



APPEAL
Integrated Planning Act 1997

File No. 3-07-090

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council

Site Address: *withheld*—"the subject site"

Applicant: *withheld*

Nature of Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Maroochy Shire Council to refuse a Development Application for building works, namely a Gazebo/Bali Hut - Class 1a Dwelling.

Date and Place of Hearing: 2.00 pm Friday 11 January 2008 at "the subject site"

Tribunal: Debbie Johnson – Chairperson
Steve Adams – General Referee

Present: Applicant/Owner
John Dunn – Maroochy Shire Council Representative
Roslyn McDermott – Maroochy Shire Council Representative

Decision

In accordance with section 4.2.34 of the IPA, the Tribunal *confirms* the decision of Maroochy Shire Council dated 5 December 2007 and the appeal is dismissed.

Background

The applicant purchased "the subject site" in 2003. The site was one of many residential allotments in the locality that were created at this time as a result of a reconfiguration, through application to Maroochy Shire Council. The conditional reconfiguration approval stipulated a Vegetation Protection Covenant was to be registered over the subject lot and many others similarly affected by native vegetation.

Subsequently, the title of “the subject site” is encumbered by a Conservation Covenant. This Covenant affects an area of the site that is 10 metres wide, adjacent to the rear boundary of the lot, which is also a road frontage to *withheld*. The site therefore has two road frontages.

On 5 November 2007, Maroochy Shire Council issued both an Advisory Letter and a Show Cause Notice to the applicant relating to unauthorised building works on “the subject site”.

On 26 November 2007, the applicant subsequently lodged a Development Application to Maroochy Shire Council to gain approval for an existing Gazebo/Bali Hut. Council refused this application for building works on 5 December 2007, citing the application didn't comply, and couldn't be conditioned to comply, with the Vegetation Protection Covenant that affects the site.

Material Considered

- ‘Form 10 – Notice of Appeal’ lodged with the Building and Development Tribunals on 27 December 2007;
- Maroochy Shire Council’s Decision Notice, dated 5 December 2007;
- Property details, including mapping as available through PD Online; Maroochy Shire Council’s website;
- The applicant’s grounds for appeal against Maroochy Shire Council’s reasons for refusal submitted with the application to the Tribunal;
- Written submission from Maroochy Shire Council given to the Tribunal after the hearing;
- Written letter of support for the residents affected by the Vegetation Protection Covenant, from the Twin Waters Residents’ Association;
- Working drawings of the Gazebo / Bali Hut structure “as constructed”;
- Maroochy Shire Council’s representative provided a verbal submission to the Tribunal detailing Council’s concerns relating to the application and the reasons for refusal;
- Verbal submissions made at the hearing by the applicant;
- Current Title Search for Lot 53 SP 155701;
- Covenant Document 706389849;
- The *Integrated Planning Act 1997*;
- The *Building Act 1975*; and
- The *Land Title Act 1994*.

Findings of Fact

The ‘subject site’ is 1000 square metres, being rectangular in shape and having a 20 metre frontage to *withheld* on the West and *withheld* to the East.

The site is configured identically to those on the adjoining sites, all of which are constrained by the requirements of Vegetation Covenant. The Covenant affects that land which is 10 metres wide adjacent to the rear boundary of each lot.

The unauthorised building works for the Gazebo/Bali Hut, have been undertaken completely within the area protected by the Statutory Covenant which in part states-

2. *Purpose of the covenant-*

'The purpose of this covenant is to protect and conserve natural features of the Land namely remnant Vegetation on the Land and to preserve the amenity along the Land's frontage to withheld'.

3. *No interference with vegetation.*

3.1 The Covenantor must not Interfere with, or cause, permit or allow any Interference with any Vegetation on the Land.

3.2 The Covenantor may, with the prior written approval of the Council, remove any living or dead Vegetation from the Land which, in the opinion of an Authorised Officer of the Council poses a threat, by falling or fire, to persons or property on immediately adjacent land.

3.3 The Covenantor must:

(a) maintain all Vegetation on the Land to the reasonable satisfaction of the council;

(b) from time to time remove any weeds from the Land as directed in writing by an Authorised Officer;

(c) not introduce, or cause, permit or allow the introduction of any weeds onto the Land.

Reasons for the Decision

The Gazebo/Bali Hut has been built on land protected by a Conservation Covenant pursuant to the *Land Title Act 1994*.

Maroochy Shire Council, as the assessment manager, are unable to approve any building works, pursuant to Section 65 of the *Building Act 1975*, which may cause *interference* to the protected vegetation subject of the Covenant.

Debbie Johnson
Building and Development Tribunal Chairperson
Date: 19 February 2008

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
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