



Development Tribunal – Decision Notice

Planning Act 2016, section 255

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| Appeal Number: | 44-18 |
| Appellant: | Don Edwards |
| Respondent (Assessment Manager): | Rodney Retell, Building Certification Group |
| Site Address: | 35 Cameron Street, Fairfield and described as Lot 3 on RP 69061 – the subject site |

Appeal

Appeal under s. 229 and Schedule 1, Section 1, Table 1, Item 1 of the Planning Act 2016 in relation to a development approval for an Alternative Building Solution for Roofwater Drainage.

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| Date and time of hearing: | Wednesday 1 May 2019 at 10 am. |
| Place of hearing: | Development Tribunal offices, level 16, 41 George Street, Brisbane |
| Tribunal: | Mr Ain Kuru – Chair Ms Judith Brien - Member |
| Present: | Mr Ken Crase – Member |

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (Planning Act) replaces the decision of the Respondent dated 2 October 2018 with a decision refusing the application for an Alternative Building Solution for Roofwater Drainage.

Background

In 2014 the Appellant entered into a contract with Sovereign Homes Qld Pty Ltd (the Builder) to construct an extension to the Appellant's existing dwelling. The contract included the construction of new box gutters between the roof of the existing house and the wall of a second storey extension. The plans indicated new internal gutters between the existing roof and the second storey extension. The gutters were shown to fall away from a point where the internal valley of the existing roof meets the corner of the second storey extension and drain to either side of the house, one being referred to as the north south gutter and the other as the east west gutter. The unusual cross section of the gutter, which is half box shape and half v shaped sits in the space where the wall of the second storey extension intersects with the sloping roof. In addition, the plans showed a wide gutter commencing at a relatively high point along the valley, and then tapering to a narrower gutter where it meets the external gutter on either side of the house where water would drain into a downpipe.

The Builder lodged a development application for approval of the work with the Respondent, who is a licensed private certifier. On 17 July 2014 the Respondent issued a development permit for building work for alterations to the existing dwelling. The approved architectural plans are identified in the decision notice as Sovereign Homes WD01A-WD07A, 8P1, WD09A, 15A. Condition 1 of the 'Site preparation and Drainage' conditions that form part of the approval require, *"Gutter, Downpipes and Box Gutters (if applicable) shall be fitted to comply with the BCA, Part 3.5.2 and AS3500. Gutters and downpipes less than 450mm from the property boundary are to be non-combustible (PVC is non-compliant).*

The Builder installed a gutter on or about 28 August 2014, which was not in accordance with the plans approved by the Respondent. The installed gutter was narrower at the valley, no longer tapered and now drained in one direction to the north *i.e.* the east west gutter now falls in the opposite direction into the north south gutter.

In addition to the gutter, there were a number of other matters in dispute in relation to the building contract, which were referred to, and decided by, the Queensland Civil and Administrative Tribunal (QCAT) (Application BDL253-15).

On 8 January 2015 the Respondent as part of the Building Certification Group signed a final inspection certificate, certifying that the building work complies with the building approval on the basis of either inspection or that certificates were received from competent persons at identified stages of construction.

The Builder then lodged a new development application for building work with the Respondent seeking approval of a differently designed gutter system on the basis that the installed gutter system was not in accordance with the original approval. The application was stated to be for an *Alternate Building Solution for Roofwater Drainage* and included an Alternative Solution prepared by Hydraulic Consultant Neil Blair, as the design of the gutter that had been installed was not in accordance with the Deemed-to-Satisfy (DTS) provisions of the NCC 2016.

The Respondent assessed the application. On 17 October 2017 the Respondent purported to approve the application and issued a decision notice. The Appellant appealed the decision to the Development Tribunal on the grounds that the Alternative Solution and the written Statement of Reasons for the decision were deficient.

On 26 April 2018 the Development Tribunal allowed the Appeal and set aside the decision and referred it back to the Respondent to be assessed in accordance with the requirements of both the Planning Act and Building Act, noting that in the event the material provided to support the Alternative Solution is deficient, the application ought to be refused (Appeal 57-17).

Mr Blair, the Hydraulic Consultant who prepared the report to support the application, subsequently prepared a new Alternative Solution for the gutter dated 28 September 2018. On 2 October 2018 the Respondent issued a document titled 'Development Application Decision Notice – Amended' together with a Statement of Reasons, purportedly approving the development application. Despite the Tribunal decision 57-17 the document references a decision date of 19 October 2017.

There is also a document titled 'Notice of decision on change application to a development approval' (s. 83 Planning Act) signed by the Respondent. According to that document a change application was made on 2 October 2018 and on that same day the request to change the development approval was approved with conditions.

On 22 October 2018 the Appellant lodged the present appeal in respect of the Development Application Decision Notice.

The grounds of appeal are summarised as follows:

- The supporting documents lodged with the application, including the Alternative Solution, are deficient as they do not comply with ss 24, 25 and 26 of the BA;
- The Statement of Reasons for approving the Alternative Solution does not contain details required under s 68A of the BA.
- The approved Form 15 does not comply with ss 46, 48 and 49 of the BR; and
- The amended Decision Notice is misleading as no change was made.

Prior to the hearing, the Tribunal requested the parties to provide a copy of all material they would be relying on at the hearing. The Appellant was given an opportunity to provide additional material that responded to the material provided by the Respondent. The Respondent lodged further material on 30 April 2019, a copy of which was given to the Appellant at the hearing.

Appellant's Written Submissions

The following is a summary of the Appellant's written submissions.

Orders Sought

The Appellant sought the following orders:

- To allow the appeal;
- To find that the Decision Notice is invalid as the Building Act does not provide for retrospective approvals;
- That the Statements of Reasons, the Form 15 and architectural plans are deficient;
- That the Alternative Solution submitted with the application is deficient;
- That the gutters need to comply with Australian Standard AS/NCZ 3500.3:2003 Plumbing and Drainage Part 3: Stormwater Drainage (AS 3500.3) as required in the original decision notice issued by the Respondent
- That the Respondent is in breach of s. 226 of the Planning Act in that he has provided false and misleading information; and
- That the Tribunal refer the Respondent to the Queensland Building and Construction Commission (QBCC) to investigate whether he is a fit and proper person to hold a licence.

Owner's Consent

The Appellant advises that no contract exists with the builder for submitting a development application and this was done without his consent.

The Alternative Solution

The supporting documents lodged with the application, including the Alternative Solution, are deficient as they do not comply with sections 24, 25 and 26 of the Building Act. Specific issues include:

- The cross section of the gutter and upstand shown in the drawings is not the same as the gutter as built and the drawings are hand drawn with no dimensions shown of the roof;
- The builder's licence is not shown on the plan;
- The Alternative Solution does not reference all the DTS requirements in section 3 (Roof Drainage Systems – Design) and the performance requirements in AS 3500.3;
- The Alternative Solution does not address many issues including those previously identified by experts used in relation to the QCAT hearing. These include:
 - Gradient of the gutter system;
 - Overflow devices;
 - Change in direction of the gutter; and
 - Use of Yellowtongue board instead of ply to support the gutter;
- The Alternative Solution does not detail or analyse the verification methods from the NCC 2016; and

- The Alternative Solution omits critical information, which the formulas rely upon, and their source.

The Statement of Reasons

The Statement of Reasons for approving the Alternative Solution does not contain details required under s. 68A of the Building Act. The Appellant raised numerous issues with the Statement including:

- The description of the Alternative Solution only refers to the shape of the gutter not being rectangular and does not address other matters found in the DTS requirements of AS 3500.3 including the support system, overflow devices, changing direction, having a horizontal constant width, having a constant longitudinal slope and downpipes. It also refers to the gutter as a V shaped gutter which are not mentioned in NCC 2016 or AS 3500.3;
- Not correctly identifying all the relevant DTS provisions being clause 3.5.2.0 of NCC 2016 relating to how performance requirements are satisfied, clause 3.5.2.5 (c) of NCC 2016 relating to overflow measures, clause 3.5.2.5 of NCC 2016 relating to Downpipes – size and installation, and D1.2 Roof Drainage Systems in Volume 3 of NCC 2016.
- Not accurately identifying the relevant performance provisions and not referencing Volume 3 of NCC 2016;
- The assessment method used was incorrect as:
 - Evidence relied on is not in accordance with clause 1.2.2 NCC 2016;
 - The calculations used to support verification are incomplete;
 - The comparison to DTS is incomplete; and
 - There is no evidence to support the hydraulic consultant being an expert in this field.
- The evidence relied on was deficient as the drawings and calculations used were not complete, and did not address the other issues previously raised by experts in relation to other DTS requirements. There was also no evidence to support the use of Yellowtongue flooring.
- The findings on material questions of fact rely on incomplete drawings and calculations provided by the expert.

The Competent Person and Form 15

The Appellant identified the following discrepancies in the Form 15 provided by the hydraulic consultant as breaches of s. 46 of the Building Regulation as:

- Section 2 – Description of Components Certified no detailed design is provided;
- Section 3 – Basis for Certification was not detailed;
- Section 4 – Reference Documentation being the letter dated 28 September 2018 does not attach detailed hydraulic plans; and
- Section 6 – Competent Persons Details lists the contact person as “Grizzly Bear”.

Retrospectivity of the Decision

The Appellant states that the decision is invalid as the Building Act does not provide for retrospective approvals as the Planning Act, Building Act and National Construction Code only provide for future building work. It is also noted that the application and decision notice also refer to “proposed building work”

The Appellant refers to Thompson Residential Pty Ltd v Hart & Anor (2014) QDC 132 (41) which deals with common practice versus what is legally required. He relies upon that case as support for the position that the Court must consider the legal rights of parties under the law and not common practice.

In addition, the Notice of Decision on Change Application to a Development Approval cites a change however there was no change to the drawings.

Other Issues

The Appellant raised numerous other issues relating to how documents were managed, matters relating to the building contract and conduct of the Respondent. Having regard to the decision, these have not been addressed as the Tribunal considers these to be either minor matters or outside its jurisdiction.

Respondent's Written Submission

The Respondent's written submissions responded to the Appellant's submissions. The following is a summary of the Respondent's submissions.

Owner's Consent

Written consent of the owner is not required under legislation.

The Alternative Solution

The Respondent believes the hydraulic consultant took the relevant requirements into consideration. Further he cannot respond to the allegations that the Alternative Solution was deficient as this is a matter for the consultant.

There is no regulation stating drawings cannot be hand drawn. The Respondent is unable to comment on the alleged anomaly in the gutter size as this information came from the QCAT hearing at which he was not a party.

The Competent Person and Form 15

The Respondent states that under the Building Act he is able to rely on the advice of a Competent Person and is not required to gather further advice if he considers the hydraulic consultant competent.

The Statement of Reasons

The Respondent submits that the Statement of Reasons satisfies s 68A of the Building Act as it details how the Alternate Solution is different from the DTS provisions prepared by the hydraulic consultant.

Expert judgement is an option which can be used to assess an Alternate Solution. Not all assessment options need to be used.

In response to whether the expert reports tendered at the previous appeal hearing should have been considered, the Respondent states this was a matter for the expert to consider, and he does not know whether the expert had access to this information. Further he states he is not required to seek other opinions.

The Respondent submits that a Certifier does not have to gather further opinions if he believes the advice he receives is reliable.

The use of particle board to support the gutter is not relevant to the Alternative Solution.

Retrospectivity of the Decision

The Building Act supports new and existing work. The legislation does not state that it does not apply to existing work.

The Decision Notice was revised after the hydraulic consultant reviewed the calculations and dimensions of the proposed Alternative Solution. An amended Decision Notice was used to accommodate the revised Statement of Reasons.

Reply Submission by the Appellant

The Appellant provided a further submission noting that the Respondent's submission did not provide substantial evidence to support the issuing of the Decision Notice and that the Respondent had not complied with the Tribunal's previous decision. The following is a summary of the Appellant's Reply submissions.

The Alternative Solution

The Respondent did not address the Appellant's view that the drawings submitted with the application were deficient and were not the same as the installed gutter. Reference is made to DA Forms Guide: Forms 1 and 2 which details the information requirements for a building application.

The Appellant notes that the Respondent relied solely on the advice of the expert, without giving any consideration to other expert reports that were made available to him at the previous appeal. The Appellant believes it was incumbent on the Respondent to investigate the issues raised in these reports before making a decision.

Section 4.8.4 of AS 3500.3 deals with the support systems for box gutters and should have been addressed by the Alternative Solution.

The Competent Person and the Form 15

The Appellant challenges the Respondent's view that the Respondent can rely on the advice of a competent person without seeking any further information. The Appellant points out that in the previous appeal, the Tribunal stated that despite deeming Neil Blair competent, the Respondent is not able to ignore specific requirements in section 26 of the Building Act about how an Alternative Building Solution should be prepared and section 68A of the Building Act requiring an Assessment Manager to prepare a Statement of Reasons.

The Appellant also questions whether the selection of Neil Blair as a competent person was in accordance with guidelines published by the State Government.

Retrospectivity of the Decision

The Respondent was unable to support his view that the approval of work under the Planning Act also applies to existing work. The Appellant restated earlier submissions about how the definition of development in the Planning Act applies to carrying out building work and that this is reflected in the Building Act and the DA Form 2.

The Hearing

As sufficient material had been provided to the Tribunal by way of written submissions, the Tribunal conducted the hearing by hearing from the parties on what the Tribunal considered were the key grounds of appeal.

Owner's Consent

It was agreed by the parties that the application to change the gutter system was made without the consent of the Appellant, and both parties accepted that owner's consent was not required by the legislation.

The Alternative Solution

The Respondent advised that he had relied on the advice of an expert as to whether the gutter was acceptable and satisfied the performance requirements of the NCC 2016.

The Appellant stated that the expert had relied on NCC 2016 instead of National Construction Code 2014 which was in force at the time the gutter was built, and that requirements in the earlier Codes were different. The Respondent stated that NCC 2016 was the relevant code at the time the application was assessed.

The Appellant submits that the expert went to NCC 2016 Volume 2 P2.2.1 (Rainwater management), but should also have gone to AS 3500 when assessing the proposal. The Appellant also submits that the Alternative Solution did not address all the relevant aspects of the plumbing code. The Respondent advised that the hydraulic consultant found that the design of the gutter was in accordance with AS 3500 to remove water from the roof and prevent entry into the building and therefore was equivalent to the DTS provisions of the NCC 2016.

When questioned by the Tribunal about the advice provided by other experts in documents submitted in relation to the previous appeal, the Respondent advised that under the legislation he was required to assess the application submitted to him, and that he had no reason to doubt the information provided by the expert.

The Appellant also raised concerns that the dimensions of the gutter in the application was different to the installed gutter. The Respondent advised that he was reliant on the information provided to him in the application.

The Statement of Reasons

The Respondent advised that the gutter is a vee gutter and that the roofwater drainage design varied from the Deemed-to-Satisfy requirements of the NCC 2016. However, The Respondent submitted nevertheless that the expert judgment demonstrated equivalency with the DTS requirements.

The Appellant responded stating that the expert advice had several shortcomings in that the wall catchment had not been included, the calculations were not clear, the roof area was unclear, it was unknown how the pitch was factored in, there was no consideration of the overflow requirements, the gradient was not detailed and the gutter had a ninety degree change of direction.

The Respondent advised that he did not know how the expert took these matters into account, but assumed they had been considered.

Retrospectivity of the Decision

The Appellant submits that s. 49 Planning Act authorises the carrying out of assessable work and this is reflected in the words used in the application forms and as such is prospective in its operation. The Respondent submitted that it is common practice for certifiers to approve existing work and that the legislation does not prohibit a certifier from doing so.

Documentation issued

The Tribunal asked the Respondent why an amended Decision Notice was issued instead of a new decision as directed by the previous Tribunal. The Respondent advised that this arose from a misunderstanding of what was required.

At the close of the hearing, the parties were asked whether there were any other matters not discussed at the hearing that they wished to raise. No other matters were raised.

Material Considered

In deciding the appeal, the following material was considered:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 22 October 2018.
2. Submission by the Appellant dated 11 March 2019;
3. Submission by the Respondent dated 12 April 2019;
4. Reply Submission by the Appellant dated 18 April 2019;
5. Photos of the gutter and drawings of sections submitted by the Appellant at the hearing;
6. National Construction Code 2016 (NCC 2016);
7. Australian Standard AS/NZS 3500.3:2003 Plumbing and Drainage, Part 3: Stormwater Drainage;
8. Australian Standard AS/NZS 3500.5:2000 Plumbing and Drainage Part 5: Domestic Installations;
9. Development Tribunal Decision Notice, Appeal Number 57-17;
10. Planning Act; and
11. Building Act.

Jurisdiction and decision making framework

The appeal is made in response to a development approval for an Alternative Building Solution for Roofwater Drainage.

By operation of s. 229(1) and s. 1(1) and (2) of Schedule 1 of the Planning Act an appeal of this nature may be made to the Tribunal. Specifically (2) (g) states an appeal to the Tribunal can be made if the matter involves:

a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission;

This clause provides that appeals can be made to the extent that a matter relates to the Building Act, other than a matter that is decided by the Queensland Building and Construction Commission. In this case, the appeal is stated to be in relation to a decision to issue a development permit for building work. This is a matter relating to the building assessment provisions under the Building Act and is not a matter that can be decided by the Queensland Building and Construction Commission.

The Tribunal is established by operation of provisions in the Planning Act. The Tribunal must decide the proceedings based on the laws in effect when the relevant application or request was properly made: s. 251(1) and (2) Planning Act. The Tribunal may give weight the Tribunal

considers appropriate to any new laws: s. 251(3) Planning Act. The Appellant must establish that the appeal should be upheld: s. 253(2) Planning Act.

The Tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against: s. 253(4) Planning Act. The Tribunal may, but need not, also consider any other evidence presented by a party to the appeal with leave of the Tribunal: s. 256(5)(a) Planning Act.

Section 254 of the Planning Act constrains the powers of the Tribunal in deciding appeals. The Tribunal has five options of which four are presently relevant, namely, confirm the decision, change the decision, replace the decision with another decision or set the decision aside and order the person to make or remake the decision. The Tribunal must not make a change other than a minor change to a development application: s. 254(3) Planning Act.

During the course of the appeal, the Appellant raised matters relating to the professional conduct of the Respondent. Questions about the conduct of the Respondent are a matter for other entities and any referral to those entities falls outside the jurisdiction of the Tribunal.

In accordance with its statutory jurisdiction the Tribunal has decided the appeal in accordance with ss. 253 and 254(2) of the Planning Act.

Decision including reasons of the Tribunal

The decision the subject of the appeal relates to an application for an Alternative Building Solution for a box gutter made to the Respondent in circumstances where the gutters had been constructed prior to the application being made. There was also a question as to whether the design of the box gutter for which approval was sought was the design as constructed.

The Respondent purported to issue a decision on the application on 17 October 2017. On 26 April 2018 the Development Tribunal (Appeal 57-17) set aside the 17 October 2017 decision and required the Respondent to assess the application in accordance with the requirements of the Planning Act and Building Act, noting that in the event it was determined that the material provided to support the Alternative Building Solution is deficient, the application ought to be refused.

Section 51 (2) of the Planning Act does not require owner's consent where a development application is for building work.

The Tribunal must decide the appeal by reconsidering the evidence that was put before the person who made the decision appealed against.

The Respondent should have ensured the Alternative Solution addressed all of the requirements of s. 26 of the Building Act. Section 26 of the Building Act provides:

If an alternative solution is used in the supporting documents, the documents must—

(a) state—

(i) the performance requirements with which the building work purports to comply; and

(ii) how the building work complies with the performance requirements; and

(b) contain details of—

(i) how the alternative solution is different from the relevant deemed-to-satisfy provisions under the BCA or acceptable solutions under the QDC; and

(ii) inspection or test results and other documents or information relied on to prepare the application.

How building work complies with NCC 2016 is addressed in section 14 of the Building Act. In relation to a performance solution, section 14(4) states:

- (4) For subsection (3), a relevant building solution is achieved for a performance requirement only by—*
- (a) complying with the following (the relevant requirement)—*
 - (i) if the code is the BCA—the relevant deemed-to-satisfy provisions under the BCA for the performance requirement;*
 - (ii) if the code is the QDC—the relevant acceptable solution under the QDC for the performance requirement; or*
 - (b) formulating an alternative solution that—*
 - (i) complies with the performance requirement; or*
 - (ii) is shown to be at least equivalent to the relevant requirement; or*
 - (c) a combination of paragraphs (a) and (b).*

The requirements for making a decision about an application involving an Alternative Solution are contained in section 68A of the Building Act which states:

Statement of reasons for approving alternative solution

- (1) This section applies if—*
- (a) an alternative solution is used in the supporting documents for a building development application; and*
 - (b) the assessment manager decides to approve the application on the basis of the alternative solution.*
- (2) The assessment manager must prepare a written statement of reasons for the decision.*
- (3) The statement must contain details of—*
- (a) how the alternative solution is different from the relevant deemed-to-satisfy provisions under the BCA or acceptable solutions under the QDC; and*
 - (b) inspection or test results and other documents or information relied on to make the decision.*

The assessment method for deciding whether a performance solution complies with a performance requirement is described in 1.0.5 of NCC 2016:

The following Assessment Methods, or any combination of them, can be used to determine that a Performance Solution or a Deemed-to-Satisfy Solution complies with the Performance Requirements, as appropriate:

- (a) Evidence to support that the use of a material or product, form of construction or design meets a Performance Requirement or a Deemed-to-Satisfy Provision as described in 1.2.2.*
- (b) Verification Methods such as—*
 - (i) the Verification Methods in the NCC; or*
 - (ii) such other Verification Methods as the appropriate authority accepts for determining compliance with the Performance Requirements.*
- (c) Expert Judgement.*
- (d) Comparison with the Deemed-to-Satisfy Provisions.*

The performance requirement is contained in P2.2.3 in Volume 2 of NCC 2016 which states:

P2.2.1 Surface Water

- (a) Surface water, resulting from a storm having an average recurrence interval of 20 years and which is collected or concentrated by a building or sitework, must be disposed of in a way that avoids the likelihood of damage or nuisance to any other property.*

- (b) *Surface water, resulting from a storm having an average recurrence interval of 100 years must not enter the building.*
- (c) *A drainage system for the disposal of surface water resulting from a storm having an average recurrence interval of—*
 - (i) *20 years must—*
 - (A) *convey surface water to an appropriate outfall; and*
 - (B) *avoid surface water damaging the building; and*
 - (ii) *100 years must avoid the entry of surface water into a building.*

Section 3.5.2.0 of Volume 2 of NCC 2016 states:

Performance Requirement P2.2.1 is satisfied for gutters and downpipes if they are designed and constructed in accordance with one of the following:

- (a) *AS/NZS 3500.3.*
- (b) *Section 5 of AS/NZS 3500.5.*

The DTS requirements are contained in Volume 2, part 3.5.2.3 and 3.5.2.4 of the NCC 2016 which state:

3.5.2.3 Selection of guttering

The size of guttering must—

- (a) *for eaves gutters, be in accordance with Table 3.5.2.2; and*
- (b) *for box gutters, be in accordance with AS/NZS 3500.3 or Section 5 of AS/NZS 3500.5; and*
- (c) *be suitable to remove rainwater falling at the appropriate 5 minute duration rainfall intensity listed in Table 3.5.2.1 as follows—*
 - (i) *for eaves gutters — 20 year average recurrence interval; and*
 - (ii) *for eaves gutter overflow measures — 100 year average recurrence interval; and*
 - (iii) *for box and valley gutters — 100 year average recurrence interval.*

3.5.2.4 Installation of gutters

(a) *Gutters must be installed with a fall of not less than—*

- (i) *1:500 for eaves gutters, unless fixed to metal fascias; and*
- (ii) *1:100 for box gutters.*

(b) *Eaves gutters must be—*

- (i) *supported by brackets securely fixed at stop ends and at not more than 1.2 m centres; and*
- (ii) *be capable of removing the overflow volume specified in Table 3.5.2.3.*

(c) *Overflow measures in accordance with Table 3.5.2.4 are deemed to be capable of removing the overflow volume specified in that Table.*

The DTS requirements contained in AS/NZS 3500.3, s. 3.7.4(g) provide that box gutters shall:

- (i) *be straight (without change in direction)*
- (ii) *have a horizontal constant width base (sole) with vertical sides in a cross-section:*
- (iii) *have a constant longitudinal slope between 1:200 and 1:40;*
- (iv) *discharge at the downstream end without change of direction (i.e. not to the side); and*
- (v) *be sealed to the rainheads and sumps.*

The DTS requirements contained in AS/NZS 3500.5, s. 5.5.6.5 provide that box gutters shall:

- (A) *be straight (without bends);*
- (B) *have uniform slope;*

*(C) discharge in the same direction as the box gutter; and
(D) be sealed to the rainheads.*

The following are not addressed in the Alternative Performance Solution:-

- Change in direction;
- The longitudinal slope of the box gutter;
- Details of each section of box gutter; and
- Locations and details of the discharge of the box gutter, rainheads, overflow and downpipes.

The supporting documents for the Alternative Solution accepted by the Respondent is still deficient as it does not demonstrate it has adequately referenced all relevant DTS requirements set out in AS/NZS 3500.3, s. 3.7.4 (g). The specific Deemed to Satisfy requirements that do not appear to have been addressed include:

- Be straight (without change in direction);
- Have a horizontal constant with base (sole) with vertical sides in a cross-section;
- Have a constant longitudinal slope between 1:200 and 1:40;
- Discharge at the downstream end without change of downstream (ie not to the side); and
- Be sealed to the rainheads and sumps.

The supporting documents for the Alternative Solution do not adequately demonstrate that the design of the gutter complies with the performance provisions of NCC 2016.

The Respondent ought to have satisfied himself that the Alternative Solution submitted identified the relevant DTS provisions that would be subject to the Alternative Solution rather than rely solely on the expert opinion of another. This is particularly so when the Respondent had been a party to the previous Tribunal hearing and was well aware of the issues as the previous Tribunal had noted that the material submitted with the application for the Alternative Solution was deficient as it did not:

- a. reference the relevant performance requirement for stormwater drainage in the BCA;
- b. contain sufficient details of how it meets the above performance requirements; and
- c. demonstrate how the Alternative Building Solution compares with the Deemed-to-Satisfy provisions of the BCA.

The Statement of Reasons prepared by the Respondent refers to the relevant DTS provisions in NCC 2016 but fails to identify the relevant performance requirement. The Respondent notes that the method of assessment used by the hydraulic consultant uses a comparison which exceeds the DTS requirements for the size of a box gutter by 2.33 times. The Respondent accepts the Alternative Solution by relying on the expert judgement provided by the hydraulic consultant.

The specific requirements in s. 26 of the Building Act about how an Alternative Building Solution should be prepared and s. 68A of the Building Act requiring an Assessment Manager to prepare a Statement of Reasons do not relieve an assessment manager from properly assessing the application on the basis of 'expert' opinion.

Having regard to the material that was provided the application ought not have been approved.

There is one final matter that has been raised by the Appellant being whether the assessment manager or this Tribunal may consider an application seeking a development permit in circumstances where the works have been undertaken. The Planning and Environment Court has on occasion considered appeals about development applications where the works have already been completed prior to the lodging of the development application. The Planning and

Environment Court have approached applications of this nature with a view to striking a balance between a reluctance of requiring the dismantling of work on the basis of waste and enforcement of the planning regime by ordering demolition of works (see for example Caloundra City Council v Taper Pty Ltd [2003] QPELR 558, Brisbane City Council v Wang [2009] QPELR 144 and Choi v Brisbane City Council [2012] QPEC 27. However, these options do not arise within the scope of the power of the Tribunal in the present appeal. The Tribunal therefore finds it unnecessary to decide this issue for the purposes of this appeal.

Ain Kuru

Development Tribunal Chair

Date: 10 July 2019

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833

Email: registrar@hpw.qld.gov.au