



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	03-09-049
Applicant/Appellant:	Mr. Ivor L Whitefield
Assessment Manager:	Sunshine Coast Regional Council
Concurrence Agency: (if applicable)	N/A
Site Address:	12/8-10 Yallanga Place, Mooloolaba and described as Lot 12 on SP125507, Portion 326 — the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Sunshine Coast Regional Council (the Council) to refuse a building application for a Class 1a deck roof (shade sail).

Date of hearing:	2 nd July 2009 (adjourned), but not reconvened, with concurrence of parties to the appeal
Place of hearing:	The subject site
Tribunal:	Mr Phil Dance – Chair
Present:	Mr Ivor L Whitefield - Appellant Mr Alan Thompson – Sunshine Coast Regional Council representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2)(c) of the IPA, **sets aside** the decision appealed against to refuse the development application for building work, namely a shade sail structure/enclosure, and **directs** the assessment manager to approve the development application subject to the following conditions:

- 1(a) The shade sail must be supported on its outer (canal) side by existing or equivalent steel posts, and must comply with the BCA regarding fire separation;
- 1(b) Save for the supporting posts and cables, the shade sail must be set back not less than 900mm from the revetment wall;
- 1(c) Save for supporting posts and cables, the shade sail must have a minimum set back from side boundaries of 900mm;

- 1(d) The shade sail is to be open sided and not more than 6.5m long (measured parallel to the frontage of the adjacent unit), and not more than 3.6 metres wide (measured parallel to the side boundaries, and be generally as shown in the supplementary plan provided by the appellant and dated 7 July 2009; and
2. The building must comply with all other relevant building assessment provisions applicable to this Building Development Application; and
3. The decision held in this application is separate to any other applications which may be made over the property.

Background

The appellant applied for a building work development permit for a shade sail structure at the premises. The structure is located on a timber deck which has been constructed between a multiple dwelling unit and a canal. The deck has been constructed to the canal revetment alignment which is also the property boundary.

By notice dated 25 May 2009, the Council refused the application for the following reasons:

- 1) The deck roof (shade sail) does not comply with and cannot be conditioned to comply with Maroochy Plan 2000, Code 2.1.2 (Code for Waterways and Wetlands), P1, Acceptable Measure A1.2(b). For waterways where a revetment wall exists, all buildings and structures higher than 1.0 metres above ground level are set back 4.5 metres from the property boundary adjoining the waterway.
- 2) The deck roof (shade sail) does not comply with and cannot be conditioned to comply with the Building Codes Australia 2009 Part 3.7.1 (Fire Separation)."

The appellant appealed to the Tribunal against this refusal.

The subject site is occupied by the end unit (north-western end) of a group of 12 home units. The units face a canal towards the south-west. A timber deck is built to the canal revetment which is co-incident with the property boundary. An enclosed structure has been constructed from the side of the home unit over much of the deck. It is constructed to the side boundaries and in this, is in conflict with the BCA.

The units are in a locale populated by several other unit complexes, interspersed with dwellings. The area enjoys generally good amenity.

The Tribunal commenced hearing the appeal on-site on 2 July 2009. The hearing was adjourned to allow further submissions from the parties. The appellant made a further submission. The Council advised that it intended to rely on its original submission and further advised that it does not acknowledge the supplementary submission made by the appellant as a development application. Neither party wished for the Tribunal hearing to be reconvened.

Material Considered

The following correspondence and documentation were reviewed and taken into consideration:

1. Site photographs;
2. Sunshine Coast Regional Council (SCRC) Decision Notice dated 25 May 2009;
3. 'Form 10 - Notice of appeal' dated 18 June 2009, lodged with Tribunal Registry;
4. SCRC report to Tribunal dated 25 June 2009, including attachments A to H;
5. Provisions of the (former) Maroochy Shire Planning Scheme, including
 - Code 2.1.2, Code for Waterways and Wetlands
 - Planning Scheme administrative definition of "Environmental Value", and
 - Section 1 of the planning scheme, Introduction.
6. Further submission, including amended plan, provided by the appellant, dated 7 July 2009;
7. Correspondence from SCRC dated 22 July 2009.

Also considered were the observations made at the site inspection and the comments of the parties made during the course of the hearing on 2 July 2009.

Findings of Fact

The Tribunal makes the following findings of fact:

1. An unauthorised structure exists on the premises which can be described as a shade sail with adjustable "marine clears" that allow for the area under the shade sail to be enclosed.
2. The proposal before the Tribunal is an amended proposal, which the appellant has offered up for consideration by the Tribunal following the on-site hearing which was adjourned.
3. The amended proposal before the Tribunal is a significantly reduced proposal as compared with that refused by the Council.
4. The Council refused the application for two reasons, being:
5. The deck roof (shade sail) does not comply with and cannot be conditioned to comply with Maroochy Plan 2000, Code 2.1.2 (Code for Waterways and Wetlands), P1, Acceptable Measure A1.2(b)
 - a. *"For waterways where a revetment wall exists, all buildings and structures higher than 1.0 metres above ground level are set back 4.5 metres from the property boundary adjoining the waterway."* and,
 - b. The deck roof (shade sail) does not comply and cannot be conditioned to comply with the Building Code of Australia 2009 Part 3.7.1 (Fire Separation).
6. In assessing the degree of compliance with the Code for Waterways and Wetlands it is necessary to consider not only the Acceptable Measure referenced in the refusal, but also the corresponding performance criterion and other parts of the code, and any other relevant material.
7. No evidence was brought before the Tribunal alleging that the structure is the subject of any complaint from neighbours or others who frequent the locality.
8. The Council does not acknowledge the supplementary correspondence from the appellant as a development application.
9. As the application is for building work, the Tribunal may, with the consent of the appellant, vary the application if the Tribunal is satisfied that:
 - The building, when erected, will not have an extremely adverse affect on the amenity or likely amenity of the building's neighbourhood; and
 - The aesthetics of the building, when erected, will not be in extreme conflict with the character of the building's neighbourhood.

Reasons for the Decision

The Council and the appellant agree that the amended proposal now before the Tribunal will comply with the Building Codes Australia 2009 Part 3.7.1 (Fire Separation).

Notwithstanding non-compliance with Acceptable Measure A1.2(b) of the planning scheme Code for Waterways and Wetlands, the proposal does not compromise the corresponding Performance Criterion.

The Tribunal, having considered the Code for Waterways and Wetlands in its entirety considers that the proposal does not jeopardise achievement of the purpose of the code.

Based on the findings of fact and statement of reasons, it is the Tribunal's decision that the appeal is upheld. Council's decision to refuse the development application for building works is set aside and the application is approved, subject to conditions.

Phil Dance
Building and Development Tribunal Chairman
Date: 6 October 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:

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