



Building Newsflash

WHEN THE USE OF THE LAND IS NOT CLEAR

Purpose

This Newsflash discusses the responsibilities of private certifiers in assessing a development application when the use of the land is not clear under the planning scheme.

Background

This issue was dealt with in a recent Court case. Livingstone Shire Council brought proceedings against a decision by a private certifier to grant a development approval for the construction of a 12 storey building on land at Yeppoon. Council sought declarations that the development approval was invalid.

The land was contained within the Tourist Business and Residential zone in which “an accommodation building” was a permitted use. A “multiple dwelling” was not. The Respondents claimed that the development involved “serviced apartments” and therefore fell within the definition of “accommodation building”. The Council submitted that the best fit definition was that of a “multiple dwelling”.

Council also argued that additional approvals were required, and that the private certifier could not decide the application until the additional approvals, such as those relating to water supply, sewerage and stormwater drainage, had been issued by Council.

The Queensland Fire and Rescue Service was a referral agency for the proposal. None of the necessary steps relating to that entity’s role as referral agency had been complied with. The Respondents submitted that the omission should not be regarded as being of any real consequence.

The Court had regard to the material available to the private certifier at the time the development application was decided, and as to whether the private certifier had sufficient information to determine the application.

The Court held that:

- Here, the “best fit” was “multiple dwelling”. The proposal did not involve serviced apartments in the traditional sense that services, including at least the provision and changing of linen and cleaning, were provided to occupants as of course and (usually) by the management.

- It had not been demonstrated that the proposal had a character of serviced apartment or accommodation building, so as to take it out of “multiple dwelling” where it fitted without difficulty.
- The private certifier proceeded with inadequate design detail available, and adopted the approach of issuing an approval on the faith of things being regularised in due course.

Legislation

Integrated Planning Act 1997

Section 5.3.5 (4) requires that private certifiers must not decide the application until –

- (a) all necessary development permits are effective for other assessable development related to the development; and
- (b) all necessary preliminary approvals are effective for other assessable aspects of the development.

Section 5.3.8(1) provides that a private certifier must always act in the public interest when performing the functions of a private certifier.

Interpretation

When is a shop not a shop? When is a tavern not a hotel but a shop? Questions of this kind will arise whenever a particular proposal does not fit neatly or specifically within any of the definitions contained within a planning scheme.

Private certifiers need to ensure that they are aware of the different levels of assessability within a planning scheme. If they have concerns, they should seek advice from the relevant local authority.

The same level of vigilance that would be expected of a local government assessing a development application should be expected from a private certifier. Section 5.3.8(1) of the *Integrated Planning Act 1997* must not be overlooked. It provides:

“a private certifier must always act in the public interest when performing the functions of a private certifier.”

Certifiers need to ensure that they have followed due procedure in determining an application and not merely rely on the developer’s assertions as to the intended use of a building, they are asked to approve.

For further information

Case Notes QLD, *Private Certifier Failure*, Corrs, Chambers, Westgate Lawyers

http://www.corrs.com.au/WebStreamer?page_id=4687

Livingstone Shire Council v Brian Hooper & M3 Architecture (Architects in Association) & Ors [2003] QPEC 063

http://www.courts.qld.gov.au/qjudgment/QPEC_2003/QPEC03-063.pdf

Kilmister v Gold Coast City Council & Anor [2001] QPEC 073

http://www.courts.qld.gov.au/qjudgment/QPE_2001/pe01-073.pdf