



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	12-2010
Applicant:	KTMH Developments (Qld) Pty Ltd
Assessment Manager:	Sunshine Coast Regional Council
Concurrence Agency: (if applicable)	N/A
Site Address:	26 – 40 Menzies Drive, Pacific Paradise and described as Lot 5 SP 217624 —the subject site

Appeal

Appeal under section 526 of the *Sustainable Planning Act 2009* against the decision of the assessment manager to impose conditions on a decision notice for a preliminary permit for building work relating to finished floor level and vegetation removal.

Date of hearing:	Thursday 6 May 2010
Place of hearing:	26 – 40 Menzies Drive, Pacific Paradise
Committee:	Chair: Ain Kuru
Present:	Stuart McLeod - KTMH Developments (Qld) Pty Ltd Rod McLeod- KTMH Developments (Qld) Pty Ltd Fred Vicary - Sunshine Coast Regional Council

Decision:

The Committee, in accordance with section 564 of the *Sustainable Planning Act 2009* directs the Sunshine Coast Regional Council to amend the decision notice to:

- remove conditions requiring the finished floor level to be constructed at 3.24 metres AHD; and
- place an advisory note on the decision notice making it clear that the sheds are constructed below the 1 in 100 year defined flood level of 2.84 AHD.

Background

On 18 November 2009 KTMH Developments (Qld) Pty Ltd made application to Sunshine Coast Regional Council to construct two open farm sheds on the subject property. The sheds are 15.25 metres long by 9.12 metres wide by 4.40 metres high.

On 30 November the Sunshine Coast Regional Council issued an information request advising that:

- some of the proposed clearing would require approval under Council's local law; and
- that the extent of earthworks would exceed 1,000 m² and therefore the application would disturb acid sulphate soils and trigger a referral to the Department of Natural Resources.

On 2 February 2010 the application responded to the information request by:

- responding to the requirements of the local law that clearing would be limited to that reasonably required to give effect to the development permit and that rural activities are exempt; and
- that filling is limited to less than 1,000 m³ and therefore referral of the application to the Department of Natural Resources would not be necessary.

On 10 February Council subsequently issued a decision notice which amongst other matters included conditions which required:

- a maximum depth of fill of 1 metre to ensure that fill did not exceed 1,000 m³;
- a finished floor level of 3.24 metres AHD.

On 10 February the applicant lodged an appeal on the grounds that:

- the requirement that the finished floor level be 3.24 metres AHD is contrary to section 13 of the *Building Regulation 2006* which allows a local government to declare the required floor level of habitable buildings, and that the proposed shed were to be used for storing machinery etc and would not be habitable;
- request that additional vegetation clearing around the building pad to allow for reasonable access to construct the pad.

Material Considered

The material considered in arriving at this decision comprises:

- IDAS application Part A, Part E, assessment checklist, plans, elevations and covering letter dated 17 November 2009.
- Information request dated 30 November 2009.
- Response to information request dated 2 February 2010.
- Flood search certificate dated 6 August 2009.
- Decision notice dated 10 February 2010.
- Application for appeal dated 10 February 2010.
- Submission by Sunshine Coast Regional Council dated 6 May 2010 submitted at the hearing;
- *Sustainable Planning Act 2009*.
- *Building Act 1975*.

Findings of Fact

The Committee makes the following findings of fact:

- 1 Under the *Sustainable Planning Act 2009* the Committee does not have jurisdiction to hear appeals made in respect of building work applications assessed under a planning Scheme or local law which are outside the scope of jurisdiction of section 526 of the *Sustainable Planning Act 2009*.
- 2 Section 86 of the *Sustainable Planning Act 2009* does provide that a planning scheme must not include provisions about building work, to the extent the building work is regulated under the building assessment provisions, unless permitted by the *Building Act 1975*. If a planning scheme does not comply with this then subsection (2) states it has no effect.

- 3 Section 30 of the *Building Act 1975* states that a *building assessment provision* includes the provisions of any regulation made under the Act.
- 4 Section 13 of the *Building Regulation 2006* states that a local government may declare part of its area as a natural hazard management area (flood) and declare the level to which the floor levels of habitable rooms must be built.
- 5 A copy of the Maroochy Plan 2009 is not readily available, however Council's submission to the Committee advises that the proposed work is made code assessable due to the minimum floor height under Code 4.1 Element 9 of the Maroochy Plan.

Reasons for the Decision

The Committee does not have jurisdiction to hear appeals relating to building work or operational work (earthworks not associated with building work or vegetation clearing) assessed under a planning scheme or matters assessed under a local law, which are outside the scope of jurisdiction of section 526 of the *Sustainable Planning Act 2009*.

The Committee however does consider that floor levels of buildings in flood prone areas are building assessment provisions within the scope of the *Building Act 1975* in which case the planning scheme has no effect under section 86 of the *Sustainable Planning Act 2009*.

While the Committee has been unable to access the Maroochy Plan 2009 current at the time the application was lodged. However, Council's submission makes it clear that the floor level (and not other flooding or environmental considerations) was the only trigger for making the application code assessable, provided the extent of filling remained less than 1,000 m³. This was confirmed by Fred Vicary on site.

Council advise in their submission that the proposed floor height is achievable, however the site inspection by the Committee revealed that considerable fill would be required to satisfy the required height of 3.24 metres AHD. In addition, such fill would result in considerable disturbance to the site.

The Committee is satisfied that the sheds are to be used for non-habitable purposes, and therefore believes the sheds can be constructed on flood prone land.

The Council is concerned that it might be open to litigation if the buildings are damaged as a result of a flood. As a result an advisory note should be placed on the decision notice making it clear to the applicant and future purchasers of the property noting that the sheds will be constructed below flood floor level.

The Committee, in accordance with section 564 of the *Sustainable Planning Act 2009* directs the Sunshine Coast Regional Council to amend the Decision Notice to:

- remove conditions requiring the finished floor level to be constructed at 3.24 metres AHD; and
- place an advisory note on the Decision Notice making it clear that the sheds are constructed below the 1 in 100 year defined flood level of 2.84 AHD.

Ain Kuru
Chair
Building and Development Committee
Date: 18 May 2010

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
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