



## Building and Development Tribunals—Decision

---

### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	<b>3—08—067</b>
<b>Applicant:</b>	Scooter Farm Pty Ltd
<b>Assessment Manager:</b>	Sunshine Coast Regional Council
<b>Concurrence Agency:</b> (if applicable)	n/a
<b>Site Address:</b>	222 River Road, Maroochy River described as Lot 4 SP197504—the subject site

---

### **Appeal**

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against a development condition relating to building floor level contained in the Decision Notice issued by the Sunshine Coast Regional Council, being a Preliminary Approval for Building Work (PBA07/0186) relating to an agricultural shed.

---

<b>Date of hearing:</b>	<ol style="list-style-type: none"><li>1. 10.00am — Thursday, 2 October 2008</li><li>2. 10.00am — Wednesday, 10 December 2008</li></ol>
<b>Place of hearing:</b>	<ol style="list-style-type: none"><li>1. 2/44 Petrie Avenue, Maroola Beach</li><li>2. 222 River Road, Maroochy River (the subject site)</li></ol>
<b>Tribunal:</b>	Dr Robin King-Cullen – Chairperson (not present at hearing 1.) Debbie Johnson – General Referee
<b>Present:</b>	Hearing 1 on 2 October 2008: Scott Rushton – Applicant’s Representative, Suncert Building Consultants Shane Adamson – Applicant’s Representative, Ken Hicks and Associates John Dunn – Representative Sunshine Coast Regional Council  Re-convened hearing on 10 December 2008: Scott Rushton – Applicant’s Representative, Suncert Building Consultants Shane Adamson – Applicant’s Representative, Ken Hicks and Associates Peter Nolan – Scooter Farms (Applicant) John Dunn – Representative Sunshine Coast Regional Council Glenn Decker – Representative Sunshine Coast Regional Council Geoff Newell – Representative Sunshine Coast Regional Council

## Decision:

The Tribunal, in accordance with section 4.2.34 (2) (b), **changes** the decision appealed against and **directs** that the “Building Floor Level” condition listed under the Assessment Manager Conditions (hereafter referred to as Condition 1) being the subject of this appeal be deleted and replaced with the following conditions:

- (a) the proposed building, including associated building, is to be designed and constructed in accordance with the Flood Assessment Study SC 926 prepared by Empire Engineering dated April 2008 except that the finished floor level is to be no less than RL 2.80m AHD;
- (b) any components of infrastructure that are likely to fail to function or may result in contamination when inundated by flood water (eg electrical switchgear and motors, water supply pipeline air valves) are to be located above RL3.41m AHD;
- (c) no hazardous materials are to be stored in bulk on the subject site. (“Hazardous materials in bulk” is defined in Section 9, Glossary of State Planning Policy 1/03 Guideline).

The Tribunal further directs that “Property Notes” contained in Section 7 of the Decision Notice, dated 3 September 2008, be amended to reflect the above decision.

## Background

The subject site is 8.7324 hectares in area, and is bounded on the north by River Road and on the south by the Maroochy River. Boggy Creek, a tributary of the Maroochy River, crosses the site in the vicinity of the northern boundary.

The subject site is located within the Maroochy River Floodplain – Expected 100 year ARI Flood Inundation Area - and is contained in a Special Management Area – Flood Prone Land. The highest historical flood level for the site is 3.41m AHD.

The proposed building could be described as a farm shed having a gross floor area of approximately 600m<sup>2</sup> and is to be located on flood prone land with a finished floor at RL 2.66m. The proposed building involves filling greater than 1m in depth.

As a farm shed, the proposed building is self-assessable against Maroochy Plan 2000, provided the Acceptable Measures of the relevant Codes are complied with.

Suncert Building Consultants were engaged by Scooter Farm Pty Ltd to provide a Building Certification for an agricultural building on the subject site and on 4 September 2008 lodged an application with the Sunshine Coast Regional Council (Council) for a Preliminary Building Application on behalf of Scooter Farms Pty Ltd.

The application was assessed by the Council against the relevant provisions of Maroochy Plan 2000 and a Preliminary Approval for Building Work (Building associated with an agricultural use) was issued by Decision Notice dated 3 September 2008, subject to a number of conditions including:

*“The minimum floor level of the building approved by PBA07/0186 and any subsequent development approval for building works is to be at RL 4.00m AHD”.*

The proposed farm shed has already been substantially constructed on site. In the application the applicant proposed that the farm shed be built with a finished floor at RL 2.66m, being 1.34m below the required height of RL4.00m AHD specified in Condition 1. Some time between commencement of construction of the farm shed on site and the re-convened hearing on 10 December 2008, a failure occurred of the original floor slab and a new slab was constructed on top, bringing the new height of the finished floor slab to RL 2.80m AHD.

This appeal deals only with Condition 1. The Tribunal notes that, in a letter dated 10 October 2008 from Ken Hicks and Associates on behalf of the applicant, other action may be taken regarding other conditions of approval that may be in dispute but that are outside the jurisdiction of the Building and Development Tribunals. However, that is not a consideration relevant to the subject Appeal.

### **Material Considered**

- Form 10 – Building and Development Tribunals Appeal Notice, dated 19 September 2008, against a condition applying to the development and setting out the grounds of the appeal as *“We believe that our original submission adequately demonstrates that the performance criteria of the applicable code will be met”*.
- Copy of Drawing numbers 01, A01, A02, A03, A04, S01, S02, and S03 (all dated August 2007) prepared by Empire Engineering Consulting Engineers.
- Flood Assessment Study SC-926 dated April 2008 prepared by Empire Engineering Consulting Engineers.
- Copy of Decision Notice dated 3 September 2008 from Council to Suncert Pty Ltd advising of approval of Preliminary Approval for Building Work (Building associated with an agricultural use).
- Flood Search Certificate over the subject site issued 21 August 2007 to Suncert Pty Ltd.
- Verbal submissions made by the Applicant’s representatives at the hearing on 2 October 2008 and the re-convened hearing on 10 December 2008, stating reasons for the appeal and setting out why the appeal should be allowed.
- Verbal submissions made by Council’s representatives at the hearing on 2 October 2008 and the re-convened hearing on 10 December 2008, setting out why Council had imposed Condition 1 and why the appeal should not be allowed.
- Written submission by the Council provided at the hearing on 2 October 2008.
- Written submission from Ken Hicks and Associates dated 10 October 2008 in response to the submission made by the Council provided at the hearing.
- Copy of Memorandum dated 1 September 2008 from Mr Newell, Senior Engineer Hydraulics and Hydrology to Mr Dunn, Senior Building Certifier, regarding the subject application.
- Email advice from Mr Newell, Senior Engineer Hydraulics and Hydrology with the Council, dated 29 October 2008 in response to a request from the Tribunal dated 14 October for a copy of Council’s hydrology specialist’s expert comment on the content of the Flood Assessment Study SC-926 dated April 2008 prepared by Empire Engineering.
- Email advice from Mr Newell, Senior Engineer Hydraulics and Hydrology with the Council, dated 16 November 2008.
- The *Building Act 1975* (BA).
- The *Building Regulation 2006* (BR).
- The IPA.
- The Queensland Development Code.
- State Planning Policy (SPP) 1/03 - “Mitigating the adverse impacts of flood, bushfire and landslide” and SPP Guideline 1/03.
- Maroochy Plan 2000.

- Building Code of Australia.

## Findings of Fact

The Tribunal makes the following findings of fact:

1. The subject site is located within the Maroochy River Floodplain – Expected 100 year ARI Flood Inundation Area - and is contained in a Special Management Area – Flood Prone Land. The highest historical flood level for the site is 3.41m AHD.
2. All relevant provisions relating to building work on flood prone land contained in the BA, BR and SPP 1/03 distinguish between provisions for residential buildings and other buildings, with lesser requirements applying to non-residential buildings.
3. According to the material contained in the written submission by the Council provided at the hearing on 2 October 2008 (page 3 item 22), the Sunshine Coast Regional Council applies flooding requirements regarding minimum floor level equally to all buildings (regardless of whether they contain habitable rooms or not) because ‘farm sheds below the flood level were identified as a significant risk for the storage of large quantities of chemicals and other environmental hazards’.
4. The building work for which Preliminary Approval was granted is for a building associated with an agricultural use (tree farm). It does not contain any habitable rooms.
5. The parties to the appeal agree that the appropriate classification of the proposed building is Class7b/8.
6. The proposed building has already been substantially constructed on site to a finished floor level of RL 2.80m AHD, rather than RL 2.66m as proposed in the application, or RL 4.0 as required by the condition appealed against.
7. The proposed agricultural use (tree farm) has not yet commenced on site.

## Reasons for the Decision

### Jurisdiction

The Tribunal considered that two aspects arise regarding jurisdiction in relation to the subject appeal:

#### (A) Assessment against Planning Scheme provisions in addition to building assessment provisions

Section 32 of the BA provides that:

*"(1) A local government may make or amend—*

*(a) ....*

*(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** (emphasis added).*

*(2) To remove any doubt, it is declared that subsection (1) does not prevent a local government from, under IPA, making or amending a provision in a planning scheme that deals with building work for matters not within the scope of the building assessment provisions."*

Section 13 of the BR provides that:

*"(1) A local government may, in a planning scheme or by a temporary local planning instrument under IPA or a resolution—*

*(a) designate part of its area as a natural hazard management area (flood); and*

*(b) declare the level to which the floor levels of habitable rooms as defined under the BCA of*

*buildings on the land must be built.”*

In relation to clause 1(b) above, the proposed building is agreed by the parties to the appeal to be a Class 7b/8 structure (farm shed) and does not contain habitable rooms.

The relevant planning scheme (Maroochy Plan 2000) designates the subject site as being in a natural hazard management area (flood) as shown on Regulatory Map 1.5 – Flood Prone and Drainage Constraint Areas Special Management Area - and includes provisions relating to flood prone land within Code 2.5 – Operational Works and Code 2.7 – Integrated Water Management.

(B) Whether the proposed development is self-assessable under Maroochy Plan 2000

Clause 3.1.2 of the IPA states that “*self-assessable development must comply with relevant Codes*”.

Under S5.1 of Maroochy Plan 2000 the building work proposed (farm shed) is identified in Column 1 of *Table 5.1 – Self-Assessable and Assessable Building Work* - as self-assessable development, subject to compliance with a number of Codes, including “Code for Integrated Water Management” (Code 2.7) and “Operational Works Code” (Code 2.5).

Code 2.7 Element (3) Sections PI, P2 and P3 and Code 2.5 part 7.4 – Flood Management Section P2 specify requirements relating to flooding and are the only relevant code requirements in relation to condition 1.

S5.1 (4) of Maroochy Plan 2000 states that “*The Acceptable Measures in Codes (or parts of Codes) identified as applicable to self assessable development are mandatory for that development. Self assessable development that does not comply with the applicable acceptable measures is to be taken as code assessable*”.

If the Acceptable Measures of the relevant Codes have been satisfied, the building work proposed is self-assessable. However, under the provisions of S5.1 (4) of Maroochy Plan 2000, if the Acceptable Measures of the relevant Codes have not been satisfied, then the proposed development becomes Code assessable (rather than self assessable) and requires a planning application. If that is the case, the Tribunal does not have jurisdiction to deal with the appeal.

Determination of the Tribunal’s jurisdiction in the subject appeal is dependent on whether the Acceptable Measures of Code 2.7 – Code for Integrated Water Management. Code 2.7 Element (3) Sections PI, P2 and P3 and Code 2.5 part 7.4 – Flood Management Section P2 relating to flooding have been complied with (or can reasonably be conditioned to achieve compliance).

Acceptable Measures within Code 2.7 and Code 2.5 are worded in such as way that there are a number of alternative solutions available in some cases to meet the Performance Criteria **relevant to the subject application**:

- Code 2.7 P1 Acceptable Measure A1.1 – alternative solutions (b) or (c) available
- Code 2.7 P1 Acceptable Measure A1.2 – no alternative solutions available
- Code 2.7 P2 Acceptable Measure A2.1 – alternative solutions (b) or (c) available
- Code 2.7 P2 Acceptable Measure A2.2 – alternative solutions (a) or (b) available
- Code 2.7 P2 Acceptable Measure A2.3 – no alternative solutions available
- Code 2.7 P3 Acceptable Measure A3.1 – no alternative solutions available
- Code 2.5 P2 Acceptable Measure A2.1 – alternative solutions (b) or (c) available
- Code 2.5 P2 Acceptable Measure A2.2 – alternative solutions (a) or (b) available
- Code 2.5 P2 Acceptable Measure A2.3 – no alternative solutions available

If Condition 1 of the approval is met, the proposal would comply with alternative (c) for Code 2.7 P2 Acceptable Measure A2.1, alternative (c) for Code 2.7 P2 Acceptable Measure A2.1, and alternative (a) for Code 2.7 P2 Acceptable Measure A2.2. However, the applicant argues that alternative (b) has been

met in each case and therefore condition 1 is not required.

The relevant Acceptable Measures are set out below, together with the arguments of the respective parties to the appeal as to compliance.

#### Code 2.7 P1:

The Flood Assessment Study prepared by Empire Engineering argues that the proposal meets the performance criteria P1 and provides in the Conclusion (p5) "*Justification for acceptance of alternative solution*". The Report does not attempt to argue that the proposal meets the acceptable measures of the Performance Criteria, however in the submission from Ken Hicks and Associates dated 10 October 2008 in response to the submission made by the Sunshine Coast Regional Council provided at the hearing on 2 October 2008 (p3), it is argued that **acceptable measure A1.1 (b) and (c)** and **acceptable measure A1.2** have been met, as demonstrated through the Empire Engineering Report. There is no contrary view presented by the Assessment Manager's Senior Engineer, Hydraulics and Hydrology in the material provided to the Tribunal. It is assumed, therefore, that the Assessment Manager does not disagree acceptable measures of Performance Criteria P1 have been met.

#### Code 2.7 P2:

The Flood Assessment Study prepared by Empire Engineering argues that the proposal meets the performance criteria P2 and provides in the Conclusion (P5) "*Justification for acceptance of alternative solution*". The Report does not attempt to argue that the proposal meets the acceptable measures of the Performance Criteria, however in the submission from Ken Hicks and Associates dated 10 October 2008 in response to the submission made by the Council provided at the hearing on 2 October 2008 (p3), it is argued that **acceptable measure A2.1 (b)** has been met in that "*the proposed shed is to be occupied on a short term or intermittent basis in association with an agricultural use*".

In email advices dated 29 October 2008 and 16 November 2008, the Assessment Manager's Senior Engineer, Hydraulics and Hydrology refers to acceptable measure A2.1 (b) as follows: "*This application is proposing to introduce people to an area subject to flooding that would not previously have been accessed during a flood event...*" but does not comment on the exception within this acceptable measure "*where the premises are occupied on a short term of intermittent basis (eg by construction/maintenance workers, certain agricultural and forestry workers)*".

There is no definition of what is meant by the words "*certain agricultural ..workers*" within either Code 2.7 or the Administrative definitions of Maroochy Plan 2000, nor is there any information in the application and supporting materials of what agricultural use is proposed on the subject site. At the re-convened hearing on 10 December 2008, the applicant's representative, Mr Rushton, advised that the proposed agricultural use is a tree farm. A search of SPP1/03 and Guideline (in which identical wording is used) also failed to assist in clarifying the term "*certain agricultural ..workers*".

The definition of "Agriculture" in Maroochy Plan 2000 "*means the growing of crops, pastures, turf, flowers, fruit, vegetables and the like on a commercial basis. The term includes a storage shed and other ancillary facilities...*". It would be reasonable to assume that a use on the subject land that complies with the Maroochy Plan 2000 definition of "Agriculture" (a tree farm) would be intermittent in nature and so meet the intention of the exclusion envisaged for acceptable criteria A2.1(b).

The applicant argues that **acceptable measure A2.2** has been met in that "*All mechanical and electrical works will be located above the 100 year ARI flood level. A condition could be imposed in relation to this issue.*" (Submission from Ken Hicks and Associates dated 10 October 2008 in response to the submission made by the Sunshine Coast Regional Council provided at the hearing on 2 October 2008, p3). There is no contrary view presented by the Assessment Manager's Senior Engineer, Hydraulics and Hydrology in the material provided to the Tribunal. It is assumed, therefore, that compliance with this acceptable measure could be achieved through a condition of approval. The applicant argues that **acceptable measure A2.3** has been met in that "*the proposed shed has*

*been designed to resist hydrostatic and hydrodynamic forces for a Q100 event flood level. Refer to Section 2.2 – Flood Risk Assessment.”* (Submission from Ken Hicks and Associates dated 10 October 2008 in response to the submission made by the Council provided at the hearing on 2 October 2008, p3). There is no contrary view presented by the Assessment Manager’s Senior Engineer, Hydraulics and Hydrology in the material provided to the Tribunal. It is assumed, therefore, that compliance with this acceptable measure could be achieved through a condition of approval referring to the design and report by Empire Engineering.

#### Code 2.7 P3:

The Flood Assessment Study prepared by Empire Engineering does not specifically address this performance criteria, nor is performance criteria P3 mentioned in the email advices dated 29 October 2008 and 16 November 2008 from the Assessment Manager’s Senior Engineer, Hydraulics and Hydrology. However, in referring to performance criteria P2 the Assessment Manager’s Senior Engineer, Hydraulics and Hydrology does say *“Property will ultimately be stored at floor level in the shed, hence damage to property at the proposed floor level is inevitable”* and *“Items of insurable value will be kept in the shed (including machinery), to have the floor level below the minimum standard (in both MP2k and the Building Code of Australia) would be irresponsible and will create an on-going damage problem for the owner”*.

In the submission from Ken Hicks and Associates dated 10 October 2008 in response to the submission made by the Council provided at the hearing on 2 October 2008 (p3) it is stated *“No hazardous materials will be stored in bulk upon the subject site. Should any materials be stored it will be on the mezzanine floor level which is above Q100 event flood level. A condition of approval could be imposed in relation to this issue.”*

“Hazardous materials in bulk” is defined in Section 9, Glossary of the SPP Guideline 1/03 as *“hazardous materials as defined in the Dangerous Goods Safety Management Act 2001 (except that radioactive substances and infectious substances are excluded for the purpose of this SPP in quantities that:*

- Would be equivalent to or exceed the minimum quantities set out to determine a large Dangerous Goods Location in the Dangerous Goods Safety Management Regulation; or*
- Would require a license for a magazine for the storage of an explosive under the Explosives Regulation 1955.”*

Accepting the applicant’s statement that “no hazardous materials will be stored in bulk on the subject site”, performance criteria P3 is not applicable. In view of other approvals required if the applicant intends in future to store “Hazardous materials in bulk” on the subject site, it is considered a condition of approval to the effect that no hazardous materials will be stored in bulk on the subject site could be included.

At the re-convened hearing on 10 December 2008 the Council’s representative, Mr Dunne, commented that this increase in finished floor level has reduced the level of risk to property associated with flooding.

#### Code 2.5 P2:

The applicant argues that Acceptable Measure A2.1 has been met (issue is the same as Code 2.7 Acceptable Measure A 2.1- see discussion above).

The applicant argues that Acceptable Measure A2.2 has been met (issue is the same as Code 2.7 Acceptable Measure A 2.2 - see discussion above).

The applicant argues that Acceptable Measure A2.3 has been met (issue is the same as Code 2.7 Acceptable Measure A 2.3 - see discussion above).

### C. Summary

The applicant has demonstrated compliance with acceptable measures of Code 2.7 Element (3) Sections P1, P2 and P3 and Code 2.5 part 7.4 – Flood Management Section P2 (or additional conditions can be imposed to ensure compliance) without the necessity for the requirement contained in condition 1 that the minimum floor level of the building is to be at RL 4.00m AHD.

### D. Other

The Tribunal noted that the applicant continues to construct the building in disregard of the Council's various communications since the application was lodged.

The Tribunal also noted the structure, size and configuration of the building now erected on the subject site (including reference to "tenancy 1" on the Plans prepared by Empire Engineering), entry features, the extent of security lighting installed, and the absence of any agricultural use on the site. However, the Tribunal has not taken these observations into account as these matters are not being determined by this appeal.

---

**Robin King-Cullen**  
**Building and Development Tribunal Chair**  
**Date: 19 December 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  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**