



APPEAL
Integrated Planning Act 1997

File No. 3-08-012

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessing Authority: Noosa Shire Council

Site Address: *withheld*—‘the subject site’

Applicant: *withheld*

Nature of Appeal

Appeal under section 4.2.13 of the *Integrated Planning Act 1997* (IPA) against the decision of Noosa Shire Council to issue an enforcement notice (called a “defect notice”) for plumbing work, namely to have all backflow prevention devices installed correctly.

Date and Place of Hearing: 10.30 am on Thursday 3 April 2008
at the Caloundra office of the Sunshine Coast Regional Council

Tribunal: Mr Jim Graham – Chairperson

Present: Applicant’s Representative
Mr Allan Hazell – Sunshine Coast Regional Council Representative

Decision

The Tribunal **dismisses** the appeal as it does not have jurisdiction to hear the matter, for the following reasons:

- (a) The decision of Noosa Shire Council to issue a written “defect notice” on 12 February 2008 to the applicant under the *Plumbing and Drainage Act 2002* (PDA) cannot be appealed to the Tribunal.
- (b) Only an “information notice” or “enforcement notice” can be appealed to the Tribunal.

Background

Withheld employs licensed persons to install and provide backflow testing services. It was employed to install plumbing and drainage on ‘the subject site’, which included the installation of fire hose reels internal and external to the building. It further submitted that these were inspected and certified by Council during the period of 2005/6.

The water plumbing work included the installation of pipework to supply water to fire hose reels located throughout the building (approx 126 fire hose reels) installed in a commercial building at 'the subject site'.

Under the PDA, fire hose reels are required to have backflow devices installed, under certain situations, to protect the local authority's infrastructure and the private plumbing installation from contamination.

Council is required under section 38(1) of the Standard Plumbing and Drainage Regulation 2003 (SPDR) to: *"...implement and maintain a program for its local government area for the registration, maintenance and testing of testable backflow prevention devices installed in the area"*.

Section 116(2) of the PDA provides that:

"A local government may give written notice to a person who has performed plumbing or drainage work or on-site sewerage work requiring the person to do a stated thing if the local government reasonably believes the work does not comply with this Act".

Council conducted an inspection of the subject site and detected what it considered to be a breach of the applied provisions. It issued a "defect notice" to the applicant, dated 5 September 2007, directing that all backflow devices on the subject site be installed correctly.

The applicant responded to Council's defect notice in writing on 24 September 2007 providing the following explanation:

1. Fig 7 does not indicate that unions are to be installed, only that resilient seated isolation valves are to be installed upstream and downstream.
2. Item 4.6.1(j) of AS 3500.1:2003 stated that the valve be capable of being removed and replaced. We believe, however, that we have complied with this clause as the union below the FHR can be broken, hose reel removed and valve unscrewed for replacement.

A further "notice" was issued by Council, dated 28 November 2007. Council advised that the installation did not comply with section 4.6.1(j) of AS/NZS 3500.1:2003, because the "...heads of the check valves would hit the wall behind, not allowing the device to be removed". Council advised in the notice that the "All inline devices shall be installed with connections to permit the removal and replacement of the device".

At the hearing, Council also raised that if the copper pipework is constantly flexed to facilitate the removal of the inline device for replacement there could be damage caused to the structure of the pipework material which could cause failure of the pipework resulting in water damage to the building.

Finally, Council issued a "defect notice" on 12 February 2008. A notice entitled "Appeals against Council Decisions" appears to have been attached to this notice.

Section 4.2.13 of the IPA provides that a person given an enforcement notice may appeal to the tribunal against the giving of the notice. The applicants lodged an appeal to the tribunal against the decision of the Council to issue an "enforcement notice".

The applicant's response to Council's defect notice, dated 24 September 2007, provided the reasons for appealing the decision of Council to issue the written notice of failed inspection.

Material Considered

1. 'Form 10 – Notice of Appeal' lodged with the Registrar on 6 February 2008
2. Letter from the applicant and supporting documentation
3. Written "Defect Notice" issued by Noosa Shire Council dated 12 February 2008
4. Verbal submission from the applicant at the hearing
5. Verbal submission from the council representative at the hearing
6. Verbal submission from Crane Industries' representative
7. The *Plumbing and Drainage Act 2002*
8. Standard Plumbing and Drainage Regulation 2003
9. The *Integrated Planning Act 1997*
10. AS/NZS 3500.1:2003 Water Services
11. AS/NZS 3500.2:2003 Plumbing and Drainage Part 1

Reasons for the Decision

1. Enforcement notices issued under the PDA

Section 116(2) of the PDA provides that Council may give a written notice (an enforcement notice) to a person who has performed plumbing or drainage work to do a stated thing (e.g. directing the person to alter, repair or replace defective work). This is relevant where, in this matter, it relates to Council's obligations under section 38 of the SPDR to implement and maintain a program for the registration, maintenance and testing of testable backflow prevention devices installed in the area.

This enables Council to issue an enforcement notice to the "person who has performed the plumbing or drainage work". Section 116(1) of the PDA is not relevant in this matter because it requires the notice to be given to the "owner of the premises".

Section 118(1) of the PDA provides that an enforcement notice under the Act is taken to be a notice under the IPA. Therefore, the enforcement notice must comply with the general requirements of enforcement notices under section 4.3.14 of the IPA.

2. Grounds of appeal

Council detected what it considered to be a breach of the applied provisions and issued a "defect notice", dated 5 September 2007, directing that all backflow devices on the subject site be installed correctly. The applicant responded in writing, dated 24 September 2007, detailed above, disagreeing with Council's notice.

A further “notice” was issued by Council, dated 28 November 2007, in which Council advised that it considered that the installation of the devices did not comply with section 4.6.1(j) of AS/NZS 3500.1:2003, because the “...heads of the check valves would hit the wall behind, not allowing the device to be removed.”. This resulted in Council issuing a further “defect notice” on 12 February 2008, to which an “Appeals against Council Decisions” notice was attached. This notice is the subject of this appeal.

3. Was this a valid enforcement notice?

This was not a valid enforcement notice, for the following reasons:

First, an enforcement notice cannot be issued until a show cause notice has been issued (see section 115(1) of the PDA) and no evidence was presented to the Tribunal of a show cause notice being issued. Enforcement notices can be issued under section 116(1)(a)(i) or (iii) of the PDA without issuing a show cause notice. These don’t apply in this case as this does not appear to be a matter where the plumbing configuration would be danger to health or a situation where the plumbing or drainage is inadequate to deal with greywater.

Second, the “defect notice” was issued to *withheld*. The Tribunal notes that *withheld* is a private company and can be considered a person. However, in this context the notice should have been given to the person noted on the Form 7 supplied as part of the original work. Further, it should have been given to a person and not the company.

Third, the Tribunal was prepared to accept that the title, i.e. “defect notice”, was a mistake, the second last paragraph of the notice refers to section 20(4) of the SPDR and the appeal notice referred to ‘conditions imposed on a compliance certificate’. Therefore, the notice does not satisfy the requirements for an enforcement notice. Even though section 116 of the PDA does not specify, nor can the Tribunals find an approved form that requires the notice to be called an “enforcement notice”, it cannot be established that Council intended to actually issue an enforcement notice.

4. Can a defect notice be appealed to the Tribunal?

A defect notice cannot be appealed to the Tribunal. Section 4.2.7 of the IPA provides that the Tribunal may decide any matter that under the IPA or another Act may be appealed to it. Section 4.2.12A of the IPA provides for an appeal related to the issuing of an information notice and the footnote to the section recognises the two avenues of appeal being for Part 4 (compliance assessment) and Part 5 (chief executive approvals).

A defect notice has been issued in this case, not an information notice. This makes sense as it links with sections 85(10) and 86(12) of the PDA. Further, the only other appeal right available is under section 4.2.13 of the IPA which concerns enforcement notices, but as noted above, the Tribunal does not believe this was an enforcement notice.

5. Additional comments on the appeal

Despite the decision to dismiss the appeal, the Tribunal wishes to add the following comments on this matter.

Defect notices

The Tribunal considers that a “defect notice” cannot be issued for these matters. Section 20(1) of the SPDR provides that the section “applies if the local government receives a request for assessment of a particular stage of regulated work or on-site sewerage work”.

Therefore, section 20(4) is not relevant to this matter as a compliance certificate has already been issued by Council (as submitted by the applicant) and section 38 of the SPDR is relevant to this matter (i.e. local government implementing a program for registration, maintenance and testing of backflow prevention devices).

Installation of backflow prevention devices

The applicant performed the regulated work in accordance with the applied provisions of the SPDR namely AS/NZS 3500.1:2003 - Water Services. Section 4 clause 4.6.1.(j) of the standard, states that “*In-line devices shall be capable of being removed and replaced*”.

The Tribunal considers that the in-line backflow prevention devices can be removed through the uncoupling of the barrel union located downstream of the resilient seated isolating and upstream of the fire hose reel. The licensed person employed to carry out the installation and testing of backflow prevention devices will have skills and experience to overcome issues arising from the installation process.

The Tribunal interviewed a technical expert from Crane Industries (copper pipe manufacturer). This was as a result of a verbal submission made by Noosa Shire Council regarding the effect on the flexing of the copper pipework as part of the removal of the backflow prevention device on the pipework material.

The technical expert’s response was that if this action was to occur it would only be relevant at the time the valves were to be removed for replacement (minimum of 15 years life expectancy) and there would be no impact on the structural integrity of the pipework.

The fire hose reel is classed as an "end of line device" and as such there would be no impact to any other plumbing fixture or any inconvenience if the water is turned off for the maintenance work to be carried out.

Jim Graham
Building and Development Tribunal Chairperson
Date: 20 May 2008

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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