



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal number:	3—09—095
Applicant / appellant:	Donald Mackay of Don Mackay Pty Ltd
Assessment manager / Respondent:	Greg Dempster of Development Certification Pty Ltd
Concurrence agency: (if applicable)	Not applicable
Site address:	Lot 48 Abell Road, Cannonvale and described as Lot 48 on SP 166677 — the subject site

Appeal

Appeal under section 4.2.12 A(1)(b)(ii) of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager, dated 19 March 2009, to issue a non-compliance notice (form 61) for the final inspection. This refusal was based on aspects of the final inspection not complying with the development approval decision notice.

Date of hearing:	10:30am – Thursday, 11 February 2010
Place of hearing:	The subject site
Tribunal:	Bruce Shephard – chair
Present:	Don Mackay – applicant / appellant and builder Ken Ford – applicant / appellant and builder Greg Dempster – building certifier / assessment manager Alan Murphy - building certifier / assessment manager Jason Turner - building certifier / assessment manager

Decision:

The Tribunal, in accordance with section 4.2.34(2)(a) of IPA, **confirms** the decision of the building certifier to issue a non compliance notice as:

1. insufficient evidence was presented to the Tribunal to establish if the redesigned guttering was sufficient for the respective capacity of the roof or that it complies with AS/NZS 3500.3:2003 (Stormwater Drainage); and
2. the building certifier's power to accept inspection or design help in the form of a Form 15 or 16 is discretionary, not mandatory.

NOTE: The decision held in this application is separate to any other applications which may be made over the property.

Background

The Tribunal conducted an on-site hearing taking the opportunity to view the development and character of the neighbourhood.

The neighbourhood is a low to medium density residential area with low traffic volume and generally minimal vegetation. In the neighbourhood there are many examples of buildings and structures built to the side boundary, typically on the western boundary.

The subject site has a 14 metre frontage to Abell Road. On the subject site there is a single storey rendered block detached dwelling built to the boundary on the western side, along the garage and kitchen/lounge areas. The building is built approximately 90mm from the western boundary. This is commonly referred to as being 'built to boundary'.

The gutters located along the built to boundary side appear to be one off fabricated gutters with the standard outside profile. Overflow slots are located approximately 80mm down from the top outside edge. The width of the gutter is approximately 55mm, this varied as there was no gutter brackets to support the top outside edge of the gutter. The top outside edge of the gutter was located 50 mm below and 25 mm out from the invert of the roofing tile.

The proposed building was lodged for approval with Greg Dempster of Development Certification. During the final inspection on 15 April 2008 10 items of non compliance were identified. While addressing the built to boundary issue the gutter was modified to a reduced width, resulting in a decrease in the gutter's capacity. In a subsequent inspection on 15 March 2009, the issue of the decreased capacity and the location of the top outer edge were listed as being non compliant on a form 61 dated 19 March 2009. To date all other non compliant issues other than the gutter have been addressed.

The appellant appealed the decision of the assessment manager to the Building and Development Tribunals on 7 December 2009.

Material Considered

The material considered in arriving at this decision comprises:

- "Form 10 – notice of appeal" and attached letter, non-compliance notices, form 16 and letter from Jon Stoddard, form 15 from Mick Rein.
- Inspection of the site on 11 February 2009.
- 24 April 2007 - development application decision notice 60486-1, issued by Greg Dempster of development certification Pty Ltd as the assessment manager.
- 27 November 2007 – 'set out certification' for the corners of the slab by Kevin Holt Consulting Pty Ltd including sketch plan 72572.
- 29 July 2009 – incomplete form 15 for the design of the gutters and down pipes along the south western boundary by Mick Rein.
- 30 April 2009 – letter from Stoddard Building regarding the modification of the western gutters and down pipes.
- 15 April 2008 - form 61 issued by Greg Dempster with ten reasons for non compliance, entitled "non-compliance notice –reinspection required".
- 19 March 2009 - form 61 issued by Greg Dempster with no reasons for non compliance, entitled "non-compliance notice –reinspection required".
- 19 March 2009 - form 61 issued by Greg Dempster with four reasons for non compliance, entitled "non-compliance notice".

- 7 December 2009 - Building and Development Tribunals appeal notice 10 with accompanying letter also dated 7 December 2009.
- 11 February 2010 - a sequential list of events tabled by Greg Dempster during the Tribunal meeting. This list was confirmed by Ken Ford during the Tribunal meeting.
- Verbal submissions by the applicant.
- Verbal submissions by the assessment manager.
- *Building Act 1975*.
- *Building Regulation 2006*.
- IPA.
- *Integrated Planning Regulation 1998*.

Findings of Fact

The Tribunal makes the following findings of fact:

1. A final inspection was undertaken and 10 non-compliant items were listed.
2. The gutter was subject to major modification from the standard section which projected over the boundary. The new section has a significantly reduced cross section and the outside lip is a considerable distance below the level of the roofing.
3. A second final inspection was undertaken and the western side gutter was listed as a non-compliant.
4. The builder has supplied a form 16 from Jon Stoddart stating the fascia and gutter has been installed to the manufactures specifications, and a form 15 from Mick Rein for the design of the gutter and down pipes to AS/NZS 3500-3 2003 (Stormwater Drainage).
5. Greg Dempster has determined the above persons not to be competent with respect to the relevant aspects of the particular building works and at his discretion did not accept the inspection and design help from Mick Rein and Jon Stoddart.

Reasons for the Decision

During the Tribunal hearing two issues were raised. The appellant believes the certifier has not followed the correct procedure for notification of non-compliance. The certifier believes the gutter is not suitable as installed.

With regards to the procedure followed by the certifier for inspections, notification followed in this matter, it is the Tribunals opinion that this falls outside the jurisdiction of the Tribunal, in accordance with section 4.2.7(2)(a) of the IPA. The Tribunal considers that this is a matter for the Queensland Building Services Authority, to be addressed through their process for complaints against certifiers.

The two gutter defects outlined by the certifier are the reduced capacity of the gutter not being suitable for the specific roof, and the location of the gutter's top outside edge potentially allowing water to flow over the gutter in question into the neighbouring allotment. The certifier identified significant issues with the gutter and listed the gutter as a non compliance item.

The builder supplied additional evidence in the form of design and inspection help from whom they believed to be competent persons as described in the *Building Regulation 2006*. In this instance the certifier has made the decision that the help provided was not from competent persons under section 18 of the *Building Regulation 2006* and will not accept the design and inspection help. Section 49 of the *Building Regulation 2006* states the certifier may accept a certificate from a competent person. Section 32CA of the *Acts Interpretation Acts 1954* provides guidance for the word "may" in "that the power may be exercised or not

exercised, at discretion”.

The Tribunal advises that complaints arising from the decision made by the certifier, about the competency of Mick Rein and Jon Stoddart is a matter for the Queensland Building Services Authority.

The design of this gutter is of a technical nature and neither the appellant, or the certifier has undertaken the calculations required to confirm the gutter complies, or not with AS/ NZS 3500.3:2003 (Stormwater Drainage). It is the Tribunal’s opinion that the design of the gutter should be subject to a peer review by a mutually agreed, suitably qualified and experienced person.

Bruce Shephard
Building and Development Tribunal Chair
Date: 7 April 2010

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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