



Building and Development Tribunals — Decision

Integrated Planning Act 1997

Appeal Number:	3—08—016
Applicant:	<i>Withdrawn</i>
Assessment Manager:	Alan McMillan as a private certifier for Suncoast Building Approvals
Concurrence Agency: (if applicable)	Fraser Coast Regional Council (formerly Hervey Bay City Council)
Site Address:	<i>Withdrawn</i> — the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA).

Date of hearing:	Not applicable as the appeal was heard by way of written submissions
Place of hearing:	Not applicable
Tribunal:	Ain Kuru - Chair
Present:	Not applicable

Decision:

The Tribunal in accordance with section 4.2.34 finds that there are no grounds for appeal as a deemed refusal as the private certifier has issued a Decision Notice approving the development.

Background

On 15 February 2008 Alan McMillan acting as a private certifier with Suncoast Building Approvals referred a building application to Hervey Bay City Council (the Council) for assessment as a referral agency under Part 3 of the Integrated Planning Act (IPA) and Schedule 2 of the Integrated Planning Regulation (IPR). The application was for a reduced frontage setback of 4.6 metres, instead of the required 6.0 metres.

On 18 February 2008 the Council advised that the application was code assessable as the proposed setbacks did not comply with the self assessable criteria for a material change of use for a house under section 1.8.1 of the Hervey Bay Planning Scheme.

On 21 February 2008 Suncoast Building Approvals, on behalf of the applicant, subsequently made a separate material change of use application for a house, which was approved by the Council on 3 March 2008, subject to conditions.

On 14 March 2008, John Hill of Suncoast Building Approvals lodged an Appeal Notice to the Building and Development Tribunals on the grounds of a deemed refusal as the Council had not responded to the building application referred to them on 15 February 2008.

The Tribunal was appointed on 2 May 2008 and following consultation with all parties to the appeal, advised it would be decided on the basis of written submissions.

Key points made in the submission by John Hill of Suncoast Building Approvals include:

- Sections 30 to 33 of the Building Act allow the Hervey Bay Planning Scheme to prescribe alternative siting provisions for boundary clearances for houses to those contained in the Queensland Development Code; but these provisions do not give Council the power to require a material change of use application for a boundary relaxation;
- Schedule 2 Table 1 of the Integrated Planning Regulation lists the local government as a concurrence agency where an alternative non-quantifiable siting provision applies to the Queensland Development Code;
- Section 3.1.3 (5) of the Integrated Planning Act states that a planning scheme has no effect where it is inconsistent with a code;
- Most other local governments deal with siting relaxations through the concurrence process;
- Financial hardship was suffered by the owner due to the high cost of making a material change of use application, and if there was an appeal to the Court, it would be outside the client's financial means and required time frames.

Key points made in the submission by the Council include:

- The IPA requires an appeal to the Tribunal to be made by an applicant, and the definition of applicant does not extend to the assessment manager appealing a concurrence agency response;
- Council has granted a material change of use approval for a house generally in accordance with the proposed siting relaxation, and this represents its concurrence agency response;
- There is no provision which suggests the referral agency response needs to take a particular form, and the Appellant treated it as such by issuing a development permit for building work on 7 March 2008;
- Therefore there has been no refusal for the purposes of section 3.3.16(4) of the IPA and no basis for appeal.

The Tribunal provided both parties with an opportunity to comment on each other's submissions. No further comments were received.

On 24 June 2008, Connor O'Meara Solicitors on behalf of the Council referred a recent decision of the Planning and Environment Court in *Cooloola Shire Council v Suncoast Building Approvals* to the Tribunal. In short, the Honourable Judge Rackemann ruled that the Assessment Manager incorrectly lodged the Appeal with the Tribunal. Subsequently the Court set aside the Tribunal decision on the grounds that Suncoast Building Approvals had no standing to appeal, and the appeal was dismissed.

On 23 July 2008, Suncoast Building Approvals forwarded an amended Appeal Notice listing *withdrawn* as the Applicant.

On the 15 October 2008 the Tribunal wrote to the parties advising that the amended Appeal Notice had been accepted, and that it would now proceed to consider the appeal. In addition, the Tribunal advised that it would deal with the application as a deemed refusal by John Hill, acting as a private certifier.

The parties were then given until 7 November 2008 to provide further written submissions to the Tribunal.

On 7 November 2008, Connor O'Meara Solicitors on behalf of the (new Fraser Coast Regional) Council forwarded a further submission which in summary stated:

- The Council does not appear to be a party to the proceedings, other than a concurrence agency;
- The appeal is incompetent as there is no deemed refusal as the private certifier has approved the house.

Material Considered

The material considered in arriving at this decision comprises:

- Letter from Suncoast Building Approvals to the Council dated 15 February 2008;
- E mail-from Lee Anne Manski of the Council dated 18 February;
- Letter and Development Application Form for a New Dwelling dated 21 February;
- Development Application Decision Notice for a Material Change of Use – House dated 3 March 2008;
- Building & Development Tribunals Appeal Notice dated 13 March 2008;
- Written submission from Suncoast Building Approvals to Tribunal dated 21 May 2008 (this letter enclosed letters from *withdrawn* and the owners *withdrawn*;
- Outline of Submissions from Connor O'Meara Solicitors on behalf of the Council to Tribunals received on 23 May 2008;
- Letter from Connor O'Meara Solicitors on behalf of the Council to Tribunals dated 24 June 2008 enclosing recent decision by the Planning & Environment Court;
- Amended Building & Development Tribunals Appeal Notice dated 23 July 2008;
- Further written submissions from Connor O'Meara Solicitors on behalf of the Council to Tribunals dated 7 November 2008;
- Building and Development Tribunal Decision - Cooloola Shire Council versus Suncoast Building Approvals dated 3 October 2007;
- Integrated Planning Act 1997;
- Building Act 1975;
- Uniform Civil Procedure Rules 1999 (Supreme Court of Queensland Act 1991);
- Queensland Development Code; and
- Hervey Bay Planning Scheme.

Findings of Fact

The Tribunal makes the following findings of fact.

Section 33 of the Building Act 1975 provides that a planning scheme may include alternative siting and site cover provisions to those contained in the Queensland Development Code. The Hervey Bay Planning Scheme contains alternative siting provisions to those in the Queensland Development Code. As the frontage setback of the proposed house did not comply with the alternative provisions in the Scheme, Alan McMillan referred the application to the Council for assessment as a referral agency under Part 3 of the IPA and Schedule 2 of the IPR.

The Council as a concurrence agency to the application, responded by advising the private certifier that a new application for a material change of use would be required for a reduced setback in accordance with the planning scheme. This advice was taken by the private certifier to mean that it did not intend to assess the application as a referral agency, and under section 3.3.16 of the IPA this response is taken to be a refusal of the application.

In accordance with section 3.5.11 of the IPA the assessment manager, that is the private certifier, must refuse the application if a concurrence agency response has stated that the application must be refused.

The applicant subsequently made an IDAS application for a material change of use, which was approved by the Council. On 7 March 2008, Alan McMillan, acting as the private certifier, issued a decision notice for the house approving the development subject to conditions.

The appeal notice was lodged on 13 March 2008. The form was incorrectly completed by the certifier and sought to appeal a deemed refusal of the building application. An amended appeal notice on 23 July corrected the applicant to *withdrawn*.

Reasons for the Decision

Under Division 3 of the IPA, appeals to the Tribunal can be made by applicants and advice agencies. Section 4.2.9 provides that an appeal can be made by an applicant against a deemed refusal by an assessment manager to issue a development permit. There is no ability under the IPA to independently appeal the decision of a referral agency. For this to happen, the assessment manager must first issue a decision notice.

In this case the private certifier, acting as the assessment manager, has issued a Decision Notice so there is no deemed refusal. Therefore there are no grounds for appeal.

The Appeal raises two other matters.

Firstly for a private certifier to fulfil their obligations under the Building Act, the Council should deal with a siting variation as a concurrence agency as provided for under that Act and the IPA. The Explanatory Notes for the Building and Other Legislation Amendment Bill 2006 Section 6A state that the policy intent of the legislation is to allow local governments to relax the Queensland Development Code requirements for site clearances and boundary setbacks for single detached class 1 and 10 buildings and structures in their planning schemes. A local government referral is therefore triggered if the proposed building work does not comply with the alternative provisions in the planning scheme. The aim of the legislation is to streamline and integrate the application process under IDAS by allowing domestic applications to be dealt with expeditiously by the private certifier, thereby avoiding unnecessary delays and costs for applicants having to make a second application to the local government.

Secondly, the Hervey Bay Planning Scheme deals with boundary setbacks for houses as a material change of use. The definitions included in the IPA and Building Act, and provisions included in the Queensland Development Code would point to boundary relaxations being defined as building work. This aspect is also dealt with in some detail in the Department's publication *Building Work in Planning Schemes*.

Ain Kuru
Building and Development Tribunal Chair
Date: 2 December 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:

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