



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	25- 2010
Applicant:	Mr Leo Leonard
Assessment Manager:	Bundaberg Regional Council
Concurrence Agency: (if applicable)	Bundaberg Regional Council
Site Address:	34 Poinciana Drive, Innes Park – described as Lot 243 on RP 142956 - the subject si

Appeal

The original appeal lodged with the Building and Development Tribunal was against the response of the concurrence agency's refusal of an application relating to the amenity and aesthetic impact of particular building work as assessed against the Removal, Rebuilding and Demolition of a Building Policy of Bundaberg Regional Council pursuant to Schedule 2, Table 1, Item 15 of the *Integrated Planning Regulation 1998* (IPR).

The Tribunal dismissed the appeal (Appeal No 3-09-057) as it believed it did not have jurisdiction as the assessment manager had not decided the application within the decision making period and the appeal was against the response given by the concurrence agency.

This was appealed to the Planning and Environment Court by the applicant and the Court held that the Tribunal had jurisdiction to decide the matter as the application was deemed to be refused (*Leonard v Bundaberg Regional Council* [2010] QPEC 35).

The Court further remitted the matter back to the Tribunal.

Date of hearing:	10.00AM Monday 17 May 2010
Place of hearing:	Following an inspection of the site and locality, the hearing was held at the offices of the Bundaberg Regional Council, 190 Bourbong Street, Bundaberg.
Committee:	Mr Leo Blumkie – Chairperson Mr Ain Kuru - General referee Mr Peter Marles – General Referee
Present:	Mr Leo Leonard - Applicant Mr Steve Curran - Council Representative Mr Brad Geaney - Council Representative

Decision:

PART A

The Tribunal, in accordance with section 4.2.34(2)(e) of the *Integrated Planning Act 1997* (IPA) , with the consent of the applicant **varies** the application as follows :-

- Include a new timber deck to the South East corner of the proposal as follows :-
 - measuring a minimum of 2.4m wide and at least 2.4m long;
 - includes a skillion roof, pitched to match the house roof, which commences directly under the existing soffit and has a 'colorbond' or similar roof sheeting matching the house roof colour as far as possible;
 - the roof to the deck commences no more than 500mm behind the existing main roof when measured back from the front barge line;
 - has timber railings;
 - has horizontal battening to underside of floor on all external sides;
 - has a lattice screen to the front elevation i.e 2.4m wide from floor to a minimum of 1.8 metres high;
- The rear deck and deck to the North East corner of the proposal is not considered essential to the proposal and may be removed or included at the discretion of the applicant;
- Include a new access sliding door to the new deck from the house;
- Move the carport, including roof, forward so that the roof of the carport is in line with the new roof of the new deck i.e. no more than 500mm back from the front barge line;
- Include the vertical window to the front elevation on the right hand side;
- The carport has the front elevation of the carport fully enclosed (door is considered part of enclosure);
- Provide lattice infill to the total Western side of the carport **or** provide 1.8m high fence from South West Corner of the carport to the Western side boundary;
- Excavate under the front of the house for a depth of 450mm, when measured at the front elevation line i.e. Lower the floor line of the house 450mm to that shown in the proposal when measured at the front elevation line;
- Render the full front façade (from ground level to under side of soffit) visible from the street, including carport and front porch, to the satisfaction of Council (Written approval of Council required prior to issue of the development approval);
- Provide timber battens or equivalent to the remainder of sub-floor space so that it is inclosed from the ground line to the under-side of the floor, all to the satisfaction of Council. (Written approval of Council required for materials and method of construction prior to issue of the development approval);
- Provide driveway and landscaping to the front of the property to the satisfaction of Council, and
- All the required works are to be completed within 6 months of receiving development approval.

and

PART B

The Tribunal, in accordance with 4.2.34(2)(d) of IPA also makes the following orders and directions:-

1. The assessment manager shall decide the application (as varied under Part A by this Tribunal) as if the concurrence agency had assessed the application and had no concurrence agency requirements.
2. The assessment manager shall decide the application within **20 business days** of the date of this decision. However, the decision making period may be further extended, including for the purpose of providing further information to the assessment manager, if the applicant, before the period ends, gives written agreement to the extension.
3. Should the assessment manager not decide the application within the above period then the Tribunal will decide the application.

4. Despite the above, the assessment manager must not grant the building development approval until all other necessary development permits are effective for the development.

Background

The applicant paid a holding deposit for an existing church/hall located at 10 Bauer Street Bargara, which was available for demolition/removal.

The applicant then made three applications to the Bundaberg Regional Council on 23 March 2009 as follows:-

1. Removal of the church from 10 Bauer Street Bargara.
2. Development application for relocation of the church/hall to 34 Poinciana Drive, Innes Park.
3. Request for concurrence agency assessment of the proposal for the removal to 34 Poinciana Drive, Innes Park.

Approval was given by the Bundaberg Regional Council to the removal of the church/hall. This approval has now expired, however it is not subject to consideration as part of this appeal.

The amenity and aesthetics assessment was considered by Council on 20 April 2009 as a concurrence agency and correspondence was sent to the applicant on 27 April 2009 advising that the proposal was not agreed on amenity and aesthetic grounds. This concurrence agency response was not given to the assessment manager during the referral agency's assessment period.

The applicant, after discussion with Council officers decided to make changes to the proposal and added amongst other things, battens to under-side of dwelling, render to the front elevation, a vertical window to the front elevation and timber screens to both sides of the building at the front.

Even though the applicant proposed to undertake all the work within the prescribed period, the application indicated stages for the work.

Amended drawings were submitted to Council on 12 May 2009.

The amended application was to be reconsidered by Council as a concurrence agency on 16 June 2009, however incorrect documents (not the updated documents) were inadvertently submitted to the Council meeting.

On 19 June 2009, the Council advised the applicant that the proposal was again not agreed to "*as it did not meet the desired outcomes of the Removal, Rebuilding and Demolition Policy of the former Burnett Shire Council.*"

The correct documents were submitted to the Council meeting on 1 September 2009. The Council again agreed not to support the proposal and correspondence was forwarded to the applicant on 4 September 2009 again not agreeing to the proposal.

Whilst this mistake (submitting wrong drawings) was being corrected by Council officers, the applicant lodged an appeal of the decision (given on 19 June 2009 by the concurrence agency) with the Registrar on 14 July 2009.

The appeal was heard by the appointed Tribunal on 3 September 2009.

The Tribunal dismissed the appeal on 27 October 2009.

The applicant then lodged an appeal with the Planning & Environment Court. The Judge ordered that:-

- the appeal be allowed;
- the decision of the appeal be set aside; and
- the matter be remitted to the Tribunal to be redetermined in accordance with law.

The judgement also included confirmation that the development application under the times prescribed under IPA and the procedures required were not properly given within time, hence there was a deemed refusal of the development application.

The Registrar, as a result of the Court order established a new Tribunal to decide the appeal against the deemed refusal. As the appeal is against a referral agency's decision in respect of the amenity and aesthetics impact of a building, a new amenity and aesthetics Tribunal was established in consultation with the Local Government Association, Housing Industry Association and Queensland Master Builder's Association.

On 10 May 2010 the chairperson of the new Tribunal advised the applicant and Council of the date, time and place for the appeal to be reheard. A hearing and site visit was subsequently conducted on 17 May 2010.

The site is a rectangular shaped block with approximately 1 metre fall from the front to the rear. The adjoining properties have existing slab on ground brick veneer class 1 buildings typical in size to modern subdivision developments.

The neighbourhood (as nominated by the council representatives on site) is developed with a range of class 1 buildings which include:-

- slab on ground brick veneer construction of various sizes;
- low set timber frame buildings of various sizes sheeted with various materials;
- removal buildings of various sizes; and
- two storey timber frame buildings

It was noted that, due to the wide frontage of lots, the majority of houses in the neighbourhood present the long side of the house to the street i.e a substantial façade faces the street. As a result, the character of the neighbour was enhanced with most of the houses addressing the street.

At the hearing Council representatives advised that there were also town planning considerations due to a nearby quarry and that a code assessable application may be required.

The day after the hearing i.e. on 18 May 2010 the applicant had a verbal telephone discussion with the chairperson and advised that as a result of the new deck agreed to at the front right hand side, he would like to, for financial reasons, delete both the rear and rear side deck and increase the length of the new deck so that an existing widow in the side wall could be converted to a sliding door to provide access to the new deck.

The Chairperson considered this amendment to be acceptable, as in his opinion, it would further enhance the amenity and aesthetics of the proposal, and agreed to discuss and confirm the change with the Tribunal before the decision was made.

The Chairperson phoned Council representatives on 24 May 2010 and discussed the changes preferred by the applicant as noted above. The Council representatives had no issues with the deletion of the rear deck. The matter was also formally put to both parties in correspondence from the Chairperson on 26 May 2010.

Neither party raised further issues and the Tribunal agreed to the changes and they are included in the decision.

Material Considered

The material considered in arriving at this decision comprises:

- 'Form 10 – Notice of Appeal' and grounds for appeal, drawings, extracts and correspondence accompanying the appeal lodged with the Registrar on the 14 July 2009.
- Bundaberg Regional Council's concurrence agency correspondence dated 19 June 2009 not agreeing to the amended proposal.
- The removal, rebuilding and demolition policy of the former Burnett Shire Council adopted by resolution on 8 August 2007, and as adopted by Bundaberg Regional Council as part of the Council amalgamations.
- Correspondence dated 27 April 2009 and 4 September 2009 from the Bundaberg Regional Council (concurrency agency) not agreeing to the proposal.
- Order of the Planning & Environment Court dated 12 April 2010.
- Written statements from adjoining neighbours (4 in total) stating that they have no objection to the proposal.
- Verbal submissions from the applicant at the hearing.
- Verbal submissions from the Council representative at the hearing
- Correspondence to both parties dated 26 May 2010 confirming the changes agreed to by the Tribunal as a result of phone discussions with the chairperson after the hearing.
- Telephone discussion between the applicant and chairperson on 18 May 2010.
- *Building Act 1975.(BA)*
- *Building Regulation 2006.(BR)*
- *Integrated Planning Act 1997.(IPA)*
- *Integrated Planning Regulation 1998.(IPR)*

Findings of Fact

The Tribunal makes the following findings of fact:

- The subject site is located within the Urban Residential Zone and the Coastal Towns Planning Area of the former Burnett Shire Planning Scheme.
- The former Burnett Shire Council resolved at its General Meeting on 8 August 2007 to be a concurrency agency under Schedule 2, Table 1, Item 15 of the IPR for the following building works for class 1 or 10 buildings or structures, located in any part of the shire, on the basis that they may have an extremely adverse effect on the amenity or likely amenity of the locality, or be in extreme conflict with the character of the locality:-
 1. the removal of a building or structure whether for rebuilding at another site or not;
 2. the rebuilding of a building or structure removed from another site; or
 3. the demolition of a building or structure.

Additionally, to assist in the performance of this concurrence agency role, the Council adopted a Removal, Rebuilding and Demolition Policy.

- Pursuant to the Local Government amalgamations of March 2007; Bundaberg Regional Council has adopted the planning scheme and policies of the former local authority.
- On 23 March 2009 the applicant lodged 3 applications with the Bundaberg Regional Council namely:-
 - Removal of the church/hall from 10 Bauer Street Bargara.
 - Development application for relocation of the church/hall to 34 Poinciana Drive, Innes Park.
 - Request for concurrency agency assessment of the removal to 34 Poinciana Drive, Innes Park.

- In accordance with section 3.1.7 of the IPA, Bundaberg Regional Council is the assessment manager for the development application for building works.
- In accordance with Schedule 2, Table 1, Item 15 of the IPR, (Amenity and Aesthetic impact of particular building work) the resolution of 8 August 2007 and section 62 of the BA, the nature of the development application for building works is such that :-
 - (1) The concurrence agency for the application is Bundaberg Regional Council; and
 - (2) A concurrence agency response to the assessment manager is required prior to deciding the development application for building works.
- Bundaberg Regional Council as concurrence agency decided not to agree to the proposal on 20 April 2009 and advised the applicant of the decision in writing on 27 April 2009.
- The applicant made changes to the proposal and submitted amended drawings to Council on 12 May 2009.
- Council reconsidered the application on 16 June 2009 (updated drawings inadvertently not submitted) and again decided not to agree to the proposal.
- Bundaberg Regional Council as concurrence agency again decided (updated drawings submitted) not to agree to the proposal on 16 June 2009 and advised the applicant of the decision in writing on 19 June 2009.
- An appeal was lodged with the Registrar on 14 July 2009.
- The Tribunal decision was given on 27 October 2009.
- An appeal was lodged with the Planning and Environment Court by the applicant.
- The decision of the Court was delivered on 12 April 2010.
- The Court determined that the procedures required with respect to serving of notices within time, had not been adhered to, and therefore, there was a deemed refusal of the development application.
- Both parties had not been given the opportunity to be heard in that respect, which in itself was an error in law, and deprived the parties of natural justice.
- On 12 May 2010 both parties were advised of a new Tribunal being established by the chairperson and also a time, date and place was nominated for the hearing.

Reasons for the Decision

The Tribunal agreed the proposal would have an extremely adverse effect on the amenity or likely amenity of the neighbourhood, and would be in extreme conflict with the character of the neighbourhood.

This decision was based on the fact that even the most up-to-date proposal had a narrow tall façade that did not adequately address the street contrary to other houses in the neighbourhood.

Options were discussed with the applicant to increase the presentation of the house to the street by adding a roofed deck to the front right hand side of the proposal and bring the carport (including roof) forward.

The applicant agreed to these additional changes.

Other matters were discussed with both parties and agreement was reached at the hearing on a list of conditions to be included in the proposal.

The Tribunal was satisfied that the building when erected in accordance with the application varied as agreed would 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.

The matter of the removal application approval having expired and the possible need for a code assessable application under the planning scheme issues were not part of this appeal and are matters for the applicant to resolve with Council. However if a code assessable application is required then the date of this decision will be the date of any decision notice given by the Council under its planning scheme to approve the development.

Leo Blumkie
Chair
Building and Development Tribunal
Date: 1 June 2010

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee 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 Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees
Building Codes Queensland
Department of Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248