



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	3—09—012
Applicant:	Trevor Michael Endres
Assessing authority:	Fraser Coast Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	26 Wolfe Street, River Heads and described as Lot 88 on RP 136911 — the subject site

Appeal

Appeal under section 4.2.13 of the *Integrated Planning Act 1997* (IPA) against an Enforcement Notice, dated 29 January 2009, issued by Council under the *Plumbing and Drainage Act 2002* (PDA) regarding the construction of a land application area, requiring the applicant to:-

1. Remove excavated soil from top of absorption trench and install topsoil as per AS/NZS 1547 Figure 4.5A.
 2. Batter excavated bank or provide engineer certified retaining wall to stabilise bank to prevent excess soil falling onto absorption trench.
 3. Provide diversion drains to exclude rainwater from land absorption trench.
 4. Pay re-inspection fee of \$69.30 prior to booking another final inspection.
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Date of hearing:	10.00am – Monday, 23 March 2009
Place of hearing:	The subject site
Tribunal:	Jim Graham – Chair Laurie Barnett – Member
Present:	Trevor Endres – Applicant Peter Soares – Owner Lisa Allen-Soares – Owner Chris Bouffler – Builder David James – Council Representative

Decision:

The Tribunal, in accordance with section 4.2.34 (2) of IPA, **confirms** the decision of the Council to issue an Enforcement Notice for the following reasons:

1. The Enforcement Notice was validly issued by Council pursuant to the PDA.
2. The applicant did not address the issues raised in the Enforcement Notice, instead seeking clarification on whether the Queensland Plumbing and Wastewater Code (QPW Code) prevents a trench being installed in fill and requesting that the Chief Plumbing Inspector be directed to approve the work.
3. The applicant did not further particularize the grounds of appeal at the hearing with regard to the requirements of the Enforcement Notice.
4. The grounds for appeal must relate to the issues raised in the "Enforcement Notice" as appealed to the Tribunal in accordance with sections 4.2.12A and 4.2.13 of IPA.

Background

An application was lodged with Council for plumbing and drainage works on an unsewered allotment at the subject site on the 5 March 2008. The application was assessed by Council and works proceeded on the basis of the approved plans.

However, during the construction of the on-site sewerage facility the applicant and Council disagreed on aspects of the construction of the facility resulting from a difference of opinion in the interpretation of the QPW code and Australian New Zealand Standard 1547:2000 (On-site domestic-wastewater management) (AS/NZS1547).

On 25 November 2008 the Applicant was issued by Council with a notice under section 115 of the PDA asking the Applicant to show cause why, as the Responsible Person, they should not be given an Enforcement Notice. The notice also stated that the purpose of the show cause notice was to provide the Applicant with an opportunity to respond as to why an Enforcement Notice should not be issued requiring the Applicant to:

1. Forward to Council Form 7 – Notification of Responsible Person for drainer on on-site sewerage facility.
2. Remove excavated soil from top of absorption trench and install topsoil as per AS/NZS 1547 Figure 4.5A.
3. Batter excavated bank or provide engineer certified retaining wall to stabilise bank to prevent excess soil falling onto absorption trench.
4. Provide diversion drains to exclude rainwater from land absorption trench.
5. Pay re-inspection fee of \$69.30 prior to booking another final inspection.

The Tribunal was provided with an undated letter by the applicant that addressed the issues raised by Council and enclosed the Form 7, satisfying the first issue. The Applicant advised Council, amongst other things, that AS/NZS 1547 did not require imported topsoil to be used; and that it was impossible to batter the bank due to the depth of the trench; and that AS/NZS 1547 did not provide that trenches could not be placed in filled land (advising that the trenches had been installed as directed); and that diversion drains were in place and that the Applicant refused to pay the re-inspection fee.

On 27 January 2009, Council sent the Applicant a letter re-stating the above grounds, except for the first one, and advising that Council still intended to issue an Enforcement Notice. The Council refuted the responses provided by the Applicant stating that the topsoil used was more akin to clay loam, not sandy loam.

Council also advised that battering and retaining walls needed to be considered in the design phase, that the design submitted to Council did not detail the Applicant's intention to locate the facility in uncontrolled fill and that in all likelihood any proposal of this nature would have been refused. Council also re-stated provisions of the QPW code and AS/NZS 1547 with regard to selection, sizing and positioning of land application systems.

The Enforcement Notice was subsequently issued to the Applicant by Council. It re-stated the grounds detailed in Council's previous letter, as described above, and provided that these must be satisfied by 27 February 2009.

The documents supplied to the Tribunal at the on-site hearing revealed that the building platform constructed is a cut and fill on the block of land which is detailed on building site plan (J15435), dated 7 February 2008. This plan also gives an approximate location for the Domestic Sewerage Treatment Plant. The drainage plan approved by Council also gives an approximate location of the treatment plant and transpiration trenches. This plan was designed by the Applicant, a plumber/designer. The approved design clearly shows that the Onsite Sewerage Facility is to be located outside the cut and fill area on the subject site.

The approved building plan shows that the building platform is to finish 5.0m from the Fraser Drive boundary and 7.0m and parallel with the truncated corner boundary of the Lot which would allow sufficient area for the construction of the trenches. Since the installation of the trenches, which it has been established were constructed in natural ground, excess soil has been placed over the trenches; approximately 200mm.

The grounds of appeal provided with the Form 10 – Building and Development Tribunals Appeal Notice stated that the *“central issue here is the Chief Plumbing Inspector's interpretations of the [QPW code] and his refusal to allow a trench in fill”*. The Applicant provided that *“my main challenge to the [Fraser Coast Regional Council] is to show me where it says to not put a trench in fill”*. The Applicant addressed the issues raised in previous correspondence from Council and then sought the following:-

- Clarity on whether subparagraphs (i), (j) and (k) of Part 3 – Land Application Systems of the QPW code prevent a trench being installed in fill.
- A request that the Tribunal direct the Chief Plumbing Inspector to accept my sign off of this job.

The later request appears to be a reference to section 86(6) of the PDA. This section provides that for on-site sewerage work the local government may decide not to carry out the assessment if an approved person for the assessment gives it a notice in the approved form stating that the work complies with the compliance permit and the Standard Plumbing and Drainage Regulation 2003 (SPDR).

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 12 January 2009.
2. Enforcement Notice issued by Council, dated 29 January 2009.
3. Letter from Council to the applicant, dated 27 January 2009, responding to the applicant's undated letter.
4. Letter from the applicant to Council, undated, responding to the Show Cause Notice.
5. Show Cause Notice issued by Council, dated 25 November 2008.
6. Submission from Council, received 23 February 2009:-
 - Record of Inspections.
 - Form 7 – Notification of Responsible Person.
 - Soils Test and Design.
 - Approved Drainage Design.
 - Building Plan & Site Plan.
 - Application for On-Site Sewerage Facility & Standard Conditions of Approval.
 - Rainwater Tank Installation Form.
 - As-Constructed Drainage Plan to Date.

- Compliance Permit for On-Site Sewerage Facility & Plumbing Work Conditions.
 - Notice of Non-Compliant Plumbing /Drainage/On-Site Sewerage Work.
 - Show Cause Notice (25 November, 2008).
 - Show Cause Notice Response to Mr D King.
 - Enforcement Notice (29 January, 2009).
 - Photographs of site.
7. Verbal submission from the Applicant at the hearing;
 8. Verbal submissions from the Owners at the hearing;
 9. Verbal submissions from the Council representative at the hearing;
 10. The IPA.
 11. The PDA.
 12. The SPDR.
 13. The QPW Code.

Findings of Fact

The Tribunal makes the following findings of fact:-

1. The applicant (Plumbing contractor/Hydraulic Plan Designer) submitted a hydraulic plan for approval to the Fraser Coast Regional Council as part of the plumbing and drainage application made under the PDA.
2. The Fraser Coast Regional Council approved the hydraulic plan designed and lodged by the applicant.
3. The installation by applicant (plumbing contractor/Hydraulic Plan Designer) was not carried out as per the approved hydraulic plan.
4. No attempt has been made to exclude surface stormwater water from the effluent disposal area.
5. There is evidence on premises of effluent leaching from the absorption (transpiration) trenches. This leaching has caused an area (approx 2sq, metres) midway along and on the downhill side of the trenches to become saturated with effluent.

Reasons for the Decision

1. Enforcement Notice and grounds for appeal

Section 116 (2) of the PDA provides that Council may give a written notice (an Enforcement Notice) to a person who has performed plumbing or drainage work or on-site sewerage work to do a stated thing. For example, to direct the person to do a stated thing to ensure that the on-site sewerage work complies with the PDA or the relevant compliance permit.

This is relevant where, in this matter, it relates to Council's obligations to ensure that on-site sewerage work complies with the requirements of the PDA, SPDR, the QPW code and AS/NZS 1547. The later three instruments are given effect through the PDA; hence the reference to "Act" in section 116 (3) of the PDA, which pursuant to the *Acts Interpretation Act 1954* includes a reference to instruments made under the Act.

In this case, an Enforcement Notice was given to the applicant. The Tribunal considers that the process followed by the Council conformed to the process set out in the PDA. The grounds, other than the first request for a "Form 7 – Notification of Responsible Person" remained consistent in all correspondence sent to the applicant.

However, the Applicant chose to appeal the decision of the Council to issue the Enforcement Notice on grounds that did not address the issues raised in the Enforcement Notice. Instead the applicant sought clarification on whether the QPW Code prevents a trench being installed in fill and requested that the Chief Plumbing Inspector be directed to approve the work.

The Tribunal considers that although these matters were indirectly in dispute they were not the subject of the Enforcement Notice. Despite this, the Tribunal chose to conduct an on-site hearing to give the Applicant further opportunity to properly respond to the issues raised in the Enforcement Notice.

2. Interpretation of the QPW Code / AS/NZS 1547

In addition to the decision to confirm the appeal, the Tribunal wishes to add the following comments on the application of the QPW Code and AS/NZS 1547 in this matter.

The applicant raised issues in the grounds for appeal regarding the interpretation of Part 3 – Land Application Systems in the QPW Code. In particular, clarity on whether subparagraphs (i), (j) and (k) of Part 3 – Land Application Systems of the QPW Code prevent a trench being installed in fill. This part of the QPW Code, under performance criteria P1 provides that:

“A land application system must be designed constructed, installed and maintained in such a manner as to-
(a).....
(i) avoid the likelihood of unintended or uncontrolled discharge;
(j) avoid the likelihood of blockage and leakage;
(k) avoid the likelihood of damage from superimposed loads or ground movement;
(l)....”

The interpretation preamble to the QPW Code provides that the code:

“...has been designed to provide performance solutions to meet the statutory requirements of the PDA. This will maintain the standards set by the QPW Code while allowing for innovation in materials and methods.

Objectives and Functional Statements are informative only and are included to provide an aid to interpreting the Performance Criteria. Objectives are the community expectations for the QPW Code. Functional Statements describe how to meet those community expectations.

Performance Criteria have been developed to meet the Objectives and Functional Statements. The Acceptable Solutions provide a simple and direct manner of meeting the Performance Criteria.

Where legislation requires compliance with the QPW Code, compliance with the Performance Criteria is mandatory

Unless otherwise provided by the QPW Code, the requirements of the relevant Australian and New Zealand Standards are applicable. Where there is any inconsistency, or the QPW Code has additional requirements, the QPW Code prevails.”

The QPW Code also makes reference to section 8B of the SPDR which provides that on-site sewerage work must comply with the QPW Code. Specifically, section 8B provides:-

- (1) Plumbing and drainage work and on-site sewerage work must comply with the QPW code.*
- (2) Plumbing and drainage work or on-site sewerage work complies with the QPW Code only if the work satisfies the relevant performance criteria under the QPW Code.*
- (3) Compliance with the relevant performance criteria can be achieved only by:-*
 - (a) complying with the relevant acceptable solution under the QPW Code; or*
 - (b) formulating an alternative solution that:-*
 - (i) satisfies the performance criteria; and*
 - (ii) is shown to be at least equivalent to the relevant acceptable solution under the QPW Code; or*

(c) a combination of paragraphs (a) and (b).

In addition, the QPW Code also notes that section 9 of the SPDR requires that plumbing and drainage and on-site sewerage work must comply with Australian and New Zealand Standards 3500.0 to .2 and .4 and 1546.1 and .3 and 1547. These are called “applied provisions” and called up in schedule 1 of the SPDR.

In addition the following extract from AS/NZS 1547:2000 provides that:

“2.2.2 Performance requirements

2.2.2.1 Public health and environment

Site investigation and design procedures shall include the evaluation of potential public health and environmental effects and shall ensure that the final on-site domestic-wastewater management system will produce effluent that complies with the public health and environmental quality requirements of the regulatory authority. The final choice of system shall incorporate:

- (a) Measures to ensure that the option of full sewerage servicing has been assessed and compared with on-site servicing and the best practicable option (BPO) selected.*
- (b) ...”.*

The Tribunal considers that in this instance the QPW Code and AS/NZS 1547 is not in conflict but describe the same requirements, albeit in different words. In particular, clause 2.2.1 supports performance criteria P1(i). The QPW Code, nor AS/NZS 1547, does not expressly state that a trench must not be constructed in fill, however, it is entirely within the ambit of the Council’s responsibility (based on the above considerations) to require that a trench not be constructed in uncontrolled fill. The Tribunal considers that the placement of absorption trenches in uncontrolled fill is to be avoided.

The proximity to Fraser Coast Marine National Park to the subject site and the performance of the land application area on the subject site is a major concern to this Tribunal.

3. On-site sewerage designers / approval for local government

The applicant, in the grounds of appeal, requested the Tribunal to direct the Chief Plumbing Inspector to accept the work as approved by the applicant. As noted above, the Tribunal considers that this is a reference to section 86(6) of the PDA which provides that:

*“However, if the work is on-site sewerage work, the local government may decide not to carry out the assessment if an approved person for the assessment gives it a notice (**a notice of compliance**) in the approved form verifying that the work complies with—*

- (a) the relevant compliance permit; and*
- (b) the Standard Plumbing and Drainage Regulation”.*

Section 86(13) of the PDA further provides that:-

“In this section—

approved person, for assessment of on-site sewerage work, means the person who designed the on-site sewerage facility to which the work relates and who—

- (a) in the local government’s opinion, is competent to give a notice of compliance; and*
- (b) if the person is required by law to be registered or licensed under a law applying in the State to practise in the aspect of the work—is so registered or licensed”.*

The Tribunal considers that a decision to designate a person as an “approved person” for the purposes of section 86 (6) of the PDA is a matter wholly within the discretion of the Council. The converse is also true as to the ability to remove that person’s approval. These matters cannot be appealed to the Tribunal and as such the Tribunal cannot make or give a direction or order to that effect.

Therefore, for the reasons given above the Tribunal **confirms** the decision of the Council to give the Applicant an enforcement notice.

Jim Graham
Building and Development Tribunal Chair
Date: 9 April 2009

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