



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	21-048
Appellant:	Ausmar Homes Pty Ltd ABN 5508723620
Assessment Manager:	Michael Grummett
Concurrence Agency:	Sunshine Coast Regional Council
Site Address:	10 Ming Court Nambour and described as Lot 7 on SP 307381 – the subject site

Appeal

Appeal under section 229 and schedule 1, sections 1(1)(b) and 1(2)(g), and table 1, item 1, of the *Planning Act 2016* (“the PA”) with respect to Concurrence Agency’s response directing the Assessment Manager to refuse appellant’s application under section 51 of the PA (“the application”), for a building works development permit for a new dwelling house (“the house”) located on the subject site in circumstances where the Assessment Manager had at the time of the Concurrence Agency’s Response already issued a Decision Notice with a Development Permit allowing the building of the House – which was subsequently built.

Date and time of hearing:	N/A
Place of hearing:	N/A
Tribunal:	Mark Chapple – Chair Anthony Roberts - Member
Present:	N/A

Decision:

The Development Tribunal (Tribunal), in accordance with section 252 of PA decides that the Tribunal has no statutory jurisdiction to hear or decide the Appeal.

In this decision, the Tribunal refers to the Council as the Concurrence Agency noting that the Council had not been requested to provide a Referral Agency response at the time of the Decision Notice and makes no finding as to whether the Council was a necessary and proper Referral Agency for the application.

Please be advised that any appeal period for starting proceedings in the Planning and Environment Court (the Court) about this matter starts again from the date you receive this Decision Notice, which should be attached to the Court appeal lodgement documentation.

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>

Background

1. The Assessment Manager via a Decision Notice of 5 November 2020 to the Appellant issued a Development Permit allowing the building of the House on the Subject Site. The Assessment Manager issued approval for the construction of a dwelling house under the assumption that a site boundary was a side boundary and not a road frontage and therefore there was no requirement for the proposed development to be referred to the Council for building work under Schedule 9, Part 3, Division 2, Table 3 of the Planning Regulation 2017 for design and siting.
2. The Appellant has submitted a chronology of events with the Notice of Appeal which records that footings and piers for the House were inspected on 13 January 2021 and that on 27 May 2021 Sunshine Coast Building Approvals (SBCA) provided the *Form 21* to the Appellant.
3. According to Appellant's chronology an application was subsequently made to the Council as a Referral Agency on 27 July 2021 in response the Council raising concerns about the boundary setbacks of the House and on 2 August 2021 the Council responded directing refusal of the application.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal material and correspondence accompanying the appeal lodged with the Tribunal's Registrar 24 August 2021
2. Decision Notice Michael Grummett – (SCBA) 5 November 2020
3. Email Tom Hill of SBCA to Registrar 17 September 2021
4. Email Tom Hill of SBCA to Registrar 18 September 2021
5. Email Tom Hill of SBCA to Registrar 20 September 2021
6. Email Tom Hill of SBCA to Registrar 22 October 2021
7. Email Tracey Douglas of Council to Registrar 20 October 2021 with attached Survey Plan SP 307381
8. Email Tracey Douglas of Council to Registrar 27 October 2021
9. Email Tracey Douglas of Council to Registrar 1 November 2021

The Appeal

4. The Appellant filed a Notice of Appeal (Form 10) with the Registrar on 24 August 2021.
5. The Appellant's Form 10 Notice of Appeal/Declaration describes the appeal as "appeal about a development application, including a building development application"
6. The Notice of Appeal in Item 4 Grounds for Appeal/Declaration refers to a cover letter. A letter from SCBA dated 18 August 2021 includes the following passage:

"We, Suncoast Building Approvals request an appeal against the Referral Agency Response Refusal (CAR21/0488) by Sunshine Coast Council for the existing dwelling house setbacks at Lot 7 SP307381 10 Ming Court Nambour. Council raised a concern with the dwelling setbacks while under construction on the 5th May 2021. The dwelling house was granted building approval by Suncoast Building Approvals (SBA) 5th November 2020. Council raised the concern below: "The North Western side boundary is a road reserve and not just a side boundary. Council has no record of a reduced

setback approval." The Building Approval has allowed the garage setback 450mm to the eave and a setback for the rest of the dwelling 1550mm to eave on the North Westen (sic) boundary due to the belief that this is a side boundary and did not require a reduced setback approval from Council."

Submissions and Responses about Jurisdiction

7. On 7 September 2021 Ms Dena Diaz the Acting Registrar sent an email to Susan Ward of SCBA pursuant to section 246 of the PA which included the following request "Could you please advise of the precise legal basis upon which the Appellant asserts that the Development Tribunal has jurisdiction to hear the appeal?"
8. Tom Hill of SCBA responded to Ms Diaz's email on 17 September 2021 with an email which included the following:

"It is accepted that the Tribunal has jurisdiction to hear an appeal against "the refusal of all or part" of a development application but in that same section it also has jurisdiction to hear an appeal against "a provision of the development approval". The Appellant considers that the provision of the Development Approval that there was no requirement for referral to the Council was wrong (assuming Council to be correct) and if so wants the Tribunal to set aside the decision of the Assessment Manager and then approve the dwelling which has been constructed."

9. By email of 15 October 2021 the Tribunal made a request of the parties as follows:

"The Tribunal in this matter has requested that the parties make submissions as follows:

1. *That the Respondent provides their response to the Registrar's email of 7 September 2021 to Ms Susan Ward of Suncoast Building Approvals, namely whether it believes the Development Tribunal has jurisdiction to hear the appeal; and*
2. *Further provides its response to the submission made by Mr Tom Hill of Suncoast Building Approvals, dated 17 September 2021.*

Responses are to be provided to the Registrar no later than 4pm on Friday 22 October 2021, with a copy to the parties.

In addition, the Tribunal also asks the appellant to provide the following:

1. *A copy of the approval notice by the Assessment Manager dated November 2020 (referred to in the email response of 17 September 2021); and*
2. *Confirm the matter or decision subject of the appeal brought forward by Suncoast Building Approvals on behalf of Ausmar Homes Pty Ltd.*

Responses are to be provided to the Registrar no later than 4pm on Friday 22 October 2021, also with a copy to the parties"

10. By email of 18 October 2021 Tom Hill of SCBA on behalf of the Appellant responded to the Tribunal's request referring to and attaching his email of 20 September 2021 which included the following:

By letter dated 28 June 2021 the Assessment Manager referred the development application to Council as the Referral Agency. By that letter Council was asked to approve the setbacks requested. That "approval" to be given by a decision by Council to tell the assessment manager that it had no requirements for the application. On

receiving that advice, the assessment manager would then grant the development permit.

The application/referral to Council (as Referral Agency) was clearly part of the development application.

On receiving that application Council was required under sections 55 and 56 to "assess the development application" and "after assessing the development application" was required to make a decision, that decision being restricted to telling the assessment manager that the agency had no requirements for the application (which would have the effect of Referral Agency approving the setbacks requested) or giving one of the nominated directions, one of which could be a direction to the assessment manager to refuse the development application (which would have the effect of the Referral Agency refusing the setbacks requested).

Council gave notice of its decision in a response dated 2 August 2021. It stated - "Council directs REFUSAL of CAR21/0488."

By its response in directing the assessment manager to refuse the development application, Council clearly refused to tell the assessment manager that it had no requirements for the application, thereby permitting the assessment manager to approve the development application with the setbacks requested. This refusal was part of the development application.

That part of the development application seeking setbacks was clearly refused by Council by it directing the assessment manager to refuse the development application. This provision giving jurisdiction does not limit the Tribunals jurisdiction to a refusal by the assessment manager to issue the development permit. If that was the intention, it could easily have been stated. There is no logical need to confine jurisdiction to only that refusal.

11. Tom Hill of SCBA gave a further email response to the Tribunal's request of 15 October 2021 which included the following:

"The Assessment Manager has issued a Development Approval for the construction of a house with the setbacks as shown on the plans for that approval. Council contends a siting relaxation is required. On application for that relaxation, Council recommended refusal. The Appellant wants the approval to stand. For that to occur, it wants the Tribunal to first determine if a relaxation was required and secondly, if it is required, whether it should be granted, contrary to Council's refusal. To determine this, the Tribunal will need to consider the decision of the Assessment Manager to issue the Development Approval without the referral and, if it determines the referral was required, to consider the referral and overturn the recommendation of Council. The end result will be that the Development Approval stands or a new approval issues in the same terms as the current approval. "

12. The Council's email response to the Tribunal's request of 15 October provided by email of 20 October 2021 included the passage:

"Council response:

1. Council as a Referral Agency has directed refusal in its Referral Agency Response to the applicant Assessment Manager (Suncoast Building Approvals), dated 2 August 2021. Under the Planning Act, a Referral Agency does not have the jurisdiction to refuse an application. Suncoast Building Approvals is the Assessment Manager for the application. The Assessment Manager must refuse the application before an appeal is

lodged and the matter can be considered by the Tribunal in accordance with the Planning Act 2016.

2. *As confirmed in Mr. Hill's email, dated 17 September 2021, the Assessment Manager (Suncoast Building Approvals) issued approval for the construction of a dwelling house under the assumption that the boundary was a side boundary and not a road frontage. A review of the registered survey plan confirms this to be a road boundary (see 'Attachment A'). This fact was accepted by the applicant and subsequently a concurrence agency referral request was submitted to Council (Council reference: CAR21/0488) seeking Council approval for a reduced front boundary setback which was not supported by Council."*

13. On 21 October 2021 the Tribunal requested the Council to provide a submission with respect to Mr Hill's email of 20 September 2021 which the Council provided on 27 October 2021 via email which included the following:

"Appeal No. 21-048 – Council submission (2)

The Tribunal in this matter has requested that the parties make submissions as follows:

1. The Respondent respond by way of submission to the matters raised in Mr Tom Hill's email of 20 September 2021 with a copy to the parties.
Council has assumed the direction relates to Mr Tom Hill's email of 17 September. No email of 17 September is on council records.

Council response:

While references to parts of the legislation quoted in the appellant's email appear accurate, Council has a different interpretation of the legislation referred to in the submission. Council's interpretation is set out below:

- *That the Assessment Manager for the subject development application is the building certifier in accordance with Schedule 8 of the Planning Regulation.*
- *In accordance with s.83(1)(d) of the Building Act, the private certifier as Assessment Manager must not grant the building development approval applied for until (if relevant) a referral agency has given its referral agency's response to the private certifier or, if the referral agency does not give a response before the end of the referral agency's response period for the application, until after the response period has ended.*
- *S. 54(2)(a) of the Planning Act sets out that a referral agency, for a development application, is the person prescribed by regulation as a referral agency for applications of that type. Schedule 6, Part 2, Section 2(2) of the Planning Regulation 2017 applies to the development and in accordance with Schedule 9, Part 3, Division 2, Table 8 of the Planning Regulation 2017, the Local Government is the referral agency where there is a non-compliance with the planning scheme setback provisions (building assessment provisions).*
- *S. 56 of the Planning Act sets out the requirements for a Referral agency's response as follows:*
 - (1) *After assessing the development application, the referral agency must decide—*
 - (a) *to tell the assessment manager that the agency has no requirements for the application; or*
 - (b) *to direct the assessment manager to do any or all of the following—*

- (i) to give any development approval subject to stated development conditions;*
- (ii) to give any development approval for only a stated part of the application;*
- (iii) to give any development approval only as a preliminary approval;*
- (iv) to impose a stated currency period for a development approval given; or*
- (c) to direct the assessment manager to refuse the application for stated reasons.*

- *Council as Referral Agency has directed the assessment manager to refuse the application in its Referral Agency Response dated 2 August 2021 in accordance with (c) above. S. 60 of the Planning Act sets out requirements for deciding development applications. It is clear the decision must be made by the Assessment Manager and under s. 62(a) must comply with all referral agency's responses.*
- *Chapter 6, part 1 of the Planning Act 2016 stipulates matters that may be appealed to the Tribunal and who may appeal a matter and refers to the particulars in Schedule 1 of the Act. There is no provision for Appeal to the Development Tribunal about a Referral Agency Response in Chapter 6 or Schedule 1 of the Act.*

Council reiterates its submission that under the Planning Act 2016, a Referral Agency does not have the jurisdiction to refuse the development application."

14. Upon receiving the Council's response of 27 October 2021, the Tribunal asked the Council to confirm which emails from Mr Hill they held and received an email response from the Council on 1 November 2021 which included:

"Apologies for the confusion, my email of 27 October indicated we did not have Mr Hill's email of 17 September, however I note that was provided to us in an email trail by the Tribunal. The Council submission email of 20 October responded to the 17 September email from Mr Hill. Council's response by email of 27 October was in response to Mr Hill's email of 20 September.

Council also have emails from Mr Hill dated 18 and 22 October. Council do not intend to provide a submission in relation to Mr Hill's contentions in these emails."

Tribunal's Jurisdiction

15. The issue at the centre of the Appeal is that a Development Permit was issued by the Certifier on 5 November 2020 allowing the building of the House on the Subject Site under the assumption that a site boundary was a side boundary and not a road frontage and therefore there was no requirement for the proposed development to be referred to the Council. Subsequent to the Decision Notice, a Referral Agency response from the Council was requested and the response to that request was that the Council directed refusal of the application. The Appellant advises that by the time of the Referral Agency Response the House was complete.
- (1) Section 229(1) of the PA provides that Schedule 1 ("the schedule") of the PA states the matters that may be appealed to a tribunal and states the matters which must be appealed to the Tribunal.
 - (2) Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule ("Table 1") are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in section 1(2). Section 1(5) of the schedule provides that matters in Table 3 may only be appealed to the Tribunal.
 - (3) Section 1(2)(g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, *to the extent the matter relates to the Building Act 1975, (BA) other than one that must be decided by the Queensland Building and Construction Commission.*

16. A development approval for the construction of a house is a matter under the BA as referred to in section 1(2)(g) of schedule 1.
17. The provisions of Items 2, 3 and 4 of Table 1 and Table 3 of the Schedule do not have any application to the circumstances of the appeal.

Table 1 Item 1 of the Schedule provides:

1. Development applications. For a development application other than an excluded application, an appeal may be made against—

(a) the refusal of all or part of the development application; or

(b) the deemed refusal of the development application; or

(c) a provision of the development approval; or

(d) if a development permit was applied for—the decision to give a preliminary approval.

18. The *Planning Regulation 2017 Schedule 8* provides that if a Development Application is for building work only to be assessed against the building assessment provisions the Assessment Manager is the Private Certifier, and it was the private certifier Michael Grummett as the Assessment Manager who issued the Decision Notice of 5 November 2020 with the Development Permit allowing building of the House.
19. The PA section 56 provides the alternatives open to the Referral Agency when providing its response as set out in the Council's submission of 21 October 2021. Section 56 gives the Referral Agency the power to direct the Assessment Manager to refuse the application but does not grant the Referral Agency power to decide the application.
20. The PA section 62 provides that the Assessment Manager must comply with the Referral Agency's response.
21. The Decision of the Council to give the Referral Agency Response is therefore not a "refusal" in terms of Item 1 of the Table as the Certifier as Assessment Manager had the responsibility to decide the application not the Council.
22. The Tribunal finds that it has no jurisdiction to hear or decide an appeal of the Council's decision to give its Referral Agency Response of 2 August 2021. As the Certifier as Assessment Manager has issued a Development Approval for construction of the House, this is not a case where there has been a refusal or deemed refusal of the application in terms of 1 Table 1 Item 1 (a) and (b) of the Schedule.
23. The Appellant has submitted that:
 - There was a "provision" of the Development approval for the house in terms of Table 1 Item 1(c) of the Schedule that no Referral Agency Response was required and,
 - That the Referral Agency Response "was part of the application" decided by the Certifier in terms of Table 1 Item 1(c) of the Schedule.
24. The Tribunal finds that a Referral Agency Response was not "part of the application" at the material time and the Certifier granting the Development Approval in the absence of the Referral Agency Response is not a provision of the Development Permit of 5 November 2020.
25. The Council's Referral Agency Response had not been given when the Decision Notice with the Development Permit for the House was issued on 5 November 2021.

Accordingly, the Tribunal decides pursuant to section 252 of the PA that it has no jurisdiction to hear the Appeal.

General Comments

The Tribunal makes no finding about whether the Council's referral Agency Response was in fact required.

Nevertheless, the Tribunal has some sympathy for the position of the Appellant and house owner at 10 Ming Court. The Council approved reconfiguration of the land which created Lot 7 on SP 307381 (Lot 7) in an irregular shape relative to the area of the land. The creation of the irregular shaped Lot 7 with associated easements made it very difficult to design and build a house on the site while abiding by the setbacks specified in the Council's Planning Scheme. The approval of the reconfiguration creating Lot 7 and the resultant shape and size of Lot 7 are not considerations the Tribunal has had regard to in making its decision.

The Tribunal makes these comments in the hope they may be of some assistance to the parties in resolving the matter.

Mark Chapple

Development Tribunal Chair
Date: 24 November 2021

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.

Enquiries

All correspondence should be addressed to:

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

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