

SPECIAL COUNCIL MEETING

COUNCIL MINUTES

Monday 28 November 2016

Council Chambers



John Brown
General Manager
Break O'Day Council
28 November 2016

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SCM11/16.1.0 ATTENDANCE

SCM11/16.1.1 Present

Mayor Mick Tucker
Deputy Mayor John McGiveron
Councillor Margaret Osborne OAM
Councillor Barry LeFevre
Councillor Glenn McGuinness
Councillor Hannah Rubenach-Quinn
Councillor John Tucker
Councillor Kylie Wright
Councillor Janet Drummond

SCM11/16.1.2 Apologies

Nil

SCM11/16.1.3 Leave of Absence

Nil

SCM11/16.1.4 Staff in Attendance

General Manager, John Brown
Executive Assistant, Angela Matthews
Planning Coordinator, Paula Kloosterman
Planning Consultant, Rebecca Green
Building Services Coordinator, Jake Ihnen
Manager Community Services, Chris Hughes

SCM11/16.2.0 PUBLIC QUESTION TIME

Three (3) people in the gallery.

In accordance with Section 31(1) of the Local Government (Meeting Procedures) Regulations 2005 the following questions were submitted in writing prior to the Council Meeting.

Nil.

SCM11/16.3.0 DECLARATION OF PECUNIARY INTEREST OF A COUNCILLOR OR CLOSE ASSOCIATE

Section 48 or 55 of the Local Government Act 1993 requires that a Councillor or Officer who has an interest in any matter to be discussed at a Council Meeting that will be attended by the Councillor or Officer must disclose the nature of the interest in a written notice given to the General Manager before the meeting; or at the meeting before the matter is discussed.

A Councillor or Officer who makes a disclosure under Section 48 or 55 must not preside at the part of the meeting relating to the matter; or participate in; or be present during any discussion or decision making procedure relating to the matter, unless allowed by the Council.

Nil.

SCM11/16.4.0 PLANNING AUTHORITY

Pursuant to Section 25 of the Local Government (Meeting Procedures) Regulations 2015 the Mayor informed the Council that it was now acting as a Planning Authority under the Land Use Planning and Approvals Act 1993.

SCM11/16.4.1 DA061-2016 – Illegal Works – Rooftop Deck – 41 Honeymoon Point Road, The Gardens

| | |
|----------------|-------------|
| FILE REFERENCE | DA 061-2016 |
|----------------|-------------|

POTENTIAL MOTION:

After due consideration of the representation received and the relevant performance criteria pursuant to Section 57 of the *Land Use Planning & Approvals Act 1993* and the *Break O' Day Council Interim Planning Scheme 2013* that the application for **Legalisation of Rooftop Deck and Stairs** on land situated at **41 Honeymoon Point Road, The Gardens** described in Certificate of Title CT 105273/2 be **REFUSED**, on the following grounds:

1. The proposal is inconsistent with Clause 14.4.1 P3 due to the visual impact of the rooftop deck when viewed from the road.
2. The proposal is inconsistent with Clause 14.4.1 P4 due to the impact of the proposal on the amenity and privacy of habitable room windows and private open space of adjoining dwellings as the proposal does not provide separation that is consistent with the character of the surrounding area.

OFFICER'S RECOMMENDATION:

After due consideration of the representation received pursuant to Section 57 of the *Land Use Planning & Approvals Act 1993* and the *Break O'Day Council Interim Planning Scheme 2013* that the application for **Legalisation of Rooftop Deck and Stairs** on land situated at **41 Honeymoon Point Road, The Gardens** described in Certificate of Title CT 105273/2 be **APPROVED** subject to the following conditions:

1. Development must accord with the Development Application DA 061-2016 received by Council 1 September 2016, together with all submitted documentation received and forming part of the development application, except as varied by conditions of this Planning Permit.
2. All runoff from the proposed development must be collected and contained within the confines of the property by means that will not result in soil erosion or other stormwater nuisance. Absorption drains must be of sufficient size to absorb stormwater runoff.
3. The proponent must install along the full length of the southern side of the deck and the southern side of the top flight of stairs a privacy screen to a minimum height of 1.8m with a uniform transparency of maximum 25% within three (3) months of the date of approval.
4. All building wastes are to be removed to the appropriate waste disposal facility to prevent an environmental nuisance being caused outside of the works site.
5. Any damage that may occur to any Council infrastructure during the construction of the proposed development must be reinstated to the satisfaction of Council and at the cost of the developer.

ADVICE

- All underground infrastructure including all forms of water, storm water, power, gas and telecommunication systems must be located prior to the commencement of any on-site excavation and/or construction works. Any works to be undertaken within two (2) metres of any Council owned infrastructure must be done in consultation with Council's Works Manager.
- The introduction of non-native plant species and plant species not of local provenance should be avoided and environmental weeds regularly monitored and targeted for removal.
- Activities associated with construction works are not to be performed outside the permissible time frame listed:

Monday-Friday 7am to 6pm

Saturday 9am to 6pm

Sunday and public holidays 10am to 6pm

INTRODUCTION:

Application is made for the legalisation of a rooftop deck and stairs at 41 Honeymoon Point Road, The Gardens. Residential use in the Environmental Living Zone is a permitted use with qualifications – if for a single dwelling, under Table 14.2 of the *Break O’Day Interim Planning Scheme 2013*.



Existing access and driveway



Subject site



Subject site

DISCUSSION:

Prior to any motion being moved or discussion taking place the General Manager advised that following the decision at the Council meeting on 21 November 2016 that he became concerned that an incomplete planning process may exist due to the nature of the decision. To ensure Council was not exposed to a flawed approach on this matter Council's solicitor was briefed and legal advice was sought. The General Manager read out the following legal advice provided by Simmons Wolfhagen:

"I am of the opinion a decision by the Council to refuse the DA is required. That decision can only be achieved (unless under a delegation to a single officer) by a vote on a motion to refuse. It is usual and proper practice that the motion to refuse set out the grounds for refusal.

The Council must actually make a decision to either grant a permit subject to conditions or to make a decision refusing it.

A lost motion to approve pursuant to the recommendations of Council officers merely constitutes a lost motion but does not in my opinion constitute a decision to actually refuse a permit. Something more is required from the Council acting as the Planning Authority in order to satisfy the requirements to be found in Part 4 of the Act. That positive obligation requires the Council to proceed to put on a motion for a decision to refuse if a motion to approve has been lost. It is effectively a two stage process for the Planning Authority in these circumstances. It is not uncommon. If a motion to approve is lost then the Council must proceed to determine the application by putting on a motion to refuse. If that motion is not put on and passed, the Council has neither approved nor refused the DA – it has made no decision or determination as required by the Act.

Section 59 of the Act allows an applicant to make application to the Tribunal to issue a permit where the Council has not made a decision in time. An applicant under this section has his costs (including all his experts) paid by the Council in any event and whether or not the Tribunal agrees to issue a permit. These costs, in my experience, can be expensive indeed.

Secondly, there are cost ramifications for a Council that does not set out reasons for refusal for a DA. A Council which does not agree with a recommendation for approval should set out reasons for that disagreement and refer to the scheme provisions when doing so. Proper process requires those reasons be encapsulated in a motion to refuse. An appeal from a refusal to the Tribunal always proceeds by reference to the Council grounds of refusal. The Council is exposed to a risk that, if the appeal succeeds, the Council will pay the successful appellants costs of the appeal where it did not state or justify its reasons for refusal."

Discussion following the moving of the motion for refusal:

- Clr Rubenach-Quinn stated her reasons as the same as the meeting on the 21 November 2016 as follows:

I voted against this based on the performance criteria 14.4.1, P4 a) i) as I believe it has not been adequately demonstrated that the privacy of the neighbouring house (43 Honeymoon Pt Rd) would not be unduly impacted by this development. The reasons being that the

acceptable solution (10 meters set back from the boundary for each dwelling equates to a minimum 20 meters separation) was not met, and as such the performance criteria was relied upon, with the 'justification' that a total of 16 meters horizontal separation with a screen was adequate. I do not believe there was enough evidence presented that the performance criteria was addressed - the photographs tend to indicate otherwise. Additionally, I do not believe the requirement for a screen with maximum transparency of 25% helps in any way to address the privacy issues, as a person could be standing right beside the bamboo screen, and peering through the gaps, gaining in effect a 100% view of the neighbours. The bamboo screen only offers effective privacy for the proponents, not for the representors.

- Cllr Drummond stated her reasons as the same as the meeting on the 21 November 2016 as follows:

I voted against the Officer's Recommendation in regard to this matter based on the following performance criteria:

14.4 Development Standards

14.4.1 Building Design and Siting

A1 I believe the stairs should be considered as site coverage, due to the nature of their construction and the proximity to the neighbouring property. There is a question when the stairs are included in the footprint, if the Acceptable Solution/Performance Criteria of less than 20% of the site being used for development has been met, this was not addressed as the stairs were not deemed to be site coverage.

A3 The deck is constructed within the footprint of the existing dwelling and has not reduced the existing setback. It is located approximately 7m from the frontage, however, it is in an elevated position and can be viewed from the nearest public space, which is a tourist road.

Acceptable Solution/Performance Criteria P 3 a) The prevailing setbacks of existing buildings on nearby lots and pattern of development of the surrounding area is not met, due to the bulk of the building and the difference in setbacks to surrounding properties, the illegal deck increases the overall bulk and the silhouette of the entire building.

Acceptable Solution/Performance Criteria P 3 b) The visual impact of the building when viewed from the road. I consider this criterion is not met, as when viewed from the road, the illegal deck has altered the appearance of the building and the roofline. This is a tourist road and as such any built structure needs to be minimal with regard to visual impact.

A4 Buildings must be set back to a minimum of:
(a) 10m to the side and rear boundaries.

P4 Buildings must be set back adequately to protect:

- (a) the amenity of adjoining dwellings by providing separation that is consistent with the character of the surrounding area having regard to:
 - (i) the impact on the amenity and privacy of habitable room windows and private open space; and
 - (iii) the locations of existing buildings and private open space areas.

The Proposed solution by the Planning Officer states “The deck is separated from the adjoining dwelling at 43 Honeymoon Point Road by a physical separation of at least 16 metres.” This does not equate to the requisite 20m horizontal separations, when taking into consideration the 10m set back from each side of the boundary. The photographs provided in the submission from the representor do not seem to support the 16 metre separation and not enough alternate evidence was provided to support that the criteria was being met. It is also irrelevant that “It is unlikely that the private open space will be utilised the majority of the time in front (north side) of the bedroom windows due to this area not being accessible from a habitable room (other than a bedroom), this is a bordering private open space and this should be taken into direct consideration as required by the performance criteria.

A prior ruling on this development gave discretion to consider residential amenity such as the ones raised, I believe, in this matter **L & W Geale v Break O'Day Council and R Harvey [2002] TASRMPAT 200 (10 October 2002)** “8. While there was no specific provision of the Planning Scheme relating to provision for general amenity, it was however conceded on behalf of the respondents, and the Tribunal accepts, that in the exercise of the discretion to approve or refuse a proposed development, it may take account of factors of residential amenity such as the ones raised by the present appeal.”

I am unconvinced that the amenity and privacy of habitable room windows and private open space of the representors will not be significantly impacted upon by this rooftop deck.

The further issue here is the screening materials of 25% transparency, this to me is not an adequate level of screening to secure the amenity and privacy of habitable room windows and private open space of the representors. It may well offer privacy only to the proponents of the illegal development but not the representors.

- Clr J Tucker sought a point of clarification as to whether Honeymoon Point Road is listed as a “tourist road”. The General Manager advised that it is not listed as far as we are aware of and the Planning Consultant confirmed that it is not listed as a “tourist road”.
- Mayor Tucker asked Clr Rubenach-Quinn whether she had any further closing comments. Clr Rubenach-Quinn responded that she had spoken adequately on this.

Discussion following the moving of the motion for approval:

- Clr McGiveron stated that he had been over the report thoroughly and the Officer’s Recommendation addressed issues adequately and all of the representations had been addressed.

COUNCIL DECISION:

SCM11/16.4.1.265

Moved: Clr H Rubenach-Quinn / Seconded: Clr J Drummond

After due consideration of the representation received and the relevant performance criteria pursuant to Section 57 of the *Land Use Planning & Approvals Act 1993* and the *Break O'Day Council Interim Planning Scheme 2013* that the application for **Legalisation of Rooftop Deck and Stairs** on land situated at **41 Honeymoon Point Road, The Gardens** described in Certificate of Title CT 105273/2 be **REFUSED**, on the following grounds:

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FOR Clr H Rubenach-Quinn, Clr J Drummond, Clr K Wright

AGAINST Clr J McGiveron, Clr J Tucker, Clr M Osborne, Clr G McGuinness, Clr B LeFevre, Clr M Tucker

LOST

SCM11/16.4.1.266

Moved: Clr J Tucker / Seconded: Clr J McGiveron

After due consideration of the representation received pursuant to Section 57 of the *Land Use Planning & Approvals Act 1993* and the *Break O'Day Council Interim Planning Scheme 2013* that the application for **Legalisation of Rooftop Deck and Stairs** on land situated at **41 Honeymoon Point Road, The Gardens** described in Certificate of Title CT 105273/2 be **APPROVED** subject to the following conditions:

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FOR Clr J McGiveron, Clr J Tucker, Clr M Osborne, Clr G McGuinness, Clr B LeFevre, Clr M Tucker
AGAINST Clr H Rubenach-Quinn, Clr J Drummond, Clr K Wright
CARRIED

The Mayor advised the Council that it had now concluded its meeting as a Planning Authority under Section 25 of the Local Government (Meeting Procedures) Regulations.

Mayor Tucker thanked everyone for their attendance and declared the meeting closed at 5.45pm.

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MAYOR

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DATE