



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	3—09—090
Applicant:	Doug Wiltshire
Assessment Manager / Assessing Authority:	South Burnett Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	Lot 42 Wonga Crescent, Ballogie and described as Lot 42 on RP 197488 - the subject site

Appeal

The Tribunal considered two separate appeals involving the subject site, as follows:

- (A) Appeal under section 4.2.9 (1) (c) of the *Integrated Planning Act 1997* (IPA) against the deemed refusal of a building development application by the Council (Previously Wondai Shire Council) for construction of a Class 1 dwelling.
 - (B) Appeal under section 4.2.13 (1) of the *Integrated Planning Act 1997* (IPA) against the decision of the Council to issue an enforcement notice for plumbing and drainage, which has been installed without Council approval.
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Date of hearing:	10:00am on Friday 22 January 2010
Place of hearing:	Level 5, 63 George St, Brisbane
Tribunal:	Mr Leo Blumkie – Chair Mr Brad Hodgkinson – Referee Mr Ain Kuru - Referee
Present:	Mr Doug Wiltshire – Applicant Mr Russell Springall – Council representative Mr Jamie Neil – Council representative

Decision:

The Tribunal makes the following decisions for the respective appeals, as follows:

Appeal (A)

The Tribunal, in accordance with section 4.2.34 (2) (b) **changes** the decision of the South Burnett Regional Council to issue a Show Cause Notice on the subject property and **directs** the Council to withdraw the Notice.

Further, the Tribunal, in accordance with section 4.2.34 (2) (d) of the IPA, **orders** the assessment manager to process the development application (based on the legislation applicable at the time the application was originally made, namely 7 January 2008) in accordance within the times prescribed under Part 5, Division 3 of IPA, taking the date of the hearing (22 January 2010) as the date the application was made.

Appeal (B)

The Tribunal, in accordance with section 4.2.34 (2) (b) of the IPA, **changes** the conditions of the enforcement notice dated 30 October 2010 (subsequently re-issued by Council on 7 December 2009 as a signed document) by deleting the 4 conditions (including the time and date) nominated under "Action to be taken by owner" and replacing them with the following conditions:-

You are required to:-

1. Provide details of the licensed Plumber and Drainer who is taking responsibility for the plumbing and drainage work undertaken on site and submit a completed Form 7 – Notification of Responsible Person to the South Burnett Regional Council.
2. Uncover and make visible plumbing and drainage work and on-site sewerage work for assessment by South Burnett Regional Council.
3. Advise of a suitable time for a Council Officer to meet with the licensed person on site at Lot 42 Wonga Crescent, Ballogie to inspect the plumbing and drainage work and on-site sewerage work.
4. Engage the nominated Responsible Person/s to rectify all defects nominated at the meeting under item 3 above, and make all plumbing and drainage work and on-site sewerage work compliant with the *Plumbing and Drainage Act 2002*.
5. Complete the above by no later than 4.30pm on Friday 9 April 2010.

NOTE – The date for completion may be extended by the Council, provided a written request from the applicant is received by Council before the expiry date. The request must include reasons acceptable to Council for the need to extend the time.

Background

The subject site is a 55 acre block located at Lot 42 Wonga Crescent, Ballogie, described as Lot 42 on RP 197488 and is located in the Rural Zone under the Wondai Shire Planning Scheme.

A development application for building work was lodged with Wondai Shire Council on 7 January 2008. The receipt for a total fee lodgement of \$795 is included in the appeal documents.

On 16 January 2008 the Wondai Shire Council made a further information request for, amongst other things, evidence of BSA insurance payment, the 'owner to complete' section 20 of the application form and completed plumbing application forms. In its letter Council described the application as being for "building work".

On 15 February 2008 the applicant advised Council that he intended to obtain an 'Owner Builder Permit', that completion of section 20 was not necessary as the application did not involve a "material change of use" and enclosed the completed plumbing application forms.

On 1 April 2008 Council responded confirming that the application required a material change of use application and requested a copy of a power of Attorney.

On 20 August 2009 the applicant wrote to Council enclosing a copy of his Owner Builder Permit and seeking further information about why a material change of use application was required. There was no further response from Council in respect to the latter question.

The applicant states in correspondence dated 13 January 2008 that:-

- Application documents were lodged with the then Wondai Shire Council in December 2007 but were returned as the Council building certifier had resigned and Council were now no longer accepting building applications.
- Only as a result of a deputation to the Deputy Mayor, Council agreed for the applications to be lodged. Both the Deputy Mayor and CEO agreed that the slab could be poured whilst Council sorted out the building approval situation.
- As a result of the verbal directions the applicant commenced construction of the dwelling using licensed contractors.
- Photographs were taken as the work progressed as recommended by the Council officers

The dwelling is now substantially completed and tenanted.

The Wondai Shire Council has, since the application was made, been amalgamated with three other Council's to form the new South Burnett Regional Council.

On 29 October 2009, the Council issued a Show Cause Notice inviting the applicant to show cause why an enforcement notice should not be issued requiring the applicant to immediately apply for a Development Approval for the Building Work. The document was unsigned and subsequently was issued again on the 7 December 2009 as a signed document.

On 30 October 2009 the Council issued an Enforcement Notice indicating that Council was of the view that plumbing and drainage work had been installed on the premises without Council approval. The document was unsigned and subsequently was issued again on the 7 December 2009 as a signed document.

On 13 November 2009 the applicant lodged an appeal with the Registrar, Building and Development Tribunals.

On 25 November 2009 the Registrar advised the assessment manager in writing that an appeal had been lodged against the issue of enforcement notice and the deemed refusal of a development application for the construction of a class 1 dwelling.

On 18 January 2010 the Chairperson of the Tribunal advised the applicant and assessment manager in writing, that a Tribunal had been established and nominated the time, date and location for the hearing.

The Council representatives at the hearing had no knowledge of the process adopted by the previous Wondai Shire Council in regard to the application, and hence were unable to comment on the directions given by Council officers at the time. They were also unable to produce any Council records on the applications.

As a result of the lack information being available from Council at the hearing, both parties, at the request of the Tribunal, agreed that, in order to expedite the appeal process, the Tribunal should only determine the conditions necessary to bring both the development and plumbing/drainage applications to finalisation.

Subsequent to this agreement the Tribunal with the recommendation and agreement of both parties decided to consider the matters under dispute in the following order:-

1 Material Change of Use (MCU)

Prior to the hearing, the Chairperson requested planning information from Council. The Council forwarded an email (dated 19 January 2010) outlining the planning information requested to the Registrar. After discussion on the information contained in the email, the Council representative confirmed that an MCU was **not** required for the development.

2 Enforcement Notice on Plumbing & Drainage.

The applicant advised that the plumbing and drainage had now been substantially completed on the site. The applicant had himself undertaken the majority of the water service and sanitary plumbing work, as it was difficult to get licensed trade persons to come to the remote site.

The sanitary drainage and on-site sewerage work was undertaken by a licensed trade person, however the applicant was unwilling to provide the name of the person, as he was employed as an inspector for another council and did not want the person to be involved in any future possible dispute over the work.

Documents tabled at the hearing included a septic percolation report and an on-site sewerage design. For some unknown reason these documents were never received by the Council.

Council accepted documentation tabled as an application for on-site sewerage work and agreed to undertake assessment of the on-site sewerage report and design.

3 Development Application

As Council had no records available on the application, the applicant tabled a complete set of plans and site investigation reports, all previously submitted with the original application. The tribunal noted these documents were dated September 2007 and were prepared by Consulting Engineers with an office in Nanango.

The Council representative confirmed the engineers were a reputable firm, known by Council officers.

The Council representative agreed to accept the documents tabled at the hearing as a copy of the original application and process them based on the legislation applicable at the time of original lodgement (8 January 2008).

The applicant also spoke of photographs taken during the construction period and agreed to forward them to the Council representative as soon as possible.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' and grounds for appeal, drawings, photos, extracts and correspondence accompanying the appeal lodged with the Registrar on 13 November 2009.
2. Show Cause Notice issued by the assessment manager dated 29 October 2009.
3. Enforcement Notice issued by the assessment manager dated 30 October 2009.
4. Emails from the applicant to the Registrar dated 16 November 2009 and 22 November 2009.
5. Email dated 19 January 2010 to the Registrar from Council regarding planning information.
6. Verbal submissions from the applicant at the hearing.
7. Verbal submissions from the Council representatives at the hearing.

8. Correspondence dated 7 December 2009 from Council including the signed show cause notice and enforcement notice.
9. Time line of events prepared by Council.
10. Building plans and site classification reports.
11. Onsite sewerage design and percolation reports.
12. Building plans and site classification reports.
13. *Building Act 1975*.
14. *Building Regulation 2006*.
15. IPA
16. *Plumbing and Drainage Act 2002 (PDA)*.

Findings of Fact

The Tribunal makes the following findings of fact:

- The site is zoned Rural under the Wondai Shire Planning Scheme.
- The Council representative confirmed a Material Change of Use (MCU) is **not** required under the Wondai Shire Planning scheme for the construction of a Class 1 dwelling on the subject site.
- The Wondai Shire Council in their correspondence dated 16 January 2008 wrongly requested the owner of the property to complete section 20 of part A of the Development Application.
- South Burnett Regional Council correspondence dated 1 April 2008 confirmed Forms 1, 2 and 7 had been received and forwarded to Council's Plumbing Department for assessment.
- Both the Wondai Shire Council and subsequent South Burnett Regional Council have failed to process the development application in accordance with the requirements of the IPA.
- A Class 1 dwelling has been constructed on the site without the owner first obtaining a development approval as required by the IPA.
- The plumbing and drainage work and on-site sewerage work does not have an approval as required by the PDA.
- A licensed trade person has not taken responsibility for the plumbing and drainage work and on-site sewerage work.
- A development application fee and plumbing and drainage application fee for the total amount of \$795.00 was paid to the Wondai Shire Council on the 7 January 2008.
- The Council representative agreed at the hearing to make a recommendation to Council that new application fees would **not** be required to finalise both applications.

Reasons for the Decision

(A) Deemed refusal

The Wondai Shire Council and subsequent South Burnett Regional Council have failed to process the

development application duly made in January 2008 in accordance with the requirements of the IPA

The Council representative acknowledged the failure of both Councils and agreed to process the application based on the documents tabled at the hearing.

(B) Plumbing and Drainage

The plumbing and drainage and on-site sewerage work has been installed on site :-

- without the owner first obtaining an approval and
- has been undertaken by both an unlicensed person and an unknown trade person

both of which are in contravention of the PDA.

The applicant tabled an on-site sewerage report and design and a septic percolation report at the hearing which satisfied part of condition 1 of the Enforcement Notice.

A completed form 7 (Notification of Responsible Person) needs to be completed and lodged with Council.

Owing to the remote location of the site and the difficulty in obtaining a licensed trade person to take responsibility for the installation, both parties agreed 2 months should be allowed for the applicant to satisfy the conditions.

Should this time not be sufficient the Tribunal decided the applicant should be able to request an extension of time from Council. The request needs to be in writing and include acceptable reasons to Council, and must be submitted before the nominated completion date.

Leo Blumkie
Building and Development Tribunal Chair
Date: 8 February 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:

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