



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number: 3—09—038

Applicant: Michael Michell (Hutchinson Builders)

Assessment Manager: Rod Smith on behalf of the Building Certifier Pty Ltd

Concurrence Agency: Sunshine Coast Regional Council
(if applicable)

Site Address: 1 Freedom Place, Sunrise Beach and described as Lot 4 RP 868300 — “the subject site”

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager to refuse a siting variation for the proposed alterations and additions at the subject site. The decision was based on a concurrence agency response from Sunshine Coast Regional Council (Council).

Date of hearing: Monday 25th May 2009 10.30am -11.15am

Place of hearing: 1 Freedom Place Sunrise Beach, the subject site

Tribunal: Robin King-Cullen - Chair
Phil Dance - Member

Present: Robin King-Cullen – Tribunal Chair
Phil Dance – Tribunal Member
Michael Sobey, representing the owner
Scott Sobey, KHA Development Managers
Don Grehan, representing Sunshine Coast Regional Council

Decision:

The Tribunal, in accordance with section 4.2.34 (b) **changes** the decision appealed against and directs the assessment manager to re-assess the application which refused the siting variation for an addition to the existing dwelling to be constructed with a zero setback from the outermost projection to the northern boundary of the subject site, incorporating the minimum setbacks contained in Schedule 1 of the Noosa Plan, for the following reasons:

- (a) the proposal does not achieve the Overall Outcomes (c) and (e) of the Detached House Code of the Noosa Plan;
- (b) the proposal does not achieve Specific Outcome O1, paragraphs (b) and (c) of Table 14-26 of the

Detached House Code of the Noosa Plan; and

(c) the proposal would be prejudicial to the amenity of the adjoining property to the north.

Background

The Proposal

The matter concerns the decision of Council to refuse a siting variation application to enable a single storey dwelling extension (media room) to be constructed with a zero setback from the outermost projection of the northern boundary of the subject site.

The subject site, having an area of 813 square metres, is located at the corner of Liberty Place and Freedom Place and contains a two storey dwelling. The subject site slopes slightly upwards towards the northern boundary and the existing dwelling is located approximately in the centre of the block on the north/south axis. The application proposes a ground story extension of approximately 62 square metres to accommodate a media room, bar and storage area. This extension is proposed to abut the northern boundary of the subject site and to extend to within 3.7 metres of the western boundary of the subject site. A single storey dwelling house is located adjacent to the northern boundary of the subject site.

In support of their application, the applicants state, among other things, that:

1. The only possible alternative siting available for the construction of the proposed media room would involve the removal of a large amount of vegetation.
2. The adjoining and nearby user of the land in question does not object to the proposal.
3. The media room is to be constructed of sound-proof materials so as not to affect the acoustic privacy of adjoining and nearby land uses.
4. There is no existing vegetation between the proposed building from adjoining uses apart from one cane palm which is intended to be relocated to another place on the owner's property.
5. No further landscaping of the site of the proposed media room is desired, necessary or planned by either the owner or the adjoining owner, whose property is situated directly behind the owner's property and is separated by a fence.
6. The side of the house on which the media room is proposed to be constructed will not affect the visual continuity and pattern of buildings and landscape elements within the street, or the visual privacy of adjoining and nearby land uses, because it will be hidden by the owner's fence which separates the owner's property from the adjoining owner's property.

Concurrence Agency Decision

The concurrence agency (Council) response to the application dated 9 March 2009 refused the application on the grounds that "Alternative siting is available which complies with Acceptable Solution S14.1 of the Building Works Code of the Noosa Plan and thus satisfies Specific Outcome O14(b)".

The basis of the above decision (in terms of the applicable Code and the relevant provisions of the applicable Code) was questioned in the applicant's appeal notice and was also discussed at the Tribunal hearing. Council's representative, Mr Grehan, agreed with Mr Scott Sobey's interpretation that the applicable Code under which the application should have been assessed was the Dwelling House Code, not the Building Works Code as referred to in the concurrency agency response. In addition, Mr Grehan agreed that the acceptable and probable Solutions (column 2) are not necessarily the only means by which the specific outcomes can be achieved. Other solutions can be adopted; however it is always necessary to achieve all relevant specific outcomes.

The Tribunal considered that the concurrence agency response dated 9 March 2009 was incorrect to the extent that it referred to the wrong Code and did not refer to the merits or otherwise of the alternative solution proposed by the applicant other than in terms of the acceptable and probable Solutions of the Code.

Material Considered

The material considered in arriving at this decision comprises:

1. Copy of the application dated 10 February 2009.
2. Copy of letter dated 9 March 2009 from Council to Mr Rod Smith (The Building Certifier Pty Ltd) stating that the application had been refused.
3. Form 10 – Building and Development Tribunals Appeal Notice against the decision of the Council refusing the granting of the siting variation and attachments.
4. Verbal submissions made by Mr Michael Sobey and Mr Scott Sobey (the owner's representatives).
5. Verbal submissions made by Mr Don Grehan of Council setting out reasons why the application was refused and why the appeal should not be upheld.
6. Copies of the Building Works Code and the Detached House Code contained in The Noosa Plan.
7. *The Building Act 1975*.
8. IPA.
9. The Building Code of Australia.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The relevant Code against which the proposal should have been assessed is the Detached House Code contained in The Noosa Plan.
2. The relevant provisions within the Detached House Code applicable to the appeal are contained in the Overall Outcomes and Table 14-26 – Setbacks.
3. The proposal does not comply with the provisions of S1.1 (Acceptable and Probable Solutions) of Table 14-26.
4. The proposal does not comply with provisions (b), and (c) of O1 (Specific Outcomes) of Table 14-26.

Reasons for the Decision

The Tribunal considered that the concurrence agency response dated 9 March 2009 was incorrect to the extent that it referred to the wrong Code and did not refer to the merits or otherwise of the alternative solution proposed by the applicant other than in terms of the acceptable solutions of the Code.

The parties to the appeal agreed that the relevant Code against which the proposal should have been assessed is the Detached House Code contained in The Noosa Plan.

Approval of the application would follow if the applicant could demonstrate compliance with all of the overall outcomes and specific outcome O1 contained in Table 14-26 of the Detached House Code.

The proposal does not comply with provision (b) of specific outcome O1 in that it will not preserve existing vegetation that will buffer the proposed building from adjoining uses.

The proposal does not comply with provision (c) of specific outcome O1 in that it does not allow for landscaping to be provided between buildings on the subject site. The Tribunal did not accept the owners' representatives argument that landscaping could be provided on the adjoining site if necessary on the basis that impacts of the proposed development should be managed on the subject site, not on the adjoining site.

The Tribunal considered that the proposal would be visually obtrusive to the adjoining property to the north and would be prejudicial to the amenity enjoyed at those premises.

Robin King-Cullen
Building and Development Tribunal Chair
Date: 23 June 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