



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

**Appeal Number:** 3—08—063

**Applicant:** Kevin Robertson

**Assessment Manager:** David Blake for and on behalf of Allied Building Certification Pty Ltd

**Concurrence Agency (Council):** Moreton Bay Regional Council

**Site Address:** 10 Livermore Street, Redcliffe and described as Lot 204 on RP30420— the subject site

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### **Appeal**

Appeal under section 4.2.9(1)(a) of the *Integrated Planning Act 1997* (IPA) against the decision of the Assessment Manager to refuse a development application for building works, namely alterations and additions to an existing dwelling.

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**Date of hearing:** 1pm – Wednesday, 10 September 2008

**Place of hearing:** Offices of the Department of Infrastructure and Planning, Brisbane

**Tribunal:** Mr Paul Smith – Chair  
Mr Greg Schonfelder – Member

**Present:** Mr David Blake – Allied Building Certification Pty Ltd

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### **Decision:**

The Tribunal, in accordance with section 4.2.34 of the IPA, makes the following directions and orders:

1. As soon as is practicable the appellant shall give to Council the application for a referral agency response that was previously given to Council on or about 30 July 2008 but returned to the Assessment Manager on or about 8 August 2008.
2. Within 5 business days of receiving the application for a referral agency response referred to in direction No 1 hereof, Council shall assess the application and give its referral agency response.
3. If Council requires the application to be refused or requires a development approval to include conditions, the response must include reasons for the refusal or inclusion.
4. If Council does not give its referral agency response by the date referred to in direction No 2 hereof, the Assessment Manager may decide the application as if Council had assessed the application and had no concurrence agency requirements.

## **Background**

A development application for carrying out of building work under the IPA was received by the Assessment Manager for alterations and additions to the existing detached dwelling located on the subject site.

The Assessment Manager made an application for a referral agency's response to Council on the grounds that Council was a concurrence agency because of the proposed siting of the proposed detached dwelling.

Council did not assess the referral application nor did it give a referral agency response. Instead Council returned the application referred to it by the Assessment Manager to the Assessment Manager and orally advised to the effect that Council was not a concurrence agency for the application. Council advised that the relevant siting provisions are contained within its planning scheme so that a separate development application, as required under its planning scheme, was required.

The Assessment Manager refused the building development application on the grounds that because no response had been received from the concurrence agency the application was deemed to have been refused pursuant to Section 3.3.16(4) of IPA.

The Registrar notified Council of the receipt of the Notice of Appeal by letter dated 4 September 2008.

The Chair of the Tribunal notified the parties of the time and place for the hearing of the appeal by letter dated 8 September 2008.

Council orally advised the Registrar, by phone on 9 September 2008 that it would not elect to be a co-respondent in the appeal and would not attend the hearing.

By email dated 9 September the Registrar asked Council to confirm this in writing and requested written submissions to address the issues raised in the Notice of Appeal by Friday 12 September.

At the date of this decision no written submissions have been received from Council.

## **Material Considered**

The material considered in arriving at this decision comprises:-

1. 'Form 10 – Notice of Appeal' dated 29 August 2008, received by the Registrar on 3 September 2008 including grounds for appeal and correspondence accompanying the appeal application.
2. Copies of plans showing details of the proposed development.
3. Form 1 Development Application – Part's A & B.
4. Letters of support from both adjoining neighbours.
5. Application for referral (concurrence) agency advice (variation) lodged with Council dated 23 July 2008.
6. Copy of the receipt from Council for the referral (concurrence) agency application dated 30 July 2008.
7. Development Application Decision Notice from the Assessment Manager dated 29 August 2008.
8. Verbal and written submission from the Assessment Manager at the hearing.
9. Various emails between the Registrar and the parties.
10. The *Building Act 1975* (BA).
11. The Building Regulation 2006.
12. The IPA.
13. The Integrated Planning Regulation 1998.
14. The Queensland Development Code (QDC).
15. Relevant section of Council's planning scheme.

## Findings of Fact

The Tribunal makes the following findings of fact:-

1. A building development application was made for the alteration and additions to the existing Class 1a dwelling on the subject site. The proposal involved the raising of the existing dwelling in its present location and the construction of an unroofed deck on the front of the dwelling. The new ground floor area is to be enclosed and a Class 10a garage constructed in part of this area.
2. The site area of the subject site is 405m<sup>2</sup>.
3. The following siting provisions apply to the subject land:-
  - (a) For the front setback, s.33 of the BA, and Council's planning scheme provide for the road frontage setback of 6.0m to the outer most projection.

The setback proposed to the unroofed deck from the road boundary (west) is 3.0m.

- (b) For the side and rear setbacks, the effect of the QDC MP1.1 for the subject site with a road frontage of 10.06m, provides a 1.0m setback to the outer most projection.

The setback proposed on one of the side boundaries (north) is 0.98m.

- (c) The application for a referral concurrence agency response was made to Council on or about 30 July 2008.
4. The Assessment Manager, in the written submissions attached to the Notice of Appeal advised that a response was received via telephone from a Council officer on 7 August 2008 advising to the effect that Council was not a concurrence agency for the application and because the siting provisions were contained within its planning scheme an application for planning approval was required.
5. The application for a referral agency response was returned by post to the Assessment Manager on or about the 8 August 2008.
6. The Appellant's submissions attached to the Notice of Appeal referred to the following:-
  - The local government is identified in IPA part 3.1.8(1) and IPR schedule 2 as the concurrence agency for assessing non-compliance with the alternative siting provisions established under BA section 33.
  - BA Section 83(d) prevents the private building certifier from approving the building development application if a concurrence agency has jurisdiction for a part of the building assessment work until that part has been assessed by the concurrence agency, under the building assessment provisions. For BA section 30(c) a planning scheme provisions made under Section 32 or 33 is a building assessment provision.
  - The local government, as the concurrence agency, failed to determine the siting application submitted to it on 30 July 2008 within the 5 business day period established under IPA part 3.3.14(1)(a) and IPR Schedule 4 Row 1, item (b).
  - For other districts within Council it is clearly stated that the local government is the concurrence agency for non-compliance with alternative siting provisions.
  - The Council's concurrence agency application form clearly recognises the application is for "assessment for compliance with the alternative provisions and performance criteria of the QDC...".
  - While BA Section 33 allows the local authority to alter the provisions of the QDC, neither BA Section 31(3), Section 32, Section 33 or other section of the Act permits the local authority to alter the process by which non-compliance with the alternative provisions are assessed against the performance standards. IPA Section 3.1.3(4) and (5) also clarifies the power of the local planning

instruments in this regard, therefore Council can not request a Development Permit (Planning) to be lodged in place of a Concurrence Agency assessment.

- As Council did not assess the application as a concurrence agency and give a response in the required time the application is considered a deemed refusal and as such the tribunal has the jurisdiction to consider the application for design and siting on its merits without further involvement of Council.

### **Reasons for the Decision**

1. The Tribunal refers to and adopts the Assessment Manager's submissions, summarised in paragraph 6 under the "Findings of Fact" heading of this decision.
2. Under Section 3.3.16(4) of IPA, if a concurrence agency does not give a referral agency response in connection with this particular application within the referral agency's assessment period, the application is deemed to have been refused.
3. The effect of Section 3.3.16(4) of IPA is that the applicant may either wait for a response or file a deemed refusal appeal.
4. With a deemed refusal appeal, ordinarily a preliminary step, aimed at identifying the issues in dispute, would be for Council to assess the application and if it believes the application should be refused, or approved subject to conditions, identify the reasons for the refusal or conditions.
5. However in this case Council has taken the unusual step of not assessing the application and returning the application to the applicant with no written explanation.
6. Council did not respond to the notice of the Tribunal's hearing. No Council representative attended the hearing. The Appellant was represented by the Assessment Manager who's written submissions had been provided to Council. In the interest of natural justice the hearing was adjourned and Council was requested to make urgent written submissions. The Appellant's representative at the hearing was advised that the hearing would be reconvened, possibly by telephone, if submissions were received from Council. No submissions were received.
7. Because Council presently does not have a copy of the application in its possession, it is not in a position to respond in any meaningful way to any directions the Tribunal may choose to give. The Tribunal also believed it would be prudent to review submissions from Council before deciding the appeal.
8. The directions and orders given are intended to make Council do what the Tribunal believes it should have done when it first received the copy of the application; namely assess the application and give a response.
9. The Tribunal is of the opinion that Council has had, and will have following receipt of this decision, adequate time to respond to the application and further delay in deciding the application is not justified.
10. The decision includes a form of guillotine order in the event that Council continues to remain silent.

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**Paul Smith**  
**Building and Development Tribunal Chair**  
**Date: 15 October 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**