



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-07-044

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Cooloolo Shire Council

Site Address: *withheld*—"the subject site"

Applicant: *withheld*

Nature of Appeal

Appeal against the decision of Cooloolo Shire Council to issue a decision notice as a material change of use instead of a determination as a referral concurrence agency for an assessment against a qualitative statement for the siting of a Class 1a detached dwelling that did not comply with a quantitative standard of the Cooloolo Shire Council Planning Scheme.

Date and Place of Hearing: The appeal was conducted by way of written submissions.

Tribunal: David Kay – Tribunal Chairperson
Don Grehan – Tribunal Referee

Decision

The decision of the Cooloolo Shire Council, dated 3 August 2007 is **set aside** and **is to be replaced with the following:-**

Under Section 3.3.16 (1) of the *Integrated Planning Act 1997* the concurrence agency response to the building certifier as assessment manager is to require that the following condition be placed on the development permit for building work:-

"A side boundary setback of 14.5 m to the outermost projection on drawing number PLNB sheet 1 of 9 (for the eastern side boundary) is required".

Background

Applicant's submission to the tribunal –

The applicant submitted that under the *Integrated Planning Act 1997*, the *Integrated Planning Regulation 2006* and the *Building Act 1975* the “siting variation” should be considered as a request for a referral agency response and not as an application for a material change of use.

Cooloola Shire Council submission to the tribunal –

The proposal to erect a dwelling house is self assessable in the Rural Planning Area if it complies with Column 2 of Table 8:3 of the Dwelling House Code and becomes Code assessable if it does not comply with Column 2 of Table 8:3. The proposal does not satisfy the 15 metre setback for the Rural Zone and on a lot 2 hectares or less and defaults to a Code assessable Material Change of Use.

Material Considered

1. Material submitted by the applicant with the “Form 10 – Notice of Appeal” to the Tribunal;
2. Written submission received from Cooloola Shire Council;
3. The *Integrated Planning Act 1997* (“IPA”);
4. The *Integrated Planning Regulation 1998* (“IPR”);
5. The *Building Act 1975* (“BA”);
6. The *Building Regulation 2006* (“BR”);
7. The Queensland Development Code (“QDC”); and
8. The Cooloola Shire Council Planning Scheme.

Findings of Fact

- An application for a decision relating to an assessment under a specific outcome was made to the Cooloola Shire Council.
- The matter is required to be considered by Cooloola Shire Council.
- The application was approved by Cooloola Shire Council as a development permit for a material change of use and a preliminary approval for building work.
- The appeal to a Building and Development Tribunal was lodged within the required timeframe.
- The Tribunal has jurisdiction to decide the appeal.

Reasons for the Decision

Part 2 section 3 (3) of “IPR” refers to Schedule 1 Part 3 Code Assessment.

Schedule 1 Part 3 Code Assessment Table 1 Building work Item 1 states that building work made assessable under schedule 8 “IPA” requires assessment against the “BA” Chapter 4 Part 1 division 1:-

- (a) *Chapters 3 & 4 of the “BA”;*
- (b) *any local law or planning instrument that the division allows to apply to the assessment;*
- (c) *The “QDC”;*
- (d) *The Building Code of Australia.*

The “BA” in Chapter 4 Part 1 Division 1 sets out the relevant laws and documents for assessing building work.

“BA” Section 30 Relevant laws and other documents for assessment of building work

- (1) *Building assessment work and self-assessable building work must be carried out under the following laws and documents (the **building assessment provisions**)—*
- (a) *IDAS;*
 - (b) *chapter 3 and this chapter;*
 - (c) *the fire safety standard;*
 - (d) *any provisions of a regulation made under this Act relating to building assessment work or self-assessable building work;*
 - (e) *any relevant local law, planning scheme provision or resolution made under section 32 or 33;*
 - (f) *the BCA;*
 - (g) *subject to section 33, the “QDC”.*

There is now the need to ascertain if clause (e) above or clause (g) applies.

“BA” Section 33 Alternative planning scheme provisions to QDC boundary clearance and site cover provisions for particular buildings

- (1) *This section applies for work (**relevant work**) that—*
- (a) *is building assessment work or self-assessable building work; and*
 - (b) *is for a single detached class 1 building or a class 10 building or structure located on the same allotment as a single detached class 1 building.*
- (2) *A planning scheme may include provisions (**alternative provisions**) that, for relevant work, are alternative or different to the “QDC” boundary clearance and site cover provisions.*

The building work is for a single detached Class 1 building and the Cooloola Shire Council Planning Scheme has adopted **alternative provisions** in the planning scheme for boundary clearances in Table 8:3 of the Dwelling House Code.

A planning scheme provision, being an **alternative provision** for a boundary clearance in this case Table 8:3 of the Dwelling House, forms part of the **building assessment provisions** by way of section 30 (1) (e) and this clause applies.

“BA” Section 31 Building assessment provisions form a code for IDAS

- (1) *For IPA, each of the building assessment provisions, other than IDAS, is a code for IDAS for the carrying out of building assessment work or self-assessable building work.*

The Cooloola Shire Council Planning Scheme **alternative provisions** for boundary clearances in Table 8.3 of the Dwelling House Code are a **building assessment provision** and a **code for IDAS**.

Section 3.1.3 (1) of “IPA” states that “*a regulation may require code or impact assessment for assessable development*”. Therefore, under the “IPR”, the assessment of **alternative provisions** for a boundary clearance **becomes code assessable building work assessed against the provisions of the “BA”**.

The “IPR” section 5 “Referral agencies and their jurisdiction” refers to Schedule 2 of the “IPR”.

*Schedule 2, Table 1 Item 18 states that where an **alternative provision** applies to building work and where the proposed building is **not of the quantifiable standard for a relevant qualitative statement** under the provision the local government is a referral concurrency agency to determine whether the proposed building or structure complies with the qualitative statement.*

The quantifiable standard of 15 m for a side boundary in a Rural Zone area for a lot less than 2 hectares is 15 metres. The application is for 14.5 metres to the side boundary. In this case, the proposed building work does not comply with the **quantifiable standard** of the Dwelling House Code of the Cooloola Shire Planning Scheme.

Where the proposed building work does not satisfy the quantifiable standard of the alternative boundary clearance provisions of the Cooloola Shire Planning Scheme assessment against the relevant qualitative statement is required.

The relevant qualitative statement for the Dwelling House Code of the Cooloola Shire Planning scheme is Specific Outcome SO-5 in Column 1 of Table 8:3.

However, under the Cooloola Planning Scheme, the assessment of alternative provisions for a boundary clearance becomes a code assessable against the provisions of a planning scheme. The Cooloola Shire Council considers that it is code assessable material change of use.

*In the “IPR” Schedule 2, Table 1 Item 18 states that where an **alternative provision** applies to building work and where the proposed building is **not of the quantifiable standard for a relevant qualitative statement** under the provision the local government is a referral concurrency agency to determine whether the proposed building or structure complies with the qualitative statement.*

This is where the conflict arises and we now need to address the resolution of this conflict.

Section 3.1.3(5) of “IPA” states that *”to the extent that a local planning instrument is inconsistent with the scope of a code or part of a code identified in the regulation, the local planning instrument is of no effect”*.

The local planning instrument (Cooloola Shire Council Planning Scheme) is inconsistent with the “IPR” in that it requires code assessment as a material change of use against the planning scheme under the Cooloola Shire Council Planning Scheme. The “IPR” requires a determination as a referral concurrence agency.

As the level and type of assessment required by the planning instrument is inconsistent with the level and type of assessment required by the ”IPR”, the planning instrument has no effect.

Chapter 3 Part 1 s 3.1.8 of “IPA” states that *“if an application is referred to a referral agency under Part 3 the referral agency has the jurisdiction prescribed under a regulation”*. Chapter 3 Part 3 Division 1 s 3.3.1 (c) of “IPA” *“gives concurrence agencies the opportunity to exercise their concurrence powers”*.

Conclusion

Under “IPA”, the Cooloola Shire Council must exercise their concurrence agency powers as a referral concurrence agency where “*an **alternative provision** applies to building work and where the proposed building is not of the quantifiable standard for a relevant qualitative statement*”.

David Kay
Building and Development
Tribunal Chair
Date: 3 October 2007

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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