



**Building and Development Tribunals**

**Queensland Government**

Department of **Local Government and Planning**

**APPEAL**

*Integrated Planning Act 1997*

**File No. 03-06-099**

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**BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**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* against the decision of the Maroochy Shire Council to refuse an application for Preliminary Approval for Building Works – code assessable garage - on land described as Lot “*withheld*” and situated at “the subject site”.

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**Date and Place of Hearing:** 9:00am on Monday 4<sup>th</sup> December 2006  
at “the subject site”

**Tribunal:** Mr Chris Schomburgk

**Present:** “*withheld*” – applicant;  
“*withheld*” – applicant  
Mr Steve Tucker – Maroochy Shire Council  
Mr John Roser - Maroochy Shire Council  
Mr Damien McGarry – Maroochy Shire Council

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**Decision:**

The decision of the Maroochy Shire Council as contained in its written Decision Notice dated 23<sup>rd</sup> October 2006, to refuse an application for an amended floor level for a garage, is **set aside** and **the application is approved**.

## Material Considered

The material considered in arriving at this decision comprises:

- The application and supporting plans and documentation;
- A written statement provided by the Council at the hearing;
- A written statement provided by the applicant at the hearing;
- The relevant provisions of the Town Planning Scheme for Maroochy Shire Council;
- Council's Decision Notice dated 23<sup>rd</sup> October 2006;
- The Building Code of Australia Volume 2;
- The *Building Act 1975*;
- The *Building Regulation 2006*;
- State Planning Policy 1/03 – Mitigating the Adverse Impacts of Flood, Bushfire and Landslide; and
- The *Integrated Planning Act 1997*.

## Findings of Fact

I make the following findings of fact:

- The site comprises Lot “*withheld*” and is located at “the subject site”. The site contains a new dwelling house, with the subject garage having also been constructed. The site is located one street back from the “*withheld*” foreshore, and is likely to be within the Maroochy River floodplain.
- The background to this matter is, of relevance, that the house and garage have been constructed pursuant to, but different from, a building approval issued by Suncoast Building Approvals, a certifier. The approved plans have a notation to the effect that the minimum floor level is to be 2.80m AHD (Australian Height Datum).
- When the discrepancy was discovered, an application was lodged seeking relaxation/variation of the floor level. That application lapsed due to a non-response to Council's request for further information. A new application was lodged in August 2006, the decision regarding which is the subject of this appeal.
- The house complies with this minimum floor level, but the garage does not. The application material includes a statement by a surveyor that the floor level of the garage is 2.48m AHD.
- The subject application seeks approval for this lesser floor level, given that the structure has already been built and the house is ready for occupation, subject to the necessary final certificates.
- The Council's refusal is based on Code 2.1.6 of the Planning Scheme – Design for Flooding, and in particular Element 2, Performance Criteria P1 which provides that:

*Floor levels of **detached house**, annexed units, display homes and caretakers residences must be provided at a suitable height above flood levels to protect development from flooding at an acceptable level of risk.*

- The definition of “detached house” in the Planning Scheme includes “*such outbuildings as are incidental to and necessarily associated with a detached house ...*”. The Council has interpreted this to include a garage.
- At the hearing, the Council officers explained their concerns in case of a flood event, which include:
  - Risks of environmental damage from oils or other household chemicals that may be stored in the garage at the time of a flood event;
  - Possible damage to structural members of the garage (timber construction);
  - Possible degradation/deterioration of building materials due to exposure to floodwaters;
  - Possible loss of property;
  - Possible litigation by future landowners as a result of any of the above.
- It was also explained that Council has adopted the Q100 flood level in this locality as 2.40m AHD, but adds 400mm freeboard to allow for a reasonable margin of error in calculation of the flood levels and/or backwater or other circumstances, as is common practice for most Queensland local governments. In this case, then, the garage floor at 2.48m AHD is above the calculated flood level (2.40m) but below the additional freeboard allowance (2.80m).
- The applicant (the builder) explained on site that the error was his, and that he had read from the architect’s original plan, not the stamped approved plans, when constructing the premises.
- At the hearing, potential compromise solutions were discussed. These included a new slab floor over the current one, but this was not practical due to head height inside the garage and the garage door height. The option of a notation on the rates notice for the site was canvassed but the Council remained concerned about its potential liability in case of a flood event and structural damage.
- However, while the Council’s legitimate concerns are valid, a relevant factor in the assessment of this application is the way in which non-habitable rooms (such as a garage) are treated in the relevant legislation, as distinct from habitable rooms. The *Building Regulation 2006* section 13 deals with the power of a local government to define flood levels for habitable rooms (only). Similarly, the BCA has a Performance Requirement (P2.2.1) for Q100 immunity for Class 1 buildings, but specifically excludes Class 10 buildings. State Planning Policy 1/03 is called up in the Building Regulations 2006 and again refers to the need to protect habitable rooms from flooding. However, section 1.4 of the SPP has a specific exclusion for car parking areas.
- Related to these exclusions is section 31 of the *Building Act 1975* which provides that the building assessment provisions of the Building Act is a Code for the purposes of IDAS, and is a Code that cannot be changed under a local planning instrument (s31(3)). That is, it is my interpretation that the provisions of the Building Regulation and the BCA are provisions that cannot lawfully be changed by a Planning Scheme, which is a local planning instrument under the IPA.
- The result of this interpretation is that the Planning Scheme cannot override these other provisions which specifically exclude non-habitable rooms and car parking areas. If that is the case, the Planning Scheme provision referred to above that seeks to include non-habitable rooms in this control is of no force or effect.

Based on my assessment of these facts, it is my decision that **Council's decision** to refuse the Application for relaxation of the garage floor level is **set aside** and **the application is approved**.

### **Reasons for the Decision**

- The fact of the erection of a structure contrary to a previous approval ought not to be given any weight in the assessment of such an application. This assessment must proceed as if that structure does not exist, and is being assessed "from scratch".
- The need to ensure property and structures are protected from damage during a flood event is a proper exercise of a local government's development control. In this case, the Council has set a minimum floor level to achieve an appropriate level of flood immunity. That floor level is based on a calculated floor level plus a nominal freeboard height.
- However, the provisions of the relevant legislation (discussed above) mean, based on my interpretation, that the Planning Scheme provision that seeks to apply the flood level to the non-habitable garage is of no force or effect.
- Even if I am wrong in this interpretation, the fact that the floor level of the garage (which is a non-habitable room) is above the calculated flood level but below the additional freeboard level, means that any risk of damage or loss of property as a result of flooding is minimal if any.
- While the Council's concerns to protect property and avoid litigation in the case of damage are legitimate for a local government, it is my opinion that the legal provisions mean that the Planning Scheme cannot apply. In this case, the relevant provisions of the BCA and the Building Act and the State Planning Policy are all satisfied, and the application should be approved.

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**Chris Schomburgk**  
**Building and Development Tribunal General Referee**  
**Date: 15<sup>th</sup> December 2006**

## **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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