



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	3—09—023
<b>Applicant:</b>	Jerry Altavilla
<b>Assessment Manager:</b>	Mark McKechnie for and on behalf of QPDB Pty Ltd
<b>Concurrence Agency:</b> (if applicable)	Toowoomba Regional Council ('Council')
<b>Site Address:</b>	Gatton-Clifton Road, Pilton and described as Lot 40 on RP29947 — the subject site

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### **Appeal**

Appeal under section 4.2.9 of the IPA against the decision of the assessment manager to refuse a development application for building works, namely construction of a class 1 dwelling.

The decision was based on the assessment manager reasonably believing the concurrence agency failed to respond within the prescribed timeframe for concurrence advice. Accordingly the assessment manager deemed the application to be refused.

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<b>Date of hearing:</b>	9.00am – Tuesday, 31 March 2009
<b>Place of hearing:</b>	Offices of the Department of Infrastructure and Planning, Brisbane
<b>Tribunal:</b>	Leo Blumkie – Chair Steve Adams – General Referee
<b>Present:</b>	Mr Neil Cahill – QPDB Pty Ltd Mr Mark McKechnie – Assessment Manager, QPDB Pty Ltd Mr David Krumins – Council representative Mr Michael Lisie – Council representative Mr Jim Graham – Observer - Tribunal Chair for Appeal No. 3-09-024

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### **Decision:**

The Tribunal, in accordance with section 4.2.34 (2) (a) of the IPA, **confirms** the decision appealed against and the appeal is dismissed.

## **Background**

The subject site is described as Lot 40 on RP 29947 and is located along the Gatton Clifton Road. The subdivision contains 58 lots. The roads are not formed and access to the lots is by way of easement.

The site is approximately 25.0m in width and ranges from 49.0m to 59.0m in depth with a frontage of 27.0m. The area of the subject site is 1366m<sup>2</sup>.

The land is zoned rural under the current Clifton District Planning Scheme.

A development approval was given by the Clifton Shire Council to construct a class 1 building on 4 October 1994. The development was not proceeded with in the required 12 month period, and the approval lapsed on 4 October 1995.

The Planning Scheme has been amended since the above approval, and the current scheme indicates that Council is of the opinion the Pilton area is not considered an appropriate location for a township.

A new Development Application for a class 1 dwelling was made to the Assessment Manager on the 3 September 2008.

The application was forwarded to the Council on the 28 November 2008 for concurrence agency advice in relation to compliance with the Toowoomba Regional Council Planning Scheme - Clifton District.

An information request letter, dated 16 December 2008, was received by the Assessment Manager on the 22 December 2008.

Schedule 4 "Referral agency assessment periods" requires, under 1 (b) of the Integrated Planning Regulation 1998 (IPR), the referral agency to respond within 5 business days.

The information request letter was sent on the 16 December 2008, some 11 days after the application was referred to Council. On this basis the assessment manager refused the application as a deemed refusal.

An appeal was lodged with the Registrar on 18 March 2009.

The Registrar notified Council of the receipt of the Notice of Appeal by letter, dated 23 March 2009.

The Chair of the Tribunal notified the parties of the time and place of the hearing of the appeal by letter, dated 23 March 2009.

The Council's information request letter, dated 16 December 2008, refers to 4 specific items namely:-

Items 1 and 2 – access to the property

Item 3 – siting

Item 4 – disposal of waste water which is the subject of a separate appeal (Appeal No. 3-9-024).

Items 1, 2 and 3 were confirmed by all parties present at the hearing as the subject of this appeal.

## **Material Considered**

The material considered in arriving at this decision comprises:-

1. 'Form 10 – Notice of Appeal', including grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 18 March 2009.
2. Decision Notice from the Assessment Manager, dated 2 March 2009.

3. Toowoomba Regional Council information request letter, dated 16 December 2008.
4. Clifton Shire Land use area map.
5. Clifton Shire Council Planning Scheme for land use areas (namely 3.1 - Rural).
6. Clifton Shire Council Planning Scheme – Part 4.13 "Residential Development" including parts A, B, C and D.
7. Verbal submissions from Council representatives at the hearing.
8. Verbal submissions from the Assessment Manager and representative of QPDB Pty Ltd.
9. Written submission from the Council provide at hearing.
10. The Queensland Development Code (QDC).
11. The *Building Act 1975* (BA).
12. The Building Regulation 2006.
13. The IPA.
14. The IPR.

### **Findings of Fact**

The Tribunal makes the following findings of fact:-

- The subject site is an approved lot in a 58 lot subdivision under the Clifton District Planning Scheme.
- The subject site, Lot 40, is zoned as Rural under the Clifton District Planning Scheme.
- The intent of rural, under the general description, includes other developments in certain circumstances eg "non-agricultural uses".
- Dwelling Houses are specifically referred to in the General Description and are required to comply with the "relevant acceptable solutions" for houses as set out in the Residential Development Code.
- Under Acceptable Solutions A3.3 "Any house is located at least 15.0m from the site boundary".
- Under P 5 - A5.1 - All weather road access is required to be provided to each house.
- The QDC Part 1.2 sets the boundary clearances for lots above 450m<sup>2</sup>.
- Section 33 of the BA states that "a planning scheme may include provisions (alternative provisions) that, for the relevant work, are alternative or different to the QDC boundary clearances and site cover provisions".
- The local government is identified in Part 3.1.8 (1) of the IPA and schedule 2 of the IPR as the concurrence agency for assessing non-compliance with the alternative siting provisions established under Section 33 of the BA.
- Section 83 (d) of the BA prevents the private certifier approving the building development application, if a concurrency agency has jurisdiction for a part of the building assessment work, until that part has been assessed by the concurrency agency, under the building assessment provisions.
- Section 30 (c) of the BA states that a Planning Scheme provision made under section 32 or 33 is a building assessment provision.
- The local government, as the concurrence agency failed to determine the application submitted to it within the prescribed time (5 business days) established under Part 3.3.14 (1) (a) of the IPA and Schedule 4 Row 1, item (b) of the IPR.

- An issue was raised at the hearing as to whether the proposed dwelling also required Development Permit to be lodged with the Local Authority for a Material Change of Use.
- Whether or not the proposal requires a Development Permit for a Material Change of Use, Part 4.2.7 of the IPA states that “A Tribunal has jurisdiction to decide any matter that, under this act or another act, may be appealed to it. However an appeal to a Tribunal under this act may only be about a matter that relates to the BA or a matter prescribed under a regulation”.
- The appeal is about a matter that is prescribed under a regulation, namely siting requirements.
- As Council did not assess the application as a concurrence agency and give a response in the required timeframe, the application is considered a deemed refusal and as such the tribunal has the jurisdiction to consider the application for design and siting on its merits.

## **Reasons for the Decision**

The reasons for the decision in relation to the appeal matters confirmed by all parties present at the hearing are as follows:-

In reference to the information request letter;

### Items 1 and 2

Agreed – current written evidence to be provided to the satisfaction of Council.

### Item 3

- The Tribunal refers to line of authority outlined under findings of fact.
- Under schedule 8 of the IPA the development is assessable development.
- The subject property is zoned Rural under the Clifton District Planning Scheme.
- Dwelling houses in the Rural land use area are required to comply with the relevant acceptable solutions for houses set out in the Residential Development Code.
- Under 3.1.2 of the Planning Scheme the development is self-assessable development, provided it complies with the relevant acceptable solutions as set out in the Residential Development Code.
- Under Part B of the code the Acceptable Solution A3.3 requires any house to be located at least 15.0m from the site boundary.
- The Council submitted at the hearing that the 15.0m set back is necessary to maintain the rural character of the area.
- The size of the subject block does not permit a house to be located 15.0m from all site boundaries.
- Development of 58 lots of less than 2000m<sup>2</sup> with all setbacks not satisfying the 15.0m to all boundaries is, in the opinion of the Tribunal, not maintaining a rural character.
- In addition there is insufficient space on lots less than 2000m<sup>2</sup> to satisfy the amenity associated with rural living – e.g. space between neighbours, outdoor living areas, larger class 10 building with caravan/boat accommodation, suitable vehicular access and space for waste disposal etc.
- The Council correspondence, dated 26 November 2008, expands on how the applicant may progress development of the property – e.g. amalgamation of lots in order to achieve the desired outcomes of the Clifton District Planning Scheme.
- The Tribunal agrees that a setback of 15.0m from any boundary is necessary in this particular lot (Lot 40), as the setback proposed, does not maintain the rural character of the area (small lot) and has a limited impact on the agricultural productive of the area.

- However it is acknowledged the requirement has no relevance to the accommodation of farm-owners, their family members and employees in the running of the farm. No evidence has been submitted that any farm relates to the 58 lot subdivision.
- The tribunal therefore agrees the requirement to comply with acceptable solution "A3.3 Any house is located at least 15.0m from the side boundary" is a necessary to maintain the rural character.

Item 4

Not considered as part of this appeal - Refer Tribunal decision Appeal No. 3-09-024.

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**Mr L F Blumkie**  
**Building and Development Tribunal Chair**  
**Date: 9 April 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**