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Confidential

5 September 2014

Our ref: TWD14004
Your ref: DA13/0678

The General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Attention: Lindsay McGavin

By email

Dear Sir,

DA13/0678, Unit 2, 1 Beatrice Court, Pottsville, Council ats Janice Sladen, Class 1 Appeal, LEC Proceedings No. 10357 of 2014

Report on Hearing

Proposal

- 1 This matter involved an appeal against a development application for the construction of an outbuilding on the above property (**DA**) which was refused consent by Council.
- 2 The Applicant in the proceedings clarified that the use of the proposed outbuilding was to house a boat and trailer and for general storage purposes.

Principal Issues

- 3 The Council's reasons for refusal were, in summary that the proposed development did not satisfy the requirements of the *Tweed Development Control Plan 2008 (DCP)* in respect of:
 - 3.1 deep soil planting,
 - 3.2 integration with the character of the locality and streetscape;
 - 3.3 acoustic privacy impacts on the neighbouring property to the north (2 Beatrice Court) due to the location of the outbuilding less than a metre from the main bedroom window; and
 - 3.4 consistency with the design of the existing dwelling and failure to reinforce the desired future character and streetscape.

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- 4 As the Council officers had recommended that consent be granted to the DA, it was necessary to brief a consultant town planner to give evidence at the hearing on behalf of Council.
- 5 Geoff Goodyer, a consultant town planner, was retained to review the DA, and after inspecting the site, and reviewing the relevant documents advised that he was unable to support a refusal of consent. A copy of Mr Goodyer's advice is **attached**.
- 6 Mr Chris Lonergan was then retained. He advised that he was able to support a refusal of consent based on streetscape and amenity issues, but could not support a refusal based on a breach of the deep soil landscaping provisions of the DCP, as in his opinion the DA complied with those provisions.
- 7 I was instructed to proceed to retain Mr Lonergan to give evidence and appear at the hearing on that basis.
- 8 As a result, the Statement of Facts and Contentions (**SOFAC**) was prepared by Mr Lonergan, and raised the following contentions:
- 8.1 Non compliance with the DCP as a result of impacts on the amenity of the existing dwelling on the property and the neighbouring dwelling, being, obstruction of solar access to the main bedroom of the existing dwelling, and noise impacts on 2 Beatrice Court; and
- 8.2 Non compliance with the DCP due to the development failing to reinforce the desired future character and streetscape, and not being of an appropriate scale and compatible with the existing dwelling.

The Conciliation Conference and Hearing

- 9 Section 34AA of the *Land & Environment Court Act 1979* applied to the appeal and required that the matter be listed for a compulsory conciliation conference prior to the hearing.
- 10 The matter was listed before Commissioner Hussey on 28 and 29 August 2014, to commence on site with a site inspection to be followed by the conference and then, in the absence of resolution at the conference, a hearing.
- 11 I was instructed that no Council officer had delegation to agree to any resolution of the matter at the conference, given that the determination was one of full Council.
- 12 I explained that position to the Commissioner, however, the Commissioner indicated that he would proceed with the conference.

The site inspection

- 13 The matter commenced on site.
- 14 The Applicant was represented by her agent, Peter Sladen, and the Applicant's consultant town planner Adam Smith attended.
- 15 I represented Council. Lindsay McGavin and Seth Philbrook were in attendance, as was Chris Lonergan, consultant town planner.
- 16 Two resident objectors attended, Ms Joanne Robson of 2 Beatrice Court, and Ms Laura Tribble of 3 Beatrice Court.
- 17 The matter commenced with the resident objectors giving evidence of their concerns.
- 18 The main points that Ms Robson raised were, in summary:
- 18.1 The impact of the outbuilding on the outlook from her front bedroom window;
- 18.2 The impact of the outbuilding on acoustic privacy resulting from the proximity of the outbuilding to the side bedroom window;

- 18.3 The impact on the current openness of the streetscape and on her home in particular given the setback of her home; and
- 18.4 The potential for the gutters of the outbuilding to become clogged and cause overflow of water onto her property given the proximity of the outbuilding to her boundary.
- 19 Ms Tribble's main concerns were the impacts on traffic and parking in Beatrice Court, including the difficulty of manoeuvring a boat and trailer into the outbuilding, and the impacts on streetscape.
- 20 After the Commissioner had heard the objectors' concerns and viewed the site, including from Ms Robson's home, the conciliation conference commenced.

The conciliation conference

- 21 As the conciliation conference is a conciliation between the parties to the hearing, the objectors were not permitted to attend. I had advised the objectors in advance that they could not attend the conference to avoid any expectation that they would be involved.
- 22 During the conciliation conference, the Commissioner questioned Mr Lonergan extensively regarding his concerns with the proposed application.
- 23 Initially the Commissioner took Mr Lonergan through the numeric controls of the DCP and Mr Lonergan agreed that the outbuilding complied with the numeric controls.
- 24 I pointed out to the Commissioner that the setback from 2 Beatrice Court was compliant on the basis that all planners had assumed that that boundary was the rear boundary, although this was complicated by the fact that the subject property is a corner block, and the boundary between the subject property and 2 Beatrice Court is the side boundary for 2 Beatrice Court. If that boundary were taken as a side boundary, the outbuilding's setback would not be compliant with the DCP.
- 25 Mr Lonergan maintained that the concerns with the development were qualitative and reiterated his concerns regarding the look of the development, the view from 2 Beatrice Court being constrained by the outbuilding, the noise impacts and a concern regarding traffic safety if a boat and trailer is manoeuvred into the outbuilding.
- 26 In respect of Ms Robson's concerns regarding the guttering, the Commissioner suggested some gutter guarding and Mr Lonergan accepted that that would resolve that issue.
- 27 There was a lengthy discussion between the planners and Commissioner regarding the impacts of the development on the streetscape.
- 28 Council's argument in this respect was somewhat hindered by the relatively recent erection of a 1.8m high fence along the rear boundary of the subject property. I was instructed that the fence was erected lawfully.
- 29 The Commissioner indicated his view that the fence formed part of the existing streetscape, and that therefore the acceptability of the outbuilding had to be considered in that context.
- 30 Chris Lonergan's evidence was that the key streetscape concern arose from the height of the eaves of the outbuilding. This is reflected in the SOFAC, and his written evidence.
- 31 Chris Lonergan indicated that if the eaves were lowered by 450mm the streetscape impact of the outbuilding would be acceptable, although not necessarily ideal.
- 32 After an adjournment, the Applicant's agent indicated that the Applicant would agree to reduce the height of the eaves by 450mm.

33 The conciliation conference was then terminated and the matter proceeded to hearing.

The hearing

34 The parties agreed that the evidence given by the planners during the conference would be taken to be the evidence in the hearing.

35 I took the Commissioner through the relevant planning controls, including clause 8 of the *Tweed Local Environmental Plan 2000 (TLEP)* which requires the consent authority to refuse consent if the primary objective of the relevant zone is not met, or the development would have unacceptable cumulative impacts. I also referred to some caselaw which dictated how the assessment of amenity impacts should be considered, including the relevance of the 'reasonableness' of the development.

36 In this respect I submitted that this was a second outbuilding (there already being a garage on the site). Also, in terms of amenity, the Applicant's position was that the rear garage door to the proposed building was for the convenience of being able to take a trailer through to the rear yard. I submitted that convenience should be outweighed by the need to protect the adjoining property from the impacts of noise generated in the outbuilding.

37 There were some submissions from the Applicant's agent to the effect that the impacts would be typical of a residential area and that there was increased sensitivity because the neighbour is a shift worker.

38 In response, I submitted that the layout of the site (being on a corner block), brought the outbuilding into closer proximity to the main bedroom window of the adjoining neighbor than would usually be expected and that the fact that the outbuilding was the second outbuilding on the site and would not be used for a garage, would increase the likelihood of it being used for other potentially disruptive uses, as opposed to the first outbuilding which would be expected to be used to house a vehicle. Furthermore, there is a large range of people who might be disturbed by daytime noise, not just shiftworkers, such as young children, elderly people, and students.

39 The Commissioner reserved his judgment.

The judgment

40 At the outset of his judgment, the Commissioner noted that the Applicant had agreed to amend the proposal by reducing the height of the eaves by 450mm and reducing the height of the front garage door.

41 He noted that Chris Lonergan had agreed that:

41.1 The traffic impact would be within acceptable limits; and

41.2 The reduction in the roof height would make the streetscape impact acceptable subject to the colour matching the existing dwelling and being of earthtones.

42 The Commissioner noted that Mr Lonergan remained dissatisfied with the rear door of the proposed outbuilding as it was not necessary, and had the potential to cause noise impacts.

43 The Commissioner concluded:

43.1 The reduction in height and the subdued colour of the proposed outbuilding should result in acceptable streetspace impacts, particularly as it will be screened and framed by other buildings. The impact is not unreasonable;

- 43.2 The amended proposal does not significantly impact on outlook from the front bedroom window of 2 Beatrice Court;
- 43.3 In respect of noise from uses in the outbuilding and the opening of the rear door the Commissioner noted the intent of the Applicant was to enable a trailer to access the rear yard and dispose of refuse and other clippings. The Commissioner considered the reduction in width of that rear door to 1.8m would overcome the concern;
- 43.4 He was satisfied that many dwellings with outbuildings were present in the area, and that it was reasonable that an outbuilding be conditionally approved on this site;
- 43.5 The DA did not warrant refusal based on speculation about the noise nuisance. If the residents were good neighbours then there should not be an issue;
- 43.6 The amended DA warranted conditional consent.
- 44 The Court's orders are **attached**.
- 45 Please let me know if you require any further advice.

Yours Sincerely,



Megan Hawley

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