Building and Development Tribunals
Queensland Government
Department of Local Government and Planning

APPEAL **File No. 3-01-058.**
Integrated Planning Act 1997

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Mackay City Council.

Site Address: 8 Brisbane Street, Mackay

Nature of Appeal

Appeal under Section 4.2.13 of the Integrated Planning Act 1997 against the decision of the Mackay City Council to issue an enforcement notice pursuant to section 4.3.11 of the Act as Council believes that the portion of the building used for storage is being occupied without the required building approval. Council requires the owner to cease occupation of that part of the building until a building approval has been issued and building work constructed as per the Building Code of Australia.

The building is erected on land described as Lot 163 on M912 and situated at 8 Brisbane Street, Mackay.

Date and Place of Hearing: 11.15 am, Tuesday 8th January 2002.
at 8 Brisbane Street, Mackay.

Tribunal: Nigel Rees Daniels, Dip Arch., Reg Arch., MAIBS.

Present: Applicants
Applicant's Builder
Bruce Lenahan– Mackay City Council

Decision:

In accordance with Section 4.2.34 of the Integrated Planning Act 1997, the decision of the Tribunal is to set aside the decision appealed against and make a decision replacing the decision set aside.

The decision appealed against, and set aside, is the decision of the Mackay City Council to issue an enforcement notice requiring the applicant to cease occupation of the building until a building approval has been issued and building work constructed as per the Building Code of Australia. The effect of the Council's decision is contained in the enforcement notice dated 16 November 2001 and the covering letter to the enforcement notice dated 16 November 2001.

The decision which now replaces the decision set aside, is:

The building work on the property owned and occupied by the applicant at 8 Brisbane Street, Mackay and described as Lot 162 on M912 Parish of Howard, must be rectified so that it complies with the Building Act 1975. In particular the rectification must include, but not necessarily be limited to, compliance with the Building Code of Australia (BCA) CP1 to CP9 inclusive, and as relevant. Compliance with BCA CP1 to CP9 must be achieved by compliance with the BCA Deemed-to-Satisfy provisions in BCA Specification C1.1 clause 5.1 (construction of an external wall having a Fire Resistance Level (FRL) of 90/90/90 on the northern side of the existing building), or by compliance with an Alternative Solution under BCA A0.8, or a combination of both.

In deciding the appeal the Tribunal makes further orders and directions, as follows:

1. Before proceeding with the building work, the proposed building work must be assessed for compliance with the provisions of the Integrated Planning Act 1997 and the Building Act 1975; either by submission of an application for a development permit or by self assessment if the work is self assessable. As the aggregate area of the building exceeds 500 sq m, the assessment may require referral to the Queensland Fire and Rescue Service.

2. The Mackay City Council shall give consideration to and decide whether the time may be deferred by which a wall having a FRL (or alternative solution) must be built and whether in the interim a wall which does not have a FRL may be allowed.

   The Council may make its decision as an alternative solution under BCA A0.8, recognising that the absence of a building on the adjacent property diminishes the need for avoidance of spread of fire between buildings.

3. The requirement for a wall having the appropriate FRL must be recorded on the Council's rates record and disclosed on enquiry to any intending purchaser or other person making a lawful enquiry in relation to the property. The record may be removed on completion of construction of the wall.

4. Mackay City Council and the applicant shall jointly give consideration to who is responsible to construct the wall having the FRL (or alternative solution).

Background

The appeal is about construction of a wall having a fire resistance level (FRL) on the northern side of the building on the property owned by the applicants. The property to the north is owned by Mackay City Council.

The appeal is also about whether occupation of that part of the building used for storage should cease until building approval has been issued and building work constructed, for a new external wall.

The applicant purchased its property in November 1998. At the time of purchase the buildings (relevant to this appeal) on the property comprised a main building of about 500 square metres in floor area with its wall (formerly an external wall) at 3 metres from the northern boundary, and an "infill" building constructed between the main building and a then-existing building on the property to the north. The building on the property to the north encroached onto the applicant's property by about 450mm. The wall of the building on the property to the north was clad in corrugated iron. The infill building was supported on columns independently of the northern building, but its box gutter relied on that wall for support.

The infill building was constructed in about 1988; apparently without approval.

In November 2000, the applicant purchased the property to the north. The purchase was conditional on the vendor demolishing the building on that property.

The building was demolished in December 2000.

The applicant applied for approval to construct a temporary wall.

Mackay City Council advised the applicant that a wall with a FRL was required.

The applicant went ahead with construction of the present metal clad wall.

Subsequently, the show-cause notice was issued, followed by the enforcement notice against which the appeal was made.

Material Considered

1. Notice of appeal dated 3 December 2001.
2. Show-cause notice dated 18 September 2001.
3. Enforcement notice and its covering letter, both dated 16 November 2001.

4. Information provided by Mackay City Council in relation to:
    a. Whether or not the "infill" section of the building had received building approval;
    b. The present zoning, current use and intended future use of the adjacent property to the north of the property owned and occupied by the applicant;
    c. Whether or not the demolition of the building on the adjacent property to the north had received building approval;
    d. The floor area of the buildings on the property owned and occupied by the applicant, compared with the floor area shown in Council's rates records for the property;
    e. Advice on the Council's purchase of the property to the north and the condition of purchase requiring the vendor to demolish the building.
5. Information provided by the applicant relating to:
    a. Dates of construction of buildings;
    b. Form of construction of the buildings.
6. Advice from Building Codes Queensland:
    a. Building Circular about protection of openings in external walls, with special reference to industrial buildings;
    b. Application of Standard Building Regulation Sections 15 and 16 in relation to the Building Act 1975 Section 11 and Building Code of Australia A0.8.
7. The Integrated Planning Act 1997;
8. The Building Act 1975;
9. The Standard Building Regulation 1993;
10. The Building Code of Australia;
11. The Standard Building By-Laws applying in 1988.

Findings of Fact

1. On the property owned and occupied by the applicant, the main building has a wall (once an external wall) at about 3 metres from the northern boundary, the common boundary with the adjacent property to the north owned by Mackay City Council.

2. A building on the adjacent property to the north encroached about 450 mm onto the property owned by the applicant. This building appears to have been built well prior to construction of the main building on the applicant's property.

3. The "infill" building was built to fill the space between the main building on the applicant's property and the encroaching building.

4. The Mackay City Council purchased the adjacent property to the north in November 2000. A condition of the purchase agreement required the vendor to remove all buildings from the land.

5. The building on the adjacent property to the north (the encroaching building) was demolished; following which, the "infill" building was left without an enclosing wall, but supported on posts at the distance of about 450 mm from the northern boundary. The metal clad wall was constructed on the northern side of the "infill" building at that distance of about 450 mm from the northern boundary.

6. The Standard Building Regulation 1993, through the Building Code of Australia, requires the building on the property owned by the applicant to be constructed so as to avoid spread of fire between buildings, including spread from any building which may be built on the adjacent property to the north.

7. Avoidance of the spread of fire may be achieved by applying the deemed-to-satisfy provisions of the Building Code of Australia or by applying an Alternative Solution.

8. The requirement for construction to avoid the spread of fire between buildings was triggered at each of the following:

    a. Construction of the "infill" building. The Standard Building By-Laws applying in 1988 required an external wall near the boundary to have a fire rating;

b. Demolition of the building on the adjacent property to the north of the property owned by the applicant. Demolition is building work requiring assessment or self assessment;

c. Construction of the present external wall on the northern side of the building.

9. There is no power available to the Council to allow a standard of construction less than that required by the Building Code of Australia. That is, there is no discretionary power allowing alterations to an existing building not to comply with the BCA; if a form of construction is desired other than that contained in the deemed-to-satisfy provisions of the BCA, then an Alternative Solution must be found. (See note 5 in the Reasons for the Decision).

Reasons for the Decision

1. For the purposes of applying the Integrated Planning Act 1997 Section 4.2.34, the appeal against the Enforcement Notice (Integrated Planning Act Section1997 4.2.13) is taken to mean an appeal against the decision of the assessing authority (the local government) to give the enforcement notice.

2. Construction of the wall having the required FRL (or an alternative solution) is required; but given the current use of the adjacent property to the north and given its uncertain future use, it may be reasonable to allow omission of the wall having the FRL until such time as the future use of the property to the north is known. An assessment may decide that the absence of a building on the adjacent property to the north is sufficient to avoid spread of fire between buildings.

3. The Council's requirement for demolition of the building on the property to the north does not substitute for assessment of the demolition as building work. The legislation requires assessment and approval of building work. A requirement of the Council as property owner to require the building work to be done does not constitute assessment or self assessment. If the demolition was carried out by or on behalf of the vendor, then the vendor was required to lodge an application and obtain approval. If the demolition was carried by or on behalf of the Council, then the Council was required to carry out a self assessment, and should be able to identify that the self assessment had been carried out.

4. The option of requiring the "infill" part of the building to be demolished (because it is unauthorised work) and so achieve compliance with the BCA (because the existing wall of the main building will then become the external wall at 3 metres from the boundary – a distance at which the wall does not require a fire resistance level), is not available.

   The reason that such an option is not available is that the provisions of the Integrated Planning Act 1997 Section 4.3.13 (2) provide that a person may be required to demolish or remove a work only if the assessing authority reasonably believes it is not possible and practical to take steps to make the work comply with a development approval or a code. In this case it is possible to rectify the building by making it comply with the Standard Building Regulation 1993, which is a code (Standard Building Regulation 1993 Section 2).

5. The reason that there is no power to allow a standard of construction other than that required by the Building Code of Australia, is that the Building Act 1975 Section 11, and the Standard Building Regulation 1993 Sections 15 and 16, when taken together require alterations and additions to a building to comply with the Standard Building Regulation 1993, and require that there shall be no reduction in existing safety standards in the existing building (which might not comply with the Standard Building Regulation 1993). There is no general provision for concessional approval in relation to alterations or additions to an existing building, (similar to the provision in the Standard Building Regulation 1993 Section 110, for example).

   The Building Code of Australia forms part of and is to be read as one with the Standard Building Regulation 1993. Part A0 of the Building Code of Australia contains provision for discretionary power to allow construction other than that in the deemed-to-satisfy provisions of the Building Code of Australia, by adoption of an Alternative Solution which satisfies the BCA Performance Requirements.

6. Because the requirement for a wall having a FRL was triggered on three separate occasions, with different people or entities responsible for the building work on each of those occasions, the Tribunal makes no determination about who is required to construct the wall. This is a matter to be agreed between the Mackay City Council and the applicant.

7. It would be unreasonable to require occupancy to cease of that part of the building used for storage (the "infill" building) because the standards of safety existing prior to construction of the metal clad wall have not been diminished. The standards of safety were improved following demolition of the building on the adjacent property to the north, because the use of that building, and its attendant fire risks, have been removed. This situation will change if there is any change to the use of the adjacent property to the north, or any change to the use of the property owned and occupied by the applicant.

Nigel Daniels
Building and Development
Tribunal Referee
Date: 13 February 2002.

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:

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