



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

**Appeal Number:** 3—09—080

**Applicant/Appellant:** Lincoln and Val Doggrell

**Assessment  
Manager/Respondent:** Darryl O'Brien for and on behalf of Certcon Pty Ltd

**Concurrence  
Agency/Co-respondent:** Bundaberg Regional Council  
(if applicable)

**Site Address:** 544 Branyan Drive, Bundaberg and described as Lot 8 RP185022 — the subject site

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### **Appeal**

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager to refuse a building development application for construction of a dwelling.

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**Date of hearing:** 4 December 2009

**Place of hearing:** Bundaberg Regional Council, 190 Bourbong Street, Bundaberg

**Tribunal:** Ain Kuru - Chair

**Present:** Darryl O'Brien - Assessment Manager, Certcon Pty Ltd  
Brad Geaney - Concurrence Agency, Bundaberg Regional Council  
Lincoln Doggrell - Applicant  
Val Doggrell - Applicant  
Shane Schneider - Builder  
Cr Ross Sommerfeld – Planning & Development Chair, Bundaberg Regional Council  
Rebecca Hunt - Cadet Certifier Certcon Pty Ltd

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### **Decision:**

The Tribunal, in accordance with section 4.2.34 of the IPA **sets aside** the decision of the assessment manager to refuse the appeal, and **directs** the assessment manager to approve the development with relevant and reasonable conditions once the Bundaberg Regional Council has issued a permit for the on-site disposal of sewerage and evidence that Building Services Authority insurance and Portable Long Service levy payments have been made.

## **Background**

Darodo Pty Ltd requested a siting concession for a house on the subject site. The request was made under the referral agency provisions of the IPA and the *Integrated Planning Regulation 1998*, which lists the Council as a concurrence agency where the proposed house does not meet the acceptable solutions for siting. The relevant siting provisions are those prescribed under the Queensland Development Code MP1.2.

The application requested Council consider a reduced setback under P1 Performance Criteria to reduce the frontage setback from Branyan Drive from 6.0 metres, as provided by the acceptable solution, to 5.4 metres. This was due to the location of a large escarpment to the rear of the property, which places significant constraints on the available area of the site that can be practically built on, and on the grounds that the proposal satisfied the criteria under P1. The application was received by the Council on the 14 September 2009.

On 9 October 2009 the assessment manager issued a Decision Notice refusing the application on the grounds that Council, acting as concurrence agency had refused the application under section 3.3.16(4) of the IPA. Other reasons for refusal related to there being no approval for an on-site sewerage facility and evidence that Building Services Authority insurance or portable Long Service levy payments had been provided.

The applicants lodged a Notice of Appeal which was received by the Tribunal Registry on 21 October 2009. The reason for refusal was listed as a deemed refusal for a frontage setback relaxation by the Bundaberg Regional Council.

On 5 November 2009 the Council issued advice stating that it does not believe the application meets the Performance Criteria due to the bulk of the building and it not being consistent with the setback of neighbouring buildings. It's advice, Council also advised the applicant of appeal rights to the Building and Development Tribunals.

Further, at the Hearing on 4 December 2009 the Council advised that the application cannot be considered to be deemed as refused by Council as the application was not made with the assessment manager until 9 October, and that under section 3.3.2 of the IPA, it is not obliged to give a response before the application is made.

## **Material Considered**

The following material was considered in arriving at this decision:

- Letter from Daroda Pty Ltd to Bundaberg Regional Council dated 8 September 2009 requesting a siting relaxation with relevant plans enclosed;
- Letter from Bundaberg Regional Council to Daroda Pty Ltd dated 18 September 2009 acknowledging receipt of a concurrence agency response;
- Stability Assessment Report prepared by CM Testing Service and Paul Kibble Pty Ltd dated 27 June 2007;
- Undated notes and photographs submitted by the applicant;
- Development application for a dwelling (undated);
- Engagement Notice dated 9 October 2009;
- Decision Notice dated 9 October 2009 refusing the development application;
- Notice of Appeal dated 9 October 2009;
- Letter from applicants Val and Licoln Doggrell in support of the appeal enclosing photographs of other buildings built within the setback;
- Letter from Bundaberg Regional Council to Daroda Pty Ltd dated 5 November advising that the proposed siting relaxation is not approved;

- Report to Bundaberg Regional Council Planning and Development Committee recommending the siting relaxation application be refused;
- Tribunal hearing at Bundaberg Regional Council on 4 December 2009;
- Further information providing key dates and documents from the Bundaberg Regional Council on 4 December 2009;
- Further information providing key dates and documents provided from the assessment manager on 7 December 2009;
- The *Integrated Planning Act 1997*;
- The *Integrated Planning Regulation 1998*;
- The *Building Act 1975*; and
- The Queensland Development Code MP1.2.

## Findings of Fact

The Tribunal makes the following findings of fact:

- A geotechnical report provided by CM Testing Service and Paul Kibble Pty Ltd states that the proposed dwelling must be located at least 8 metres from the top of the escarpment to the rear of the property;
- The proposed dwelling is sited 8.05 metres from the escarpment and 5.4 metres from the Branyan Drive road frontage;
- A request for a siting relaxation was made by Daroda Pty Ltd on behalf of the Applicant pursuant to Schedule 2, Part 17 of the *Integrated Planning Regulation 1998*. This request was received by the Bundaberg Regional Council on 14 September 2009;
- The Council acknowledged this request and provided a concurrence agency response on 18 September 2009;
- A development application for construction of a dwelling was, according to Darryl O'Brien, lodged with the assessment manager on 9 October 2009 (the application not being date stamped);
- This request for a siting relaxation was made prior to the making of the development application with the assessment manager. Under section 3.3.2(2) the referral agency, that is Bundaberg Regional Council, is not obliged to give a referral agency response mentioned in subsection (1) before the application is made.
- Despite the above, the Council subsequently advised on 5 November 2009 that it does not give its concurrence to the application as it does not believe the proposal meets the Performance Criteria P1 of the Queensland Development Code MP1.2.
- Section 4.2.34 of the IPA provides that in deciding an appeal the tribunal may make the orders and directions it considers appropriate.

## Reasons for the Decision

It is argued by the Council that the Decision Notice issued by the assessment manager refusing the application on the grounds of a deemed refusal from the Council was invalid as the application had not in fact been referred to Council. However, this is contrary to the letter from Bundaberg Regional Council dated 18 September 2009 which acknowledges the request as a concurrence agency response, and its later decision of 5 November 2009 where it advises the applicant of appeal rights arising from its concurrence agency decision to the Building and Development Tribunals. The latter advice in my view is incorrect as there is no appeal in respect of concurrence agency advice under section 3.3.18.

The Tribunal is able to make orders and directions it considers appropriate. In this regard, the Tribunal finds that both the Council and assessment manager have not paid due regard to the assessment processes required by the IPA. However, the Tribunal does not believe it will serve the interests of any parties to uphold the decision on these grounds, as all the relevant information is at hand and the applicant would through no fault of their own be required to prepare a new application resulting in additional cost and further delays.

In respect of the whether or not the proposal meets Performance Criteria P1 of the Queensland Development Code (QDC), the Tribunal makes the following findings.

***The location of a building or structure facilitates an acceptable streetscape, appropriate for (a) the bulk of the building or structure:***

The Council is of the view that the bulk of the building will have an adverse impact on the streetscape. At the hearing, the Council elaborated that its concerns related to the low density character of the area and the exceptionally long frontage to the road. Other concerns included the roof height and site cover.

The assessment manager and applicant advised that the encroachment only involved the extent of the eave, as the wall itself was on the required setback line. In this respect, it was argued that the building would comply with the Acceptable Solutions of the QDC if the eave was removed from the building, with window hoods providing the required shading.

The Tribunal agrees that the area has an attractive low density character, however there are no specific provisions in the Planning Scheme designed to protect this character. This is a highly desirable riverfront location, and it is very probable that large homes will be built in this area to capitalise on this aspect. Therefore without any specific town planning provisions designed to protect the character of the area, the Council by default has agreed that development in this area can occur in accordance with the QDC.

In the Tribunal's view, the proposed dwelling does provide an acceptable streetscape under the QDC, and agrees with the applicant's view that the incursion of the eave into the setback would have no discernable impact on the streetscape. The tribunal also understands that the dwelling could be redesigned to meet the acceptable solutions of the QDC, but agrees with the applicant's view that the proposed dwelling can also be considered under the Performance Criteria. It also accepts the view that a larger and bulkier building meeting the Acceptable Solutions of the QDC could be built on the site, and with such a constrained site it would be tempting to build a bulkier two storey dwelling. In respect of Council's concerns in relation to the frontage, roof height and site cover, the proposed dwelling complies with the relevant provisions of the QDC, and the minor incursion of the eave into the boundary setback does not result in any discernable impact on the streetscape. It is also noted that the adjoining dwelling has a carport built close to the road boundary, and that there are several new and very large homes being built in the area, no doubt attributed to the special amenity provided by the river frontage.

In addition, the design of the building uses a range of lightweight materials and changing roofline that in the Tribunal's view facilitates an attractive streetscape.

***The location of a building or structure facilitates an acceptable streetscape, appropriate for (b) the road boundary setbacks of neighbouring buildings or structure.***

As above, the relaxation is minor and will facilitate an acceptable streetscape. While the area has a low density character, many dwellings in the area, including the dwelling on the adjoining property are built close to the six metre setback. It is also noted the adjoining property has an open carport built within the setback distance.

Appropriately landscaped and maintained, the dwelling will provide an acceptable streetscape in keeping with the area.

***The location of a building or structure facilitates an acceptable streetscape, appropriate for (c) the outlook and views of neighbouring residents.***

The location of the building will facilitate an acceptable residential streetscape appropriate for the outlook and views of neighbouring residents. Enforcing a strict 6 metre setback would not achieve any improvement for neighbouring residents. In fact, limiting the developable area of land in this location could easily result in the construction of much larger two storey dwellings.

***The location of a building or structure facilitates an acceptable streetscape, appropriate for (d) nuisance and safety to the public.***

The reduced setback will not impact further on nuisance and safety to the public.

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**Ain Kuru**  
**Building and Development Tribunal Chair**  
**Date: 24/12/2009**

## **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 Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**