



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

Appeal Number: 42-11

Applicant: Landbank Self Managed Superannuation Fund

Assessment Manager: Toowoomba Regional Council (Council)

Concurrence Agency:  
(if applicable) N/A

Site Address: 112-120 Greenwattle Street Cranley (Toowoomba) and described as Lot 7 on SP211238 – (subject site)

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### Appeal

Appeal under section 564 of the *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager Toowoomba Regional Council to refuse a Development Application (DA) for building work for Class 1a studio dwelling and an associated Class 10a garage on the subject site.

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Date of hearing: Wednesday 27 July 2011 at 9:30 AM.

Place of hearing: Department of Local Government & Planning Offices  
128 Margaret Street Toowoomba

Committee: David Kay – Committee Chair  
Max Hunter – Committee Member

Present: John Griffin on behalf of Landbank Self Managed Superannuation Fund  
– Applicant  
Matthew Whittaker – Building Certifier Toowoomba Regional Council  
David Krumins – Toowoomba Regional Council

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### Decision:

The Committee, in accordance with section 564 of the Sustainable Planning Act 2009 (SPA), **sets aside** the decision by Council to refuse the DA for building work and replaces this with a decision to return the application conditional upon the issuing of an Information Request under SPA section 276 for the Information and Referral stage of Information Development Assessment System (IDAS) with the following information to be provided to Council:-

1. The applicant is to provide sufficient documentation to Council as outlined in the Information Sheet on Development in Steep and/or Potentially Unstable Land establishing that the slope of the land is less than 10% to enable the provision of written advice by Council to the applicant confirming that a development application for a Material Change of Use (MCU) is not required;  
**OR**

The applicant is to make a DA for a MCU for code assessment of a house required by the Toowoomba Planning Scheme 2003 Regulatory Map and Steep and/or Potentially Unstable Land Code (Code 8.5).

2. A copy of a Compliance Permit for plumbing and drainage work involving an onsite sewerage facility and composting toilet for the studio dwelling unit is to be provided before the Development Permit for building work can be granted.
3. A revised geotechnical report addressing the slope stability and also ensuring that the footing design certification site classification is consistent with the soil report site classification.
4. Advice issued by the Building Services Authority (BSA) as to whether or not the sighting of an owner builder permit advice or notification of insurance would be required before the issue of the development approval for building work is required to be provided by the applicant under Section 68(2) of the *Queensland Building Services Act 1991*.
5. A revised dimensioned site plan clearly indicating the boundary clearances of the studio dwelling building, carport the rainwater tank size and location with setbacks.
6. Revised elevations of the Class 10a building described as a garage are to be provided showing the deletion of the walls if it is intended to construct that part of the building without walls.
7. A revised floor plan indicating:-
  - (a) All of the required facilities for a Class 1a building in accordance with Part 3.8.3 of the Building Code of Australia (BCA) 2010 Volume 2. It should be noted that a laundry and space for a washing machine is required.
  - (b) Smoke alarms in accordance with Part 3.7.2. of the BCA 2010 Volume 2.
  - (c) Landing and/or stair locations and details demonstrating compliance with Part 3.9.1 of the BCA 2010 Volume 2.
8. Cross section elevations through the studio dwelling building and carport illustrating the ceiling heights and distance between the natural ground level, the underside of the floor, the finished floor level of the studio and carport. These are to provide sufficient detail demonstrating compliance with Part 3.4.1 and Part 3.1.3 of the BCA 2010 Volume 2.
9. Light and ventilation layout demonstrating compliance with Parts 3.8.4 and 3.8.5 of the BCA 2010 Volume 2.
10. Revised energy efficiency details demonstrating compliance with the Queensland Development Code (QDC) MP 4.1 – Sustainable Buildings (dated 12 November 2010) Part A1 including the reference to the relevant sections of Part 3.12 of the BCA 2010 are to be provided. The details are to include the type and specification of the hot water system to be installed demonstrating compliance with Part A5 (b) of the QDC MP4.1.

The application will lapse if the applicant does not comply with the Information Request issued within 3 months after receiving the information request or the further period as agreed upon between the applicant and Council.

## **Background**

### *Applicants submission to the Committee*

The slope of the ground and suitable building sites should have been considered at the time of the subdivision of land. This has been a requirement of the Toowoomba Planning Scheme 2003, the Toowoomba Town Plan 1996 and Chapter 30 Subdivision of Land Local Law prior to 1996. Having considered this as part of the subdivision approval there should be no further requirement to have the slope of the land and suitability for a building platform considered again.

The building application was lodged with Council at Herries Street customer service counter with both the building and plumbing application details. Building application fees had been quoted and the applicant believed that the plumbing fees were to be advised by Council. The plumbing application forms were unable to be located by some Council staff.

A previous Engineer report advised that the slope is 1 in 8 with gradients of 10 degrees. The details contained in the Council's information sheet "Development in Steep and Potentially Unstable Area" lead the applicant to believe that by providing the details from the engineer and a geotechnical soil report compliance with the Toowoomba Planning Scheme 2003 Regulatory Map and Steep and/or Potentially Unstable Land Code (Code 8.5) would have been achieved.

The value of the building work by a BSA licensee was less than \$3,300.00 and the value of work by the owners is below the limit of \$11,000.00 and accordingly no insurance premium is payable and an owner builder permit is not required.

The rainwater tank location was incorrectly dimensioned and there is sufficient area to locate the water tank in a complying location.

The studio dwelling building has a laundry tub facility with a space for a washing machine.

The proposed termite barrier is to provide a 100mm-120mm ground clearance from a steel sheeted underfloor and with the studio dwelling building being only 2.4m wide there is adequate trades access from both sides.

The details of the light and ventilation have been provided with the manufacturer's evaluation for the studio dwelling building.

The studio dwelling building has ducted ventilation and excessive insulation which maintains temperature at 22 degrees internally, irrespective of whether the external temperature is plus 38 degrees or minus 40 degrees.

The "alfresco" area is intended to be part of the carport which is an open area and it was intended that bay 3 of the carport be designated as an open outdoor area despite the engineer not nominating this on the plan. This area is intended to have R1.5 roof insulation and a ceiling fan.

The funds available to the trustees acting for the owner of the land are limited and this provides constraints as to expenditure for the preparation of plans and costs of responding to provide further information.

As a result of questions asked by committee members it was advised that the Class 10a garage structure would not have any walls and was effectively an open carport despite engineers elevations provided showing walls on 2 sides.

### *Assessment Managers submission to Committee*

Council staff submitted a folder containing the history of the subject site where a Show Cause Notice dated 13 August 2010 had been issued for erecting 2 containers on the site. The submission also contained the following:-

- An Information Request dated 19 January 2011.
- A notice dated 18 April 2011 from the applicant advising that all the information requested had been provided.
- The building work application refusal letter dated 4 May 2011.
- Various correspondence from the applicant from 6 January 2011 to the 18 May 2011.
- A letter dated 18 July from Council advising that a 3sq.m amenities block is Minor Building Work under the planning scheme and a planning approval would not be required.
- A letter dated 26 July from Council advising that details submitted to date indicated that the land had a slope of 1 in 8 (12.5%) and that on this basis an application for a MCU would be required unless the applicant submitted plans prepared by a licensed surveyor or a qualified engineer, demonstrating that the slope is less than 10 % and Council give written approval to advise that a code assessable MCU application under the planning scheme is not required.

Previous to this Council staff at the request of the Registrar had provided a copy of the Council's building application file for perusal by the Committee.

Council staff clarified the Compliance Permit for Plumbing and Drainage work issued was for a composting toilet located 30 metres from the road boundary. It was also clarified that whilst paperwork had been submitted to Council for plumbing fixtures associated with the studio dwelling building no fees had been paid and accordingly no formal application had been created to allow the commencement of any plumbing compliance assessment by Council plumbing staff.

### **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 24 May 2011.
2. Copy of documentation requested by Committee on the 18 July 2011 relating to the building application file held by Council and received on 26 July 2011.
3. Verbal submission from the applicants' representative, John Griffin, at the Committee hearing on 27 July 2011.
4. Copy of documentation submitted by the applicants' representative, John Griffin, at the Committee hearing on 27 July 2011.
5. Verbal submission from Matthew Whittaker, Building Certifier of Council at the Committee hearing on 27 July 2011.
6. Copy of documentation submitted by Matthew Whittaker of Council at Committee hearing on 27 July 2011.
7. The Sustainable Planning Act 2009 (SPA).
8. The Sustainable Planning Regulation 2009 (SPR).

9. The *Building Act 1975* (BA).
10. The Building Regulation 2006 (BR).
11. The Queensland Building Services Authority Act 1991 (QBSAA)
12. The Queensland Development Code MP4.1 – Sustainable Buildings (QDC MP4.1).

### **Findings of Fact**

The Committee makes the following findings of fact:

- A Compliance Permit was approved by Council on 12 May 2010 for Plumbing and Drainage work for an amenity block containing one fixture(WC) being a Clivus Multrum composting toilet located 30 metres from Greenwattle Street front boundary.
- A Building Application (BA) (BW/2010/2246) was lodged and approved for a 3 sq.m composting toilet. This application has lapsed.
- A BA (BW/2010/53) was lodged and accepted by Council on 6 January 2011 for a Class 1a studio dwelling and an associated Class 10a garage.
- An “Information Request” listing 14 items was issued by Council on the 19 January 2011.
- The applicant provided responses to the Information Request on the 28 January 2011 and the 18 April 2011.
- A Decision Notice refusing the application with 9 items listed where compliance had not been achieved to allow the issue of a Development Approval was issued by the Council on the 4 May 2011.
- The applicant submitted further correspondence to Council on the 18 May 2011 in response to the decision notice dated 4 May 2011.
- Council responded on 24 May 2011 confirming that appeal rights were outlined in the decision notice and accompanying attachments.

### **Reasons for the Decision**

The information contained in the application to Council and submission indicates that the land has a slope of 1 in 8 (12.5%) as determined by the qualified engineer. A letter stating that the slope is 10 degrees further confuses the issue as this would indicate a slope of 1 in 5.7 whereas a slope of 1 in 8 is approximately 12.5% degrees. This matter must be correctly addressed to enable the Council and the Building Certifier to determine if a MCU application for assessment against a Planning Scheme Code is required before the DA for building work can be issued as required by section 83(1)(a) of the BA. This has been confirmed by way of the most recent letter to the applicant from Council dated 26 July 2011.

Section 265 of SPA “Approved material change of use required for particular developments” states:-

- (1) *This section applies if, at the time an application for a development permit is made—*  
*(a) a structure or works, the subject of the application, and*

- (b) there is no development permit for the change of use; and*
- (c) approval for the material change of use has not been applied for in the application or a separate application.*

*(2) The application is taken also to be for the change of use.*

If section 265 of SPA applies the application should also have been treated as if it were a MCU and the relevant aspects of the Toowoomba Planning Scheme 2003 Regulatory Map and Steep and/or Potentially Unstable Land Code (Code 8.5) addressed before the building certifier can decide the application.

If section 265 of SPA does not apply the building certifier can proceed with deciding the application.

Based on the above it would be premature to decide the application for building work until the issue of determining whether a MCU application is required has been finalised.

*Section 83(3) of the Building Act states that:-*

*(3) If the private certifier receives the application before all other assessments for permits and approvals mentioned in subsection (1) are completed, for timings under IDAS, the application is taken not to have been received until the day all other assessments under IDAS have been completed.*

Should this section apply then the application should not be decided until the MCU has been completed.

Section 309(3) of SPA allows an assessment manager (Building Certifier) to start assessment of an application before the decision stage starts and accordingly the issue of a request for further particulars in the form of an information request is appropriate.

A Compliance Permit for a composting toilet located 30 metres from Greenwattle Street has been issued. This is required to be amended to reflect the new location adjacent to the studio dwelling or a new Compliance Permit obtained. The application for plumbing and drainage work for fixtures associated with the studio dwelling has not been properly made and must be corrected accordingly and approved.

A Compliance Permit for Plumbing and Drainage work incorporating an on-site sewerage facility for fixtures associated with the studio dwelling has not been obtained and in accordance with Section 83(1)(e) of the BA the Assessment Manager is restricted from issuing the development approval for building work.

A revised engineer's certification including addressing the slope stability should be required as the soil report classifies the site as Class P and the engineer's certification for the footing design is for a Class E site. There needs to consistency between the soil report site classification and the engineers design certificate.

During the hearing the applicant indicated that the cost of the studio dwelling was approximately \$40,000.00. The applicants response dated 18 April to the Council's Information Request dated 19 January 2011 advised that the following costs were:-

Screw pile footing supply and installation	-\$1,500.00 plus GST
Adjustable pier tops/lockdown devices	-\$ 500.00 plus GST
Carport/Alfresco Kit supply	-\$2,669.00 plus GST
Erection of Carport/Alfresco	-\$1,091.00 plus GST ( by Licensed erector)
Roof insulation plus ceiling fan	- \$ 530.00 plus GST

This indicates the total project building costs are in the order of \$45,800.00 and the Building Certifier would need clarification from the BSA as to whether or not the sighting of an owner builder permit advice or notification of insurance advice would be required before issuing the Development Approval for building work. This is required to be provided by the applicant under Section 68(2) of the QBSA Act.

The site plan should clearly demonstrate the rainwater tank is located a minimum of 6 metres from the Greenwattle Street road frontage boundary.

The plans should also clearly demonstrate that suitable area is available for a laundry tub and a washing machine as required by Part 3.8.3 of the BCA Volume 2.

In addition the plans should clearly demonstrate the location of smoke alarm and suitable stairs and landing details.

The details provided to date do not clearly demonstrate compliance with Part 3.4.1 of the BCA Volume 2 requiring subfloor ventilation and access for inspection of termite protection measures.

The lighting and ventilation details should be clearly outlined on the plans showing the area of fixed and openable glazing and doors to demonstrate compliance with Part 3.8.4 and 3.8.5 of the BCA Volume 2.

Energy efficiency details are required to be provided to demonstrate compliance with the QDC MP 4.1 – Sustainable Buildings (dated 12 November 2010) Part A1 including the reference to the relevant sections of Part 3.12 of the BCA 2010.

A site inspection of the studio dwelling with the owner and Council staff after the hearing observed that the current hot water system installed may not comply with the QDC – MP4.1 Sustainable Buildings. It was also observed that water plumbing and sanitary plumbing may not comply with the requirements of the PDA.

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David Kay  
Building and Development Committee Chair  
Date: 19 September 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:

The Registrar of Building and Development Dispute Resolution Committees  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**