Building and Development Tribunals
Queensland Government
Department of Local Government and Planning

APPEAL **File No. 03-07-073**
Integrated Planning Act 1997

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: **Caloundra Building Approvals**

Concurrence Agency: **Caloundra City Council**

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

Applicant: ***withheld***

Nature of Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* against the decision of the Caloundra Building Approvals Pty Ltd to refuse a Development Application for Building siting – within 1.5m of a sewer line. The refusal is based on a concurrence agency response from Caloundra City Council (CalAqua) not allow any part of the building to be closer than 1.5m to the existing sewer line. Caloundra City Council has elected to join the appeal as a co-respondent.

Date and Place of Hearing: 9:00 am on Monday 26th November 2007
at "the subject site"

Tribunal: Mr Chris Schomburgk – Chairperson
Mr Don Grehan – General Referee

Present: Applicant;
Mr Andrew Stewart – Building Certifier;
Owner;
Adjacent land owner;
Mr Stefan Koebsch – CalAqua;
Mr Ian Simpson – Caloundra City Council Representative

Decision:

The decision of Caloundra Building Approvals Pty Ltd as contained in its Decision Notice dated 9th November 2007, to refuse the development application for Building Works, based on a concurrence agency response from Caloundra City Council, is **confirmed** and **the appeal is dismissed.**

Material Considered

The material considered in arriving at this decision comprises:

- The application including the "Form 10 – Notice of Appeal" and supporting plans and documentation;
- Amended plans provided at the hearing (Ref: JN: 07-0295, Drawings D010, 011, 012)
- Verbal submissions from the Applicant, certifier and owner at the on-site hearing;
- Verbal submission from the Council representatives at the on-site hearing;
- Verbal submissions from the adjoining land owner, within whose land the sewer line exists;
- The relevant provisions of the Town Planning Scheme for Caloundra City Council;
- Council's Development Design Planning Scheme Policy;
- The Decision Notice dated 9th November 2007;
- The *Water Act 2000*, in particular, section 823;
- The *Building Act 1975*, in particular, section 83; and
- The *Integrated Planning Act 1997*.

Findings of Fact

I make the following findings of fact:

- "The subject site" is relatively flat and is vacant.

- The subject application seeks approval for a double garage to be built to (effectively) the western side boundary of the subject site. The garage wall is approximately 8.8m in length. An existing 150mm sewer line is located within the adjoining property and varies in its offset to the common boundary from about 0.75m at the southern end of the boundary, to about 1.6m at the northern end. The proposed garage would encroach to within about 0.70m at the southern end and about 1.4m at the northern end, although these distances were not able to be verified more accurately on site.

- The adjoining land owner has advised that he has no problems with the proposal and he has only garden beds in the area of his site that is over the sewer line.

- Under section 823 (2) of the Water Act 2000, "*a person must not, without the written consent of a service provider, build over, interfere with access to, increase or reduce the cover over, or change the surface of land in a way causing ponding of water over an access chamber for, a service provider's infrastructure.*" The subject application was referred to the Council (CalAqua as the service provider) for that written consent by letter dated 13th August 2007. By reply dated 23rd August 2007, CalAqua advised that such written consent was not granted, based on Council's Development Design Planning Scheme Policy, in particular section 8.6.2(10). That section provides that "*satisfactory provision must be made to protect the infrastructure from physical damage and to allow ongoing necessary access by Caloundra City Council*" (section 8.6.2.(10)(a)(i)). Sub-section (iv) of that section then provides that "*building over or adjacent to a sewer 150mm in diameter will only be permitted if requirements 1, 2 or 3 cannot be achieved*". The reference to "1" therein (as underlined) was explained by the Council officers to mean section 8.6.2.(10)(a)(i) as repeated above. The Policy also includes Figure 8.2, which shows a "zone of influence" around 150mm sewer lines, including the outer edges of building overhangs being a minimum of 1.5m from the centreline of the sewer.

- The applicant's revised plans show a cantilevered, engineer-designed footing system for that part of the garage floor slab that encroaches into the "zone of influence". The applicant advises that he is prepared to accept all reasonable conditions to ensure that the infrastructure is protected and access to it is maintained at all times.
- It is relevant that a Planning Scheme Policy "*may not prohibit development*" and has limited power to regulate the use of premises (IPA section 2.1.23 (2), (3) and (4)). In this case, the Planning Scheme Policy relied on by CalAqua is "*to provide guidance on standards applying where Council requires sewerage to be provided for development …*" (emphasis added).
- The decision of CalAqua to refuse to grant its written consent is a decision made under section 823(2) of the *Water Act 2000*. To the extent that there may be appeal provisions against such a decision (and it appears there may not be), it is not within the jurisdiction of this Tribunal to hear such an appeal.

Reasons for the Decision

- The decision by Caloundra Building Approvals to refuse the application is based on the decision of Caloundra City Council (CalAqua) to not grant its written consent to the building being located within the "zone of influence" of the existing sewer line. Given this, Caloundra Building Approvals Pty Ltd had no option but to refuse the application.
- The applicant has gone to considerable lengths to demonstrate a floor slab design that meets the stated intent of the relevant Planning Scheme Policy. The Tribunal is satisfied that the proposed engineered design will ensure that "*satisfactory provision is made to protect the sewer from physical damage*" and that access to it is maintained. Additional conditions could be imposed if required - for example, to require replacement of the affected section of the sewer line with PVC or similar material - to ensure its longevity and unlikelihood of maintenance requirements.
- The Planning Scheme Policy is, and can be, nothing more than a Policy and a guideline, and its implementation needs to be considered in that light. Strict adherence to empirical provisions in the Policy (eg: the 1.5m separation), without due regard for the actual intent of the Policy is not appropriate. In this case, the Council's response when asked about the protection of the sewer was merely to maintain that the Policy shows 1.5m, therefore it must be 1.5m. That is not an appropriate consideration of the merits of the application.
- Despite this, and while the Tribunal is satisfied that, in all other respects, the application ought to be approved, the decision made under section 823(2) of the Water Act is not a decision about which this Tribunal has jurisdiction. While the Tribunal is minded to uphold the appeal, to do so would be a futility given that any such approval could not be implemented without the written consent of the service provider (CalAqua). Accordingly, the appeal must be dismissed.

_____

Chris Schomburgk
Building and Development Tribunal Chairperson
Date: 4th December 2007

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 Local Government and Planning
PO Box 15031
CITY EAST QLD 4002
Telephone (07) 3237 0403: Facsimile (07) 32371248