



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal number:	81-10
Applicant:	GJ Gardner Homes
Assessment manager:	Kawana Building Approvals
Concurrence agency: (if applicable)	Sunshine Coast Regional Council (Council)
Site Address:	13-17 Amani Place, Maroochy River and described as Lot 3 on SP 208637 — the subject site

Appeal

Appeal under section 532 of the *Sustainable Planning Act 2009* (SPA) against the decision dated 13 October 2010 by Kawana Building Approvals, as the assessment manager, to refuse an application for preliminary approval for building work for earthworks associated with a class 1a dwelling.

Date of hearing:	10:30am on Friday 10 December 2010
Place of hearing:	The subject site
Committee:	Ms Kari Stephens – Chairperson
Present:	Mr Alan Thompson – Council representative Mr Peter Lusio – Assessment manager Ms Sara Carmody – Applicant Mr Trevor Holst – Applicant Mr Peter Jacobs – Owner Mrs Liane Jacobs – Owner

Decision

The Committee, in accordance with section 564 of the SPA **confirms** the decision appealed against and dismisses the appeal.

Background

The land, subject to this appeal is located in a relatively new subdivision on the high side of the Yandina-Coolum Road, Maroochy Waters. The road created as part of the subdivision is named Amani Place, and the subject site is located at number 13-17. The land is steep and runs uphill from the road frontage (which has a level of about 22m Australian Height Datum [AHD]) to the top of the land at about 57m AHD.

An existing concrete driveway connects Amani Place to an existing building pad located in the upper rear portion of the land. The building pad provides expansive rural views of the surrounding area.

The land is located within the Sustainable Rural Residential zone and has an area of approximately 8,417m². The subject site is identified as being part of the "steep land special management area" as shown on regulatory map 1.3 (2 of 2). According to the mapping, the majority of the land is shown as having a slope of 20% and over, with a small area of land towards the rear of the site being identified as having a slope between 15% and 19.99%.

As stated above, the land is part of a relatively new subdivision which was approved by the former Maroochy Shire Council by a negotiated decision notice dated 2 March 2006. The approval included 27 conditions, of which conditions 24, 25 and 26 come under the subheading "future detached house development".

Of relevance to this appeal, is Condition 25 which requires:

"Future detached housing construction must comply with the recommendations of the approved geotechnical investigation by Golder Associates, including:

- a) Buildings located on slopes greater than 17% (10 degrees) be limited to "pole" type construction;*
- b) Fill depths limited to 1.5m on land greater than 17% (10 degrees)*
- c) Individual geotechnical site investigations will be needed to each lot."*

During the hearing, the Council representative stated that he believed the slope across the building pad area, prior to its construction, was in the order of approximately 13.5%. In the absence of any other documented evidence or disagreement from other parties, the Committee is satisfied that this is a reasonably accurate assessment.

At the hearing, the owners advised that the building pad had been constructed about two years earlier. It is a large pad, approximately 25m long (north-south axis) and 21m wide (east-west), covering an area of approximately 525m². The pad has resulted in 2.7m of fill (on the south-western corner) and 3.3m of cut (on the north-eastern corner). The level of the pad is approximately 54.2m AHD.

There is no evidence of any applications or approvals relating to the construction of the pad. The Committee therefore considers the building pad to be unlawful. Although created unlawfully, it was nevertheless created with the intention of accommodating a future dwelling.

The definition of building work under the Building Act 1975 (BA) (Division 2, section 5), includes excavating and filling, vis a vis:

- (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); [author's emphasis] 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.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 11 November 2010.
2. An inspection of the site and the locality, undertaken by the Chairperson.
3. The assessment manager's decision notice dated 13 October 2010.
4. Verbal and written submissions from the parties at the hearing.

5. The 2000 Planning Scheme for the former Maroochy Shire Council (the Maroochy Plan 2000) – in particular, Code 4.1 Code for Development of Detached Houses and Display Homes.
6. The Queensland Development Code (QDC) – Part MP1.2.
7. The BA
8. The SPA
9. The *Sustainable Planning Regulation 2009*

Findings of Fact

The Committee makes the following findings of fact:

The assessment manager's decision to refuse the application for preliminary approval for building work for earthworks associated with a class 1a dwelling, is based on alleged non-compliance with provisions of the Code for the Development of Detached Houses and Display Homes, in particular Element 2, Performance Criterion P1, which states:

"P1. Excavation and filling must be carried out in a way that:

(a) does not cause environmental harm;

~~*(b) does not impact adversely on visual amenity or privacy;*~~

(c) is of a nature and scale such that natural landforms and drainage lines are maintained as much as possible; and

~~*(d) protects utility services from physical damage and allows ongoing necessary access by relevant authority."*~~

Element 2 of the code relates to "excavation or filling".

The wording of the performance criteria is ambiguous, and in particular the phrase "as much as possible" is difficult to measure.

In order to obtain some guidance on the intent behind the performance criteria, an assessment of the acceptable measures has been undertaken. It is widely accepted that these measures are one way of meeting the performance criteria.

The Code for Development of Detached Houses and Display Homes, Element 2 - Acceptable measure 1.1 states:

"Other than on land identified as having a slope of 15% or more on regulatory map 1.3 (2 of 2) (Steep Land), the extent of excavation (cut) and fill does not involve a total change of more than 1.0m relative to the ground level at any one point".

This acceptable measure relates to a slope of 15% or more as shown on regulatory map 1.3. The subject site is included within this regulatory map with slopes in the vicinity of the building pad mapped as between 15% and 19.99%. However, Council appears satisfied that the slope across the building envelope area (before the cut and fill) would have been approximately 13.5%.

Either way, the acceptable measure is indicative of the intent behind the performance criteria. It is generally accepted that the steeper the land is, the greater the likelihood for cut and fill (assuming a pad-on-ground type construction). With the acceptable measure seeking to restrict the total change in ground level to 1m, indicates that should a greater amount of cut and fill be required, then a pole type construction method, or terracing of the land/building pad, should be used in order to achieve the performance criteria.

The Code for Development of Detached Houses and Display Homes, Element 2 - Acceptable measure 1.3 states:

*"Retaining walls are:
(a) no greater than 1m high;"*

It should be noted retaining walls are not part of this application because the edge of the pad is battered back, rather than retained. Nevertheless, the 1.0m change in level is again reflected as being an acceptable measure which would satisfy the performance criteria.

Sitting outside the Code for Detached Houses, but nevertheless relevant, is the condition contained in the parent subdivision approval, specifically 25 (b) which requires that "fill depths are limited to 1.5m on land greater than 17%". With the building pad having a lesser slope (at 13.5%) theoretically, a smaller amount of cut and fill should be necessary.

In seeking further guidance relating to the extent of cut and fill, the Committee has considered Table 5.2 "self assessable and assessable operational work". In this table, excavation or filling is self assessable in the Sustainable Rural Residential precinct, when "involving less than 150m³ of material" where the lot has an area of 6,000m² or more (which is the case here). Whilst the volumetric amount of cut and fill has not been provided in the appeal documentation, given the size of the pad and the depth of the batters/cut, it is likely there is more than 150m³ of material involved. However, even if the amount of material involved is less than 150m³, the works would only self assessable where they comply with the relevant acceptable measures of the applicable code (which in this case would be the Code for Operational Works, Element 4, Excavation and Filling).

The acceptable measures of the Code for Operational Works, are remarkably similar to the acceptable measures contained in the Code for Detached Houses, as set out below:

The Code for Operational Works, Element 4 - Acceptable measure 1.1 states:

- (a) on sites of 15% or more (as identified on Regulatory Map 1.3 - Steep and Unstable Land Special Management Area), the area of excavation (cut) and fill does not involve a total change of more than 1.5m relative to the natural ground level at any point. OR*
- (b) In other areas, the extent of excavation (cut) and fill does not involve a total change of more than 1.0 m relative to the natural ground level at any point.*

Like the Code for Detached Houses, the acceptable measure in the Code for Operational Works seeks to restrict the change in level to 1.5m (where identified on map 1.3) or 1.0m elsewhere. The nominated changes in level are again a reflection of the ways in which an acceptable measure would satisfy the performance criteria.

The Code for Operational Works, Element 4 - Acceptable measure 1.3 states:

"A1.3 Retaining walls are no greater than 1 metre high."

This acceptable measure is similar to the acceptable measure contained in the Code for Detached Houses. Again, it indicates that the way in which the performance criteria would be satisfied, is by ensuring the amount of cut and fill is 1.0m or less.

With 3.3m of cut and 2.7m of fill, the amount of excavation and fill is, on average, three times greater than what the planning scheme considers to be an acceptable measure/outcome.

The committee acknowledges that an "alternate" to the acceptable measure may still meet and comply with the performance criteria. However, the alternate measure put forward here (the existing pad, which on average, has changes of level which are up to three times greater than the acceptable measures) is not considered an alternative to meeting the performance criteria.

The Committee considers the test against which this proposal/existing building pad should be measured, is whether the excavation and fill has been done in such a way to ensure that "natural landforms and drainage

lines are maintained as much as possible." When compared to the heights nominated by the acceptable measures, the changes in level which result from the cut and fill are excessive. The committee believes that the earthworks have not been undertaken in a way that considers the natural landforms "as much as possible".

The cut and fill associated with the existing house pad would appear to be greater than what the planning scheme would consider an acceptable outcome, and therefore is not considered to comply with the performance criteria. An application which cannot comply with the performance criteria should be refused by the assessment manager unless there are overriding grounds to support the application despite the conflict. The Committee does not believe there are any such grounds.

It is not reasonable to approve the extent of cut and fill in light of the performance criteria and acceptable measures discussed above.

Based on an assessment of these facts, it is the Committee's decision that the decision notice being appealed against be confirmed and the appeal be dismissed.

Reasons for the Decision

The Committee accepts that the Maroochy Plan 2000 is a performance-based planning scheme, and compliance with an acceptable measure is only one way of meeting the performance criteria. In this regard, the wording of the performance criteria is somewhat ambiguous and some reliance has been placed on the acceptable measures to provide guidance as to the planning scheme's preferred outcome.

The Committee finds that the earth works undertaken/proposed to create the building pad is on average, three times greater than what the planning scheme considers to be an acceptable outcome. The amount of cut and fill is found to be excessive, and the works have not been carried out in a way that considers the natural landforms "as much as possible".

The Committee finds that the earthwork undertaken on the site does not comply with the performance criteria. The Committee is of the opinion that there are no overriding or compelling reasons that would justify the earthworks being approved in their current format.

Kari Stephens
Building and Development Committee Chair
Date: 4 February 2011 _____

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee 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 Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

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