Drafting Plan 2104807 Rev B page 04 of 14 dated 17/08/2021 referred to in the Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 15 December 2021. (For clarity this is the alternative location proposed by the applicant with the proposed dwelling having a minimum 22.5 metre set back from the southern property boundary and a minimum 25.633 metre set back from the eastern property boundary)

3. The Tribunal, in accordance with section 254(2)(b) of the *Planning Act 2016* (Planning Act) confirms an additional condition that a vegetative buffer be provided of a least 10 metres depth, generally in accordance with Council's Landscaping Code PO9, located as shown on the amended plan in the Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 15 December 2021. (For clarity the approximate location of the vegetated buffer is shown by a green line on the plan in Clause 8 of that report).
4. The Tribunal, in accordance with section 254(2)(b) of the *Planning Act 2016* (Planning Act) confirms an additional condition that the development provides for effluent disposal in a manner acceptable to Council.

Background:

The Proposal

5. The subject site is rectangular and relatively flat having an area of 14,000 square metres (1.4ha). The lot, located in the Rural Zone, has been developed for residential purposes with a small lightly constructed detached house with garage and associated improvements including two relatively small sheds, fencing and a water bore. Gentle Rd forms a part of the northern and western boundary, with significant remnant vegetation predominantly located to this north-western corner.
6. The proposal is for a second, more substantial, 4 bedroom detached dwelling under the dual occupancy provisions of the Southern Downs Regional Council Planning Scheme.

Previous Approvals

7. The original application was considered by Council at its meeting of the 24 November 2021, with a recommendation from Council's Development Assessment Coordinator that that application be approved. (Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 24 November 2021).
8. Council deferred consideration of this application at its meeting of 24 November 2021 (Council Minutes from its meeting of the 14 November 2021).

9. Council Development Assessment Coordinator prepared a further report to Council for Council's meeting on 15 December 2021.
10. This report to Council from the Council Development Assessment Coordinator states Council deferred its decision on this matter on the 24 November "... *to consider an alternative location for the new dwelling unit.*"
11. *Inter alia* this report to Council from the Council Development Assessment Coordinator for Council's meeting on 15 December 2021 advises that discussions were held with the applicant about a different Council proposed location for the dwelling near the road towards the north east corner of subject site. (Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 15 December 2021).
12. *Inter alia* this report advises Council that the applicant has advised that the alternative Council proposed location is not a preferred location and the applicant proposes an alternative location (shown on the site plan in that report) that would locate the proposed new dwelling with a minimum 22.5 metre set back from the southern property boundary and with a minimum 25.633 metre set back from the eastern property boundary. (Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 15 December 2021).
13. Council consideration this application at its meeting on 15 December 2021 when a motion was put that the application be approved by Council subject to conditions that included the location of the dwelling at the amended location proposed by the applicant. This motion was lost (3 Councillors '*for*', 5 Councillors '*against*'). This agenda item was then "... *deferred to allow officers to review conditions of approval*". (Council Minutes from its meeting of the 15 December 2021).
14. Council Development Assessment Coordinator prepared a further report to Council for Council's meeting on 9 February 2022.
15. *Inter alia* this report advises Council that the applicant has made representations for Council to reconsider the application for the proposed dwelling to be located at the applicant's amended preferred location with further representations indicating that the applicant is prepare to provide a 10 metre vegetated buffer (rather than the 5 metre wide buffer originally proposed) and ducted air-conditioning (which the applicant claims will "*also help dramatically reduce the risks of effects of risks from rural activities on adjoining land*"). (Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 9 February 2022).
16. *Inter alia* this report further advises the applicant's view that Council's proposed location for the new dwelling (towards the north west corner of the site) is not satisfactory to the client because (in summary) it is forcing the dwelling closer to a bush fire hazard and traffic and light issues from the adjacent road.
17. That report from Council's Development Assessment Coordinator prepared for Council's meeting on 9 February 2022 then includes conditions that (in summary) includes requirements for the proposed new dwelling to be located at the applicant's amended preferred location (that would locate the proposed new dwelling with a minimum 22.5 metre set back from the southern property boundary and with a minimum 25.633 metre set back from the eastern property boundary) and includes conditions requiring a 10 metre wide vegetation buffer and ducted air conditioning for the proposed dwelling.
18. At its meeting on the 9 February a resolution that Council approve these change representations (including *inter alia* the location of the proposed new dwelling, the increase width to 10 metres for the vegetated buffer and requirement for air-conditioning) *was lost* and the Council meeting was adjourned. Shortly after the Council meeting was reconvened and the resolution moved that Council *does not approve* the change representations. This motion '*not to approve the change representations*' was carried. (Council Minutes from its meeting of the 9 February 2022).

19. The result of these Council considerations and decisions was that (in summary) the Development Application for the Material Change of Use for the second (dual occupancy) dwelling was approved subject to that dwelling being located at the Council preferred location (towards the north west corner of the site). The development conditions including the negotiated 10 metre deep vegetation buffer and mechanical ventilation (air-conditioning) were not part of the Approval Notice issued by Council on the 12 December 2021 but have subsequently been agreed to by the applicant.
20. The only condition being appealed against by the applicant is Council's requirement for the second dwelling to be located at Council's preferred location (towards the north west corner of the site).
21. The applicant is agreeable to the other conditions set out in the Report from the Development Assessment Coordinator to the Ordinary Council Meeting for the Meeting Date of the 9 February 2022 (including the condition for the wider 10 metre wide vegetation buffer and the condition requiring air-conditioning). (See Appeal Lodgement documents, confirmed by the Development Tribunal at its Hearing on site on 4 May 2022).

Reasons for the Decision:

22. The Tribunal considers that rural activity is not a reasonable expectation for the subject site.
23. The Tribunal considered that rural activity on adjacent rural zoned land will be protected from conflict with other uses that are not rural uses (in this case the proposed additional residential use) by the provision of a 10 metre wide vegetation buffer that generally meets the design criteria contained in *PO9 of the Landscaping Code*, and the provision of ducted air-conditioning that can reduce the impact of odour, noise, drift-spray and dust, if any, from nearby rural activities.
24. The Tribunal noted that the possible locations for the proposed second dwelling are seriously constrained by the power lines and easement crossing the site immediately to the north of the applicant's proposed location for the second dwelling and the requirement and desirability for the proposed second dwelling to be adequately separated from the existing dwelling and existing sheds. (Refer to '*Map of Site Details Discussed at the Tribunal Hearing on 4 May 2022.*' Printed by Tanya Collier dated 27/04/2022 (sic)).
25. The Tribunal considered that the proposed Council preferred dwelling location (towards the north west corner of the site) will introduce an unacceptable bush fire and bush fire ember attack hazard for the proposed residence, having regard to the Council's Bush Fire Hazard planning overlay. The Council dwelling location is proposed within 20 metres of areas subject to bush fire hazard and the nearby trees observed at each side of Gentle Road and on and around the granite outcrop immediately adjacent to the subject property. (Refer to '*Map of Site Details Discussed at the Tribunal Hearing on 4 May 2022.*' Printed by Tanya Collier dated 27/04/2022 (sic)).
26. The Tribunal considered that the proposed Council preferred dwelling location (towards the north west corner of the site) is likely to adversely impact the residential amenity and rural living lifestyle enjoyed from the proposed dwelling due to the lights and noise from the traffic passing nearby (near to both the north and west side of the property boundary). The mitigation of these adverse impacts through design and landscaping may only serve to increase the bushfire hazard. (Refer to '*Map of Site Details Discussed at the Tribunal Hearing on 4 May 2022.*' Printed by Tanya Collier dated 27/04/2022 (sic)).
27. In making these determinations the Tribunal gave due consideration to the following:
 - The Intent and Additional Outcomes sought for the Code in the *Rural Zone*.
 - The *Granite Belt Precinct Outcomes*. (In particular Performance Outcome PO19).

- The subject site being in an *'Important Agricultural Area'* but not classified as Class A or Class B agricultural land. (As designated by the State Government in the State Planning Policy Map dated 5/05/2022).
- The Assessment Benchmarks in the *Rural Zone* for Assessable Development. (In particular Performance Outcomes PO1, PO2, PO5, PO6).
- The Assessment Benchmarks in the *Residential Uses Code* for Assessable Development. (In particular Performance Outcome PO9 and Acceptable Outcome AO9).

28. In regard to these Assessment Benchmarks the Tribunal formed the view that each of these Performance Outcomes will be satisfactorily met by the set back of the second dwelling from the property boundaries (being a minimum of 22.5 metre set back from the southern property boundary and a minimum 25.633 metre set back from the eastern property boundary); the provision of a 10 metre wide vegetation buffer where proposed along the property boundaries, and the condition requiring mechanical ventilation (air-conditioning) for the proposed second dwelling on the subject site.

Derek Craven Kemp

Development Tribunal Chair
Date: 10 May 2022

Appeal Rights

Schedule 1, Table 2, item 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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