



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	3—09—086
Applicant:	Damien and Sophie Chegwin for Orbit Homes Pty Ltd
Assessment Manager:	Kawana Building Approvals
Concurrence Agency:	Sunshine Coast Regional Council 'Council'
Site Address:	7 Cocos Court, Doonan – the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager to refuse a development application for building works, namely a proposed dwelling. The decision was based on a concurrence agency response from the Council as the proposed building works required siting variations in relation to the road boundary setbacks and a code assessment against the Maroochy Plan 2000 for the associated cut fill and retainment walls.

Date of hearing:	11.00am – Friday 13 November 2009
Place of hearing:	The subject site
Tribunal:	Debbie Johnson – Chair Phil Dance – Member
Present:	Damien and Sophie Chegwin – Applicants Paul Lucio – Building Certifier Richard Prout – Council's representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2) (a) of the IPA, **confirms** the decision appealed against and the appeal is dismissed.

Background

The applicants had architectural drawings prepared for a single storey dwelling to be built on their land. They lodged these drawings for development approval with a private building certifier. The certifier was unable to determine the building application without first applying to the local government because the set out of the dwelling required siting concessions. Similarly, the associated excavation and filling required an assessment against the code provisions stipulated in the local town planning scheme. The certifier subsequently made an

application to the Council on behalf of the applicants for a preliminary building approval for a code assessment and by referral, to request the siting variation being sought.

On 15 October 2009, Council issued a written request for further information to address the provisions of elements (2) Excavation and Filling (whether building works or operational works) and (8) Special Requirements in relation to Steep or Unstable Land of the Code for the Development of Detached Houses and Display Homes.

Alternatively, Council requested that the applicants:

- Provide an amended design that is more in keeping with the above mentioned performance criteria.
- Provide a slope stability assessment report prepared in accordance with Maroochy Shire Town Planning Scheme Planning Scheme Policy No. 4.

On the 21 October 2009, the Certifier responded to council on behalf of the applicants by stating in part:

- The excavation of the pad will not cause environmental harm as suitable erosion control will be put in place.
- Visual amenity will not be impacted as the retaining walls are proposed to be tiered at 1.5 metres apart and suitably landscaped.
- The dwelling has been designed so as not to encroach on natural landforms.
- No utility services are on this lot.
- The dwelling will incorporate colours that are in keeping with the area.
- The roof will have a non reflective surface.
- Landscaping will be provided to all cut and fill areas.

On 22 October 2009, Council issued a decision notice refusing the application for preliminary building works-siting variation / earthworks stating that the proposed development did not comply and could not be conditioned to comply with Maroochy Plan 2000 performance criteria of Code 4.1, Element 2, P1 and Element 8, P1.

On 28 October 2009, the certifier refused the development application for the dwelling stating that as the Council had refused both the siting variation and the code assessment application, they had no other option but to refuse the building works as proposed.

On 28 October 2009, the applicant lodged an appeal against the refusal of the development application with the Building and Development Tribunals.

At the on-site hearing, the Council provided written representation to the effect that the Tribunal didn't have jurisdiction to determine the appeal, stating in part:

The Building and Development Tribunal should therefore reactivate the Applicant appeal rights in order to give the Applicant the opportunity to appeal the matter to the Planning and Environment Court.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 28 October 2009.
2. The certifier's application to Council for the preliminary building application which included his referral to Council for a determination on the siting variation sought by the applicant.
3. Photographs of the site and other properties in the immediate locality.
4. Council's request for further information notice, dated 15 October 2009.
5. The applicant's response to the information request notice, dated 21 October 2009.
6. Council's Decision Notice refusing the preliminary building approval, dated 22 October 2009.

7. Property details, including mapping and the Maroochy Plan available through Council's website.
8. The development application material including drawings detailed by Orbit Homes.
9. Slope Stability Report as prepared by Morrison Geotechnic, dated 13 October 2009.
10. Geotechnical Report by Qld Soil Testing dated 30 March 2009.
11. Registered Plan illustrating Lot 9 SP 156384, the subject site.
12. The applicant's written grounds for appeal against the refusal.
13. The Council's written submission made available to all parties at the hearing.
14. Verbal submissions made by the applicant at the hearing.
15. Verbal submissions made by the council's representative at the hearing.
12. The *Integrated Planning Act 1997* (IPA).
13. The *Building Act 1975* (BA).
14. The *Building Regulation 2006* (BR).
15. The Queensland Development Code (QDC).
16. The Building Code of Australia (BCA).

Findings of Fact

The Tribunal makes the following findings of fact:

The subject site is well covered in mature native trees and situated on a corner. The site is relatively large having an area of 4293sq/m and sits amongst other rural residential allotments. The topography is steep having an average slope over the building platform of 1 in 4 or 25%. The land falls away from both Duke Road to the North and Cocos Court which forms the Western boundary. There is a dry gully through the eastern side of the site that would flow in wet conditions as it is the natural causeway and it traverses the length of the site from North to South. The proposed building platform is clear of the gully however the lay of the land within and around the site is such that large volumes of water would be expected to cross the intended building platform to reach the gully beyond.

At the hearing the Council confirmed that they were willing to support the siting concessions. Their reasons for refusing the preliminary building application were based on the extent of excavation and filling proposed.

The proposed dwelling is single storey and appears to be approximately 300sq/m in size. The home is designed to sit entirely on a concrete slab and therefore requires a level building platform. The architectural drawings indicate that the difference in levels across this platform are as much as 4.5M causing extensive cut and fill to the site. The proposed changes to the surface levels combined with the construction of the slab on ground dwelling will cause significant impacts to the site. These works would impede the existing natural water runoff through this site.

The proposed works do not comply with the performance criteria stated in Maroochy Plan as required for Excavation and Filling, specifically:

Excavation and filling must be carried out in a way that is of a nature and scale such that natural landforms and drainage lines are maintained as much as possible.

There are more appropriate methods used for dwellings to be sited on steep or unstable sites, such as elevated light weight construction which minimize the impacts to the site.

At the hearing, the Council provided representations as they believed the Tribunal didn't have jurisdiction to determine this appeal stating:

As the reasons for refusal of the development relates to a matter outside of the Building Act 1975 the Building and Development Tribunal does not have jurisdiction to hear the appeal.

The relevant section of the *Integrated Planning Act 1997* is as follows:

4.2.7 Jurisdiction of tribunals

- (1) A tribunal has jurisdiction to decide any matter that under this or another Act may be appealed to it.
- (2) However, an appeal to a tribunal under this Act may only be about—
 - (a) a matter under this Act that relates to the *Building Act 1975* (other than a matter under that Act that may or must be decided by the Building Services Authority) or the *Plumbing and Drainage Act 2002*; or
 - (b) an error in the calculation of a charge in an infrastructure charges notice or a regulated State infrastructure charges notice; or
 - (c) a matter prescribed under a regulation.

The relevant sections of the *Building Act 1975* are as follows:

Part 2 - Interpretation

What is *building work*

- (1) *Building work* is—
 - (a) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or
 - (b) excavating or filling—
 - (i) for, or incidental to, the activities mentioned in paragraph (a); or
 - (ii) that may adversely affect the stability of a building or other structure, whether on the land on which the building or other structure is situated or on adjoining land; or
 - (c) supporting, whether vertically or laterally, land for activities mentioned in paragraph (a); or
 - (d) other work regulated under the building assessment provisions, other than IDAS.

Part 1 Laws and other documents under which building work must be assessed

30 Relevant laws and other documents for assessment of building work

- (1) Building assessment work and self-assessable building work must be carried out under the following laws and documents (the *building assessment provisions*)—
 - (a) IDAS;
 - (b) chapter 3 and this chapter;
 - (c) the fire safety standard;
 - (d) any provisions of a regulation made under this Act relating to building assessment work or self-assessable building work;
 - (e) any relevant local law, planning scheme provision or resolution made under section 32 or 33;
 - (f) the BCA;
 - (g) subject to section 33, the QDC.
- (2) However, for any particular building assessment work or self-assessable building work, subsection (1) is subject to—
 - (a) how, under this division, the building assessment provisions apply to the work; and
 - (b) any variation of them under division 2.

31 Building assessment provisions form a code for IDAS

- (1) For IPA, each of the building assessment provisions, other than IDAS, is a code for IDAS for the carrying out of building assessment work or self-assessable building work.
- (2) However, for any particular building assessment work or self-assessable building work the provisions of each of the codes are subject to—
 - (a) how, under this division, the provisions apply to the work; and

- (b) any variation of them under division 2.
- (3) For IPA, section 3.1.3(4), each code under subsection (1) is a code that cannot be changed under a local law, local planning instrument or local government resolution.
- (4) Subsection (3) is subject to sections 32 and 33.

32 Local laws, planning schemes and local government resolutions that may form part of the building assessment provisions

- (1) A local government may make or amend—
 - (a) a local planning instrument that designates, for the BCA or QDC, matters prescribed under a regulation; or
 - Example of a matter that may be prescribed*— designated bush fire prone areas for the BCA
 - (b) a provision of a local law or planning scheme or a resolution about an aspect of, or matter related or incidental to, building work prescribed under a regulation; or *Examples of aspects that may be prescribed*— swimming pool fencing or land liable to flooding; or
 - (c) alternative provisions under section 33.

Reasons for the Decision

The Tribunal has jurisdiction to determine an appeal relating to a development application in respect of the refusal or refusal in part of a development application where it relates to building works as prescribed in the Building Act. A Council can provide code provisions within a planning scheme for a matter related or incidental to, building work prescribed under a regulation however the appeal rights are still available through the Building and Development Tribunal.

The Tribunal confirms Council's decision to refuse the proposed building works because the likely impacts caused by the extent of cut and fill required to ensure a suitable building platform is unacceptable, given the natural topography of the site and its site specific characteristics.

Debbie Johnson
Building and Development Tribunal Chair
Date: 25 January 2009

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
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