Building and Development
Dispute Resolution Committees — Decision

Sustainable Planning Act 2009

Appeal Number:	**70 - 2011**
Applicant:	G Developments Pty Ltd
Assessment Manager:	Coastal Building Approval Service
Concurrence Agency: (if applicable)	Mackay Regional Council (Council)
Site Address:	31 Village Circuit, Eimeo and described as Lot 10 on SP201826 – the subject site

Declaration

Declaration under Section 510 of the *Sustainable Planning Act 2009* (SPA) about whether the Development Application (DA) made to Coastal Building Approval Service is properly made. Council advised by letter on 12 August 2011 that the application was not properly made.

Date of hearing:	Monday 26 September 2011 at 1.00pm	
Place of hearing:	Building Codes Queensland, meeting room 5B, level 5, 63 George St Brisbane	
Committee:	Natalie Rayment Jennifer Hutcheon	– Chair – General Referee
Present:	Michael Paten John Caldwell	– G Developments Pty Ltd (Applicant) – Mackay Regional Council (via teleconference)

Decision:

The Committee, in accordance with section 566 of the SPA, makes the declaration that the application made to Coastal Building Approval Service is not properly made.

Background

The DA was for a new house on vacant land, requiring a siting variation.

The Concurrence Agency advised, by letter of 12 August 2011, that the application was not properly made as the proposal '*is triggered as a Material Change of Use – Code Assessable Development application*' requiring "*assessment against the Development on Steep land Overlay Code for the proposed Dwelling House*', and the associated mandatory supporting information.

Having received the advice that the application was not properly made, the Applicant made an application for declaration about whether the application was properly made.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for Appeal / Declaration', grounds for declaration and correspondence accompanying the declaration lodged with the Registrar on 23 August 2011.
2. Drawings submitted with the application for declaration, including Site Plan.
3. Report prepared by Dillon Folker Stephens for G Developments Pty Ltd, dated August 2011, supporting the application for declaration.
4. Council submission in response to the issues under appeal dated 23 September 2011.
5. Verbal submissions from those in attendance at the hearing.
6. Additional supporting information (including survey and long section) provided by the applicant by email on 27 September 2011, as requested at the hearing.
7. Council response to additional information provided, received by email of 30 September 2011;
8. The SPA.
9. The Sustainable Planning Regulation 2009 (SPA Regulation);
10. The SPA Explanatory Notes*;*
11. The *Building Act 1975* (Building Act); and
12. The Consolidated Mackay City Planning Scheme (the Planning Scheme), including the Scheme Maps, Part 5 Mackay Frame Locality and Part 8 Overlay Codes, Division 10 Assessment Tables for the Development on Steep Land Overlay Code, and other relevant provisions.

Findings of Fact

The Committee makes the following findings of fact:

1. The subject site is a 451m^2 lot within a recently subdivided residential estate.
2. The subject site is located within the Mackay Frame Locality, Urban Residential Zone, under the Planning Scheme.
3. The subject site is mapped under the Planning Scheme within the Steep Land Overlay. '*Steep Land'*, for the purpose of this Overlay, is defined in Part 8, Division 11, section 8.35 of the Planning Scheme as "*land with slopes of 15% or greater*". Recent survey information provided by the Applicant confirms that the site has a slope of 15% or greater. The applicability of the Steep Land Overlay mapping is no longer in dispute.
4. The proposed development involves a Material Change of Use (MCU) (the start of a new use on the premises, as defined in section 10 of SPA) for a Dwelling House, which is a defined use in Schedule 1 "*Dictionary*" of the Planning Scheme.
5. The requirement for assessment against the Planning Scheme is triggered under both the Zone and Overlay Assessment Tables, as stated in Part 1.11 of the Planning Scheme. Part 1.11 (3) of the Planning Scheme states that "*if development is identified as having a different assessment category under a zone than under an overlay, or under different overlays, the higher assessment category applies*".
6. A Dwelling House is a code assessable land use in the Urban Residential Zone under Division 3, Table 5.1 "*Assessment Categories and Relevant Assessment Criteria for Making a Material Change of Use*" – Mackay Frame Locality, where it does **not** comply with the Acceptable Solutions of the Applicable Code. The relevant assessment criteria applicable to code assessment is listed in the final row of the Table as the Mackay Frame Locality Code, the Dwelling House Code and the Environment and Infrastructure Code.
7. While there is agreement that the proposed Dwelling House does not comply with the Acceptable Solutions of the Dwelling House Code in relation to building setbacks; Mackay Regional Council accepted that if the Steep Land Overlay was not applicable to the subject site, then the building application would only trigger Council as a referral agency to the building application in regard to the setback variation sought.
8. A Dwelling House is, however, also code assessable under Part 8, Division 10 "*Assessment Table for Material Change of Use in the Steep Land Overlay*", Table 8-9, Row 1, which makes "*all*" uses,

"*except…*" those listed in the row, Code Assessable. None of the uses listed as exceptions in Row 1 apply to this development proposal. Row 2 increases the level of assessment from code to impact assessment for industrial uses, which is not applicable in the circumstances. Row 3 applies to all other uses (i.e. those specifically excluded from Row 1), clarifying that they are exempt.

9. The application lodged to the Assessment Manager, the subject of this declaration application, was for building work only and no application has yet been made for the MCU for the Dwelling House.

Reasons for the Decision

Section 265 of the SPA is relevant, which states:

"Approved material change of use required for particular developments

(1) This section applies if, at the time an application for a development permit is made—
(a) a structure or works, the subject of the application, may not be used unless a development permit exists for the material change of use of premises for which the structure is, or works are, proposed; and
(b) there is no development permit for the change of use; and
(c) approval for the material change of use has not been applied for in the application or a separate application.
*(2) The application is **taken also to be** for the change of use".*

As the proposed development of a Dwelling House on the subject site also requires a Development Permit for the MCU for the development to proceed, for the reasons set out in the Findings of Fact above, and a separate application for MCU has not been made, the application must therefore be **taken also to be** for the MCU.

By **taking** the application also to be for a MCU, the development application becomes an application for both MCU and building work.

The application, when taken to include the MCU, does not meet the requirements of section 260 of SPA in relation to making a properly made application. The deficient matters are listed in Council's letter of 12 August 2011, including the omission of the relevant form for a MCU and the mandatory supporting information required to accompany a development application for MCU. This was not disputed.

However, there is dispute about whether Mackay Regional Council had the authority, as Concurrence Agency, to issue a Not Properly Made Notice under section 266 of SPA.

It is relevant that section 266 is about the Assessment Manager issuing a Not Properly Made Notice i.e. not a referral agency. However, the specific circumstances of this application are complicated, as the building certifier who received the original application (Coastal Building Approval Service) is no longer the Assessment Manager for the application when including the MCU component.

Instead, Schedule 6 of the SPA Regulation "*Assessment Manager for Development Applications*" nominates the Council as the Assessment Manager for an application involving a MCU assessable against the planning scheme, stating that if "*any aspect of the development is assessable against the planning scheme*", the Assessment Manager is the Local Government.

SPA and the Explanatory Notes for section 265 of SPA do not include a procedure for **taking** an application for an MCU (i.e. what action, if any, is required to be taken to continue the assessment of the application). Nevertheless, in the circumstances where the Assessment Manager changes as a result, it seems reasonable to accept that Council, after receiving the referral of the application, has by default received the Development Application as Assessment Manager.

If, in the alternate, the application remained with the Coastal Building Approval as the private certifier, the application would also not be properly made as it has not been made to the (correct) Assessment Manager nominated in the SPA Regulation. If Coastal Building Approval Service is not the Assessment

Manager for the application, then it would follow that they would also not have the authority to issue a Not Properly Made Notice as the Assessment Manager, although of course it would be practical for them to do so.

Also, if the contrary view were taken that the Not Properly Made Notice issued by Council had no effect, then the declaration proceedings could not yet commence under section 510(2) of SPA, which requires that an application for declaration made by an Applicant about whether a Development Application is properly made must be brought "*within 20 business days after receiving notice under section 266 that the application is not a properly made application*".

In determining this application for declaration, the Committee believes that the Not Properly Made Notice issued by Council, with reference to section 266 of SPA, has been issued correctly as the application has not been properly made under section 261(a) of SPA, on the basis that the application has not been made in compliance with section 260(1) and (3) of SPA.

As a result, the application is taken to be for the MCU, with Council as Assessment Manager. Alternatively, the application could be held by the private certifier under section 83(3) of the Building Act, until such time as the application for MCU has been determined. Section 83 of the Building Act

"*General restrictions on granting building development approva*l" states:

> "(1) *The private certifier must not grant the building development approval applied for—*
>
> *(a) if the building development application includes development other than building work—until, under the Planning Act, all necessary development permits and SPA compliance permits are effective for the other development*".

Subsection (3) states that "*If the private certifier receives the application before all other assessments for permits and approvals mentioned in subsection (1) are completed, for timings under IDAS, the application is taken not to have been received until the day all other assessments under IDAS have been completed*".

The application would then be taken not to have yet been received by the private certifier until the day all other assessments under IDAS have been completed i.e. the determination of the MCU for the dwelling house by Council as Assessment Manager.

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Natalie Rayment
Building and Development Committee Chair
Date: 24 October 2011

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