Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	**62 - 17**
Appellant:	Leafy River 888 Pty Ltd
Assessment Manager:	Sunshine Coast Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	25 and 26 Cook Road, Bli Bli in the State of Queensland and described as Lots 14 and 15 on SP 141208 ─ the subject site

Appeal

Appeal under Item 1(a) of Table 1 of Schedule 1 (Appeals) of the *Planning Act 2016* (PA) against the decision of the Assessment Manager to refuse a development application for a development permit for building work assessable against the Council's planning scheme for the construction of four class 10a sheds. The decision notice issued by the Assessment Manager stated the reason for the refusal was conflict with the performance outcomes / purpose and overall outcomes of the Flood Hazard Overlay Code of the Council's planning scheme.

Date and time of hearing:	22 February 2018 at 12pm
Place of hearing:	Site inspection by the Tribunal prior to the hearing being held off site at the Council's offices at 10 First Avenue, Maroochydore
Tribunal:	Samantha Hall – Chair Linda Tait – Member Chris Harris – Member
Present:	Jason Hague – Representative of the Appellant and Planner Rob Wibrow – Private Certifier, JDBA Certifiers Stefan Koebsch – Engineer for the Appellant Lynette Bunker – Council Planner, Appeals Unit Robert Booker – Council Engineer

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) ***confirms*** the Council's decision to refuse the development application the subject of the Proposed Development.

Please be advised that you may elect to lodge an appeal/declaration about this matter in the Planning and Environment Court (the Court). The Court appeal period starts again from the date

you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

The following link outlines the steps required to lodge an appeal with the Court.
http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court

Background

The background to this appeal is complex and the Tribunal has determined this background from the material comprising the Form 10, discussions held during the hearing, material provided by the parties and also documents appearing on the Council's PD online website.

On or about 18 October 2017, JDBA Certifiers, private building certifiers (JDBA), referred a development application for a development permit for building work assessable against the Council's planning scheme for the construction of four class 10a sheds (Proposed Development) to the Council as Concurrence Agency (Council reference CAR17/2307).

It is understood that an Information Request dated 26 October 2017 was issued by the Council as Concurrence Agency. The Tribunal has not been provided with a copy of this Information Request.

On 27 October 2017, by email from JDBA to the Council, development application CAR17/2307 was withdrawn. The reason given in the email was that "it was submitted in error based on advice from Council".

The email dated 27 October 2017, went on to state that it also lodged a development application for a development permit for building work to the Council as Assessment Manager for the same Proposed Development (DBW17/2307). The development application comprised the relevant DA Form 2 – Building work details, along with an Ecological Assessment Report prepared by North Coast Environmental Services and dated October 2017.

On or about 8 November 2017, DBW17/2307 was considered properly made by the Council.

By letter dated 8 November 2017, the Council issued an Information Request, which stated the following (emphasis added):

> *"Council as concurrence agency, advise that our preliminary evaluation identifies the need for further information to enable the proper consideration and determination of the response.*
>
> *The additional information required to assess the application is as follows:*
>
> *Reasons and justification for the application and what is the requested concession, addressing the appropriate provisions".*

The Council's PD online website identified that an Information Response was received on 24 November 2017. However, during the hearing, Mr Wibrow stated that no response had been made to the Information Request.

By letter dated 24 November 2017, the Council issued a decision notice refusing DBW17/2307 for the following reasons:

1. *"The proposal conflicts with the Performance Outcomes / Purpose and overall Outcomes of the Flood Hazard Overlay Code. The proposed development requires the importation*

of fill to the site to create the fill pads within the floodplain. No balancing of floodplain storage capacity can be provided on the site. As a result the proposal would change flood characteristics which may cause adverse impacts external to the development site."

On or about 11 December 2017, the Appellant filed the Form 10 – Application for appeal with the Tribunal's Registrar, appealing against the Council's refusal of the development application for the Proposed Development.

On 22 February 2018, a site inspection of the subject site was conducted, followed by the hearing at the Council's offices.

At the hearing, the Appellant undertook to provide further information to the Tribunal and this was provided by email dated 12 March 2018.

The Council provided a response to that information by email dated 29 March 2018.

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 Tribunal's Registrar 11 December 2017.
2. "Submission to Development Tribunal by Sunshine Coast Regional Council" dated 22 February 2018, provided to the Tribunal at the hearing on 22 February 2018 (Council's first submission).
3. "Submission to Development Tribunal by DJBA Certifiers to Appeal Hearing" dated 27 February 2018, provided to the Tribunal by email from Jason Hague to the Tribunal's Registrar dated 12 March 2018 (Appellant's submission).
4. "Response to Submission by Leafy River 888 Pty Ltd to Development Tribunal by Sunshine Coast Regional Council" dated 29 March 2018, provided to the Tribunal by email from Lynette Bunker to the Tribunal's Registrar dated 29 March 2018.
5. PD online records of the Council for DBW17/2307 which includes references to CAR17/2307.
6. Email dated 4 April 2018, sent by Emily Treloar to the Registrar providing a response to the Tribunal's query about the provision of a response to the information request by the Appellant.
7. *Planning Act 2016* (PA).
8. *Planning Regulation 2016*.
9. *Development Assessment Rules*.
10. *Building Act 1975*.
11. *Building Regulation 2006*.
12. *Building Code of Australia*.
13. *Queensland Development Code*.
14. *Sunshine Coast Planning Scheme 2014* (Planning Scheme).

15. *South East Queensland Regional Plan 2017*.

Findings of Fact

The Tribunal makes the following findings of fact:

Subject site

The subject site is described as lots 14 and 15 on SP141208.

The Council's first submission describes it as generally flat and it is located along the Maroochy River at 25 and 26 Cook Road, Bli Bli.

The subject site is located within the Sunshine Coast Council local government area and is subject to the *Sunshine Coast Planning Scheme 2014* (Planning Scheme).

The Planning Scheme identifies that the subject site is within the Rural Zone and is subject to the Acid Sulfate Soils Overlay, the Airport Environs Overlay (Runway Separation Distances, and Obstacle Limitation Surfaces), the Biodiversity, Waterways and Wetlands Overlay, the Flood Hazard Overlay, and the Height of Buildings and Structures Overlay (8.5m).

The Acid Sulfate Soils Overlay shows the entire subject site as Area 1: land at or below 5m AHD. Contours show that the land is close to 0m AHD.

The Biodiversity, Waterways, and Wetlands Overlay shows a small area in the northern corner of 25 Cook Road as Riparian Protection Area. The majority of 25 Cook Road and all of 26 Cook Road are mapped as Wetlands. The majority of 25 Cook Road and the majority of 26 Cook Road are mapped as Native Vegetation Area.

The Flood Hazard Overlay shows that the entire subject site and surrounds are in the Flooding and Inundation Area.

Also, the Flood Hazard Area/Defined Flood Extent mapping identifies the land as being within the Current Climate Riverine Flooding (Flood Modelling) area.

The State mapping identifies that the subject site is within the Regional Landscape and Rural Production Area of the *South East Queensland Regional Plan 2017*. The land is also mapped as Coastal Management District and subject to Coastal Area – Erosion Prone Area (entire site) and Coastal Area – High Storm Tide Inundation Area (entire site). The majority of both sites is mapped as containing Category B (Remnant Vegetation) on the Regulated Vegetation Management Map. Also, the Vegetation Management Supporting Map identifies the land within 25 Cook Road as Essential Habitat Species Record for the Endangered eastern curlew, Vulnerable bar-tailed godwit, Vulnerable water mouse.

Issues in the appeal

The conduct of an appeal by a Tribunal is set out in section 253(2) of the PA, which states that generally the Appellant must establish the appeal should be upheld.

Section 253(4) of the PA further states that "the tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against".

Section 253(5) of the PA adds to this by providing that the Tribunal "may, but need not, consider … other evidence presented by a party to the appeal with leave of the tribunal".

The Appellant's grounds for the appeal are as follows:

- *"Sunshine Council never issued an information request as Assessment Manager.*
- *They issued an information request incorrectly advising they were a concurrence agency.*

- *The application meets the self-assessable criteria of the flood Hazard overlay.*
- *The application is Code assessable to one overlay which has been satisfied."*

The Council's first submission while very detailed and thoroughly prepared, doesn't specifically address the Appellant's grounds of appeal but instead identifies and provides evidence in respect of a number of issues that the Council contends are relevant for the Tribunal's consideration. These issues can be distilled down to the following two matters:

- whether the Appellant made the right form of development application for the Proposed Development; and
- non-compliance with the Flood Hazard Overlay Code of the Planning Scheme.

The second matter raised by the Council, relating to non-compliance with the Flood Hazard Overlay Code of the Planning Scheme, provides evidence on behalf of the Council in respect of the Appellant's third ground for the appeal and accordingly is relevant to the Tribunal's consideration of this appeal and has been considered by the Tribunal in reaching this decision.

The first matter raised by the Council, however, is a fundamental matter as to whether the Appellant made the correct development application for the Proposed Development. This is not a matter that is in issue in the appeal. It has not been raised in the Appellant's grounds for appeal, nor was it raised by the Council during the Council's assessment of the DBW17/2307, in the information request or in its decision notice. Accordingly, this is a matter beyond the scope of this appeal and is not a matter that has been considered by the Tribunal in reaching this decision.

The Tribunal has therefore identified that the issues in this appeal are as follows:

- Issue 1 – Status of the Council's Information Request;
- Issue 2 – Did the Proposed Development meet the self-assessable criteria of the Flood Hazard Overlay Code in the Council's Planning Scheme;
- Issue 3 – Is the Proposed Development code assessable as a result of the application of the Biodiversity, Waterways and Wetlands Overlay Code and has that Code been satisfied?

Issue 1 - Status of the Council's Information Request

The Appellant raised two issues with respect to the Council's Information Request, both of which relate to the fact that the Information Request identified the Council as a "concurrence agency" and not as the "assessment manager".

That the Information Request incorrectly described the Council is not in issue, as the Information Request plainly identified the Council as "concurrence agency". The Council officers in attendance at the hearing acknowledged this and confirmed that there was some internal confusion in the Council about the status of the development application. However, what is in issue is the effect of this error on the validity of the Information Request and consequently on the Council's decision to refuse DBW17/2307.

The two development applications

It appears that there was confusion on the part of both the Appellant and the Council at the time of lodgement about the nature of the development application. It was originally lodged as an application for building work to a private certifier as assessment manager and referred to the Council as a referral agency (CAR17/2307). However, following internal consideration by the Council and discussions between a Council officer and Mr Wibrow, it was agreed that the development application should instead have been made to the Council as assessment manager (DBW17/2307), due to the Proposed Development not meeting the self-assessable criteria in the Biodiversity, Waterways and Wetlands Overlay Code of the Council's Planning Scheme.

This decision was not made, however, until after an Information Request had been issued by the Council in respect of development application CAR17/2307. A copy of the Information Request issued by the Council in respect of development application CAR17/2307 was not provided to the Tribunal and is not included in Council's PD online records, however, the Tribunal is satisfied by oral evidence given by Mr Wibrow at the hearing that the Information Request issued by the Council in respect of development application CAR17/2307 was identical in substance to that issued by the Council in respect of development application DBW17/2307, with the exception of citing different application numbers.

The Proposed Development the subject of each of the two development applications, CAR17/2307 and DBW17/2307, was the same. The only difference being that the Council was a concurrence agency for development application CAR17/2307 but was instead the assessment manager for development application DBW17/2307.

It is clear to the Tribunal after discussing this issue with the representatives of both parties at the hearing, that the reference to the Council as "concurrence agency" rather than "assessment manager" in the Council's Information Request in respect of development application DBW17/2307 was likely to have been a "cut and paste error" because an Information Request had only recently given for the then withdrawn development application CAR17/2307 for the same Proposed Development.

Was a response given to the Information Request?

At the hearing, Mr Wibrow gave oral evidence that upon receipt of the Information Request given for development application DBW17/2307, he spoke to an officer of the Council and advised that the development application was made to the Council as assessment manager and not as concurrence agency and for the Council to assess it as the assessment manager.

At the hearing, Mr Wibrow and Mr Hague were adamant that no other response had been given to the Information Request and they expressed surprise that the Council went on to issue the decision notice on 24 November 2017 in the absence of a response to the Information Request.

It is noted that the Council's PD online records for DBW17/2307 identified that a response had been given to the Information Request on 24 November 2017.

Following the hearing and as a result of deliberations by this Tribunal about the evidence given on behalf of the Appellant at the hearing, which was neither refuted nor confirmed by the Council, the Tribunal's Registrar, by email dated 4 April 2018, made a request to the Council as to whether an Information Request had been provided to the Council by the Appellant on 24 November 2017 as identified on the Council's PD online website and if it was, to provide a copy of that response.

By email dated 4 April 2018, an officer of the Council responded to the Tribunal's request noting that an email from Mr Wibrow was received on 10 November 2017, stating that all information had been provided at lodgement and a response to the information request would not be provided. A copy of this email was provided to the Tribunal and subsequently provided by the Registrar to the Appellant. The officer went on to explain that no information response had been received on 24 November 2017 and that the notation to that effect on the Council's PD online website appeared to be an administrative error as to the date of receipt which had been rectified.

Accordingly, the Tribunal is satisfied that despite the oral evidence given to the contrary, the Appellant clearly satisfied the requirements of sections 13.2 and 13.3 of Part 3 – Information request of the Development Assessment Rules by providing a notice that none of the information would be provided and advising the Council that it must proceed with its assessment of the development application.

What is the effect of the error in the Information Request?

There are no provisions in the PA that deal with the effect of an error in an Information Request and nor was there any precedent from the Planning and Environment Court identified by the Appellant to support the issue that had been raised.

When considering the practical effect of the error in this case, the Tribunal finds that the Appellant was at no stage under any misapprehension as to the nature of the Council's role in assessing development application DBW17/2307. There are three very clear stages during the assessment of this development application which demonstrate this – the first, being the withdrawal of development application CAR17/2307 in which the Council was a concurrence agency and the lodging of a fresh development application DBW17/2307 in which the Council was the assessment manager; the second, being the telephone call asserted by Mr Wibrow and the email dated 20 November 2017, in which the Appellant clearly expressed an understanding that the Council was the assessment manager and not concurrence agency; and the third, is also in the email dated 20 November 2017, in which the Appellant clearly complied with the requirements of sections 13.2 and 13.3 of Part 3 – Information Request of the Development Assessment Rules in providing a response to the Council's Information Request.

Accordingly, the Tribunal is satisfied that the Appellant suffered no prejudice or misunderstanding as a result of the error in the Information Request and on this basis the Tribunal finds that the error is not a sufficient reason to set aside the Council's decision to refuse development application DBW17/2307.

The information requested by the Council

While not raised by the Appellant in its ground of appeal, there is one other matter relating to the Information Request that the Tribunal considers should be raised with the Council. This is the adequacy of the information requested in the Information Request.

The Information requested by the Council can be quoted in less than two lines –

"*Reasons and justification for the application and what is the requested concession, addressing the appropriate provisions*".

Given the lengthy and comprehensive nature of the Council's first submission in this appeal, the information requested in respect of this development application is so broad as to be almost meaningless. The purpose of an information request is to give an assessment manager an opportunity to ask for any additional information that it requires to adequately and competently assess and decide a development application. An assessment manager should therefore clearly articulate in its information request what information it requires to do this.

In this instance, asking for reasons and justifications for the application and asking that the "appropriate provisions" be addressed, does not give the Appellant any insight into the Council's concerns about the Proposed Development, which, from the Council's first submission, appear to be focussed upon the alleged impact the Proposed Development would have upon flood storage in the floodplain. But nowhere was this raised in the Information Request.

This is a significant flaw in the way that the Council has assessed this development application and it is hoped it is an isolated example and not consistent with the way the Council articulates all its information requests in respect of building development applications.

Turning now to the other matters raised in the Appellant's grounds of appeal.

Issue 2 – Did the Proposed Development meet the self-assessable criteria of the Flood Hazard Overlay Code in the Council's Planning Scheme

Preliminary

Section 5.3.3(2) of the Planning Scheme notes that "Accepted development that does not comply with one or more of the relevant acceptable outcomes in the relevant parts of the applicable code(s) becomes assessable development requiring code assessment unless otherwise specified."

Building Work Assessment Benchmarks

Table 5.7.1 (Building Work) of the Planning Scheme identifies that building work can be accepted development if involving minor building work. This is not the case in this instance. Building work can also be accepted development if the applicable use code identifies acceptable outcomes applicable to accepted development. The third option is code assessment if the building work is not otherwise specified to be accepted development. If this is the case, the assessment benchmarks are identified as the use code applicable to the use for which the building work is to be undertaken, the local plan code applicable to the site on which the building work is to be undertaken (not applicable), and the transport and parking code.

In this instance, the Appellant contended that the Proposed Development comprised Class 10a sheds, being a private shed. Therefore, the Dwelling House Code is a relevant assessment benchmark.

The Council's decision notice did not identify non-compliance with the Dwelling House Code as a reason for refusal and accordingly the Tribunal has not considered compliance with the Dwelling House Code of the Planning Scheme in this decision.

In addition to Table 5.7.1 (Building Work) of the Planning Scheme, Table 5.10.1 (Overlays) of the Planning Scheme identifies when an overlay changes the category of development and category of assessment from that stated in a zone and the relevant requirements for accepted development and assessment benchmarks for assessable development.

Compliance with the Acid Sulfate Soils Overlay Assessment Benchmarks

The Acid Sulfate Soils Overlay includes the entirety of the subject site as Area 1: land at or below 5m AHD.

In respect of the Acid Sulfate Soils Overlay, Table 5.10.1 (Overlays) of the Planning Scheme provides that "Any Development" if:

> *(a) within Area 1 as identified on an Acid Sulfate Soils Overlay Map and involving:-*
>
> *…*
>
> *(ii) filling of land with 500m^3 or more of material with an average depth of 0.5m or greater; …*

is subject to code assessment if the development is provisionally made accepted development by another table of assessment and is assessable in relation to the Acid Sufate Soils Overlay Code.

Acceptable Outcome AO1.1(d)(i) of the Acid Sulfate Soils Overlay Code requires that the disturbance of acid sulfate soils be avoided by not undertaking filling on land at or below 5m AHD that results in actual acid sulfate soils being moved below the water table or previously saturated acid sulfate soils being aerated. However, it is not clear from the evidence provided whether the Proposed Development will result in actual acid sulfate soils being moved below the water table.

The Council's decision notice did not identify non-compliance with the Acid Sulfate Soils Overlay Code as a reason for refusal and accordingly the Tribunal has not considered compliance with the Acid Sulfate Soils Overlay Code of the Planning Scheme in this decision.

Compliance with the Flood Hazard Overlay Assessment Benchmarks

The Flood Hazard Overlay shows that the entirety of the subject site and surrounds are in the Flooding and Inundation Area.

In respect of the Flood Hazard Overlay, Table 5.10.1 (Overlays) of the Planning Scheme identifies that Building Work not associated with a material change of use, other than minor building work, if within a flood and inundation area as identified on a Flood Hazard Overlay Map is "no change" (to the category of assessment) and assessable in relation to the Flood Hazard Overlay Code.

The Council's decision notice identified conflict with the "Performance Outcomes / Purpose and Overall Outcomes" of the Flood Hazard Overlay Code as the reason for refusal, also stating "*The proposed development requires the importation of fill to the site to create the fill pads within the floodplain. No balancing of floodplain storage capacity can be provided on the site. As a result the proposal would change flood characteristics which may cause adverse impacts external to the development site*."

This appeal relates to an application for building approval without a material change of use. Therefore, there is no use being applied for. The Appellant's evidence is that the proposed sheds are Class10a structures which are defined in the Building Code of Australia as a "non-habitable building or structure" being a "private garage, carport, shed or the like". The Appellant's submission provided plans showing the proposed sheds to be located with proposed dwelling houses on the subject site. This appears to be supported by a separate development application that the Tribunal understands has been lodged with the Council for dwelling houses on the subject site. The Council's first submission contends that the size of the sheds, calls into question their use for residential purposes and that the size suggests a farming or commercial purpose. On the evidence available, the Tribunal has no reason not to believe the Appellant's evidence and accepts that the intended use is ancillary to dwelling houses. If however, the intended use of the proposed sheds was not to be ancillary to the dwelling houses, then it is a matter for the Appellant to obtain the relevant use approval. On this basis, the Tribunal accepts the Appellant's application of Table 8.2.7.3.1 of the Planning Scheme given the definition of "dwelling house" in the Planning Scheme which includes "out-buildings and works normally associated with a dwelling house and may include a secondary dwelling".

Acceptable Outcome AO4.1 of Table 8.2.7.3.1 of the Planning Scheme states "*Filling of areas outside of the plan area of all buildings and driveway areas does not exceed 50m^3 and does not result in net filling on the site*."

The Ecological Assessment Report prepared by North Coast Environmental Services dated October 2017 states that the Proposed Development will require approximately 600mm of fill and that each shed will have a vehicle manoeuvring area around it. In the hearing, the Appellant advised that the Proposed Development would have an average fill level of 500mm. The plans submitted both with development application DBW17/2307 and as part of the Appellant's submission, clearly identify proposed filling to occur outside of the areas of the proposed sheds for the purposes of creating a manoeuvring area and driveway.

The Council's second submission states that Drawing Number PO1 Issue P2 dated 26 February 2018 (submitted as part of the Appellant's submission), shows a fill pad area of approximately 10,110m^2 and approximately 5,055m^3 of fill. The submission goes on to state that the plan shows significant areas of fill, in excess of 50m^3 for manoeuvring areas which are outside of what would be reasonably required for the sheds and driveways.

The Appellant contended that the filling, both that beneath the buildings and for the manoeuvring area and driveway, constitute works incidental to the building work.

In Schedule 2 (Dictionary) of the PA, building work and operational work are defined as follows:

> **building work**—
> *(a) means—*
> *(i) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or*
> *Example —*
> *building a retaining wall*
> *(ii) works regulated under the building assessment provisions; or*
> *(iii) excavating or filling for, or incidental to, the activities stated in subparagraph (i); or*
> *(iv) excavating or filling that may adversely affect the stability of a building or other structure, whether on the premises on which the building or other structure is situated or on adjacent premises; or*
> *(v) supporting (vertically or laterally) premises for activities stated in subparagraph (i); and*
>
> **operational work**—
> *means work, other than building work or plumbing or drainage work, in, on, over or under premises that materially affects premises or the use of premises.*

The appellant has contended that the definition of building work includes work "incidental to the building and its use".

Work for or incidental to the building, in this instance, could relate to ensuring that the finished floor level meets the minimum flood level requirements, in addition to providing vertical or lateral support to the building.

The proposed drawings do not show a floor finish within the sheds as providing any vertical or lateral support to the building however, given the application of the Flood Hazard Overlay, any filling within the structure of the sheds could be considered "incidental to" in terms of raising the internal building area above potential floodwaters. Similarly, as the Council's evidence suggests, the provision of driveways to the sheds would also be considered by the Tribunal to be "incidental to" the proposed sheds.

The definition provides that building work extends to excavating or filling for or incidental to, "building … a building or other structure". That is, the definition does not define building work to include excavating or filling that is required for something that is "incidental to" the "use" of a building.

It is the Tribunal's view that paragraph (a)(iii) of the definition of "building work" in the PA includes filling or excavation that is required for the construction of the building only and not the filling or excavation for additional surrounding land areas to be used for manoeuvring or other activities associated with the later use of that building.

Accordingly, for the purposes of Acceptable Outcome AO4.1 of Table 8.2.7.3.1 of the Planning Scheme, the Tribunal is satisfied that the Proposed Development does involve filling of areas outside of the plan area, being the areas identified for manoeuvring and that the proposed filling of these areas would exceed 50m^3 and result in net filling on the subject site. Therefore, the Proposed Development is in conflict with Acceptable Outcome AO4.1 of Table 8.2.7.3.1 of the Planning Scheme for accepted development.

Further, having regard to all of the evidence, the Appellant has not established to the satisfaction of the Tribunal that the Council erred in its decision that the Proposed Development will "directly, indirectly or cumulatively change flood characteristics which may cause adverse

impacts external to the development site" and thus it was in conflict with Performance Outcome PO4 of Table 8.2.7.3.1 of the Planning Scheme.

The Appellant has not provided evidence to demonstrate that the Proposed Development will comply with the relevant performance outcomes and acceptable outcomes for assessable development in Table 8.2.7.3.2 of the Planning Scheme, including Performance Outcomes PO1 (development does not modify landform) and PO2 (physical alteration to land does not occur or is committed development), AO5.1 (screening) and Acceptable Outcomes AO5.2 (flood resilience), AO9 (loss of flood storage), and AO10 (physical alteration including vegetation clearing does not occur in storm tide inundation area).

It is therefore the Tribunal's view that the Proposed Development is in conflict with parts of the Flood Hazard Overlay Code and cannot be conditioned to comply with the Flood Hazard Overlay Code.

Issue 3 - Compliance with the Biodiversity, Waterways and Wetlands Overlay Code

A small area in the northern corner of 25 Cook Road is shown as Riparian Protection Area in the Biodiversity, Waterways and Wetlands Overlay Map of the Planning Scheme. The majority of 25 Cook Road and all of 26 Cook Road are mapped as Wetlands. The majority of 25 Cook Road and the majority of 26 Cook Road are also mapped as Native Vegetation Area. By being so mapped, this meant the subject site was considered an "ecologically important area" by the Planning Scheme.

In respect of the Biodiversity, Waterways and Wetlands Overlay, Table 5.10.1 (Overlays) of the Planning Scheme identifies that building work not associated with a material change of use, other than minor building work, is "no change" (to the category of assessment) and assessable in relation to the Biodiversity, Waterways and Wetlands Overlay Code.

It was undisputed at the hearing that the Proposed Development was code assessable under the Council's Planning Scheme by virtue of its non-compliance with Acceptable Outcome AO1.1 of table 8.2.3.3.2 of the Biodiversity, Waterways and Wetlands Overlay Code, which provided that "*Ecologically important areas are retained in-situ and are conserved or rehabilitated to ensure their ongoing contribution to…*".

It is understood by the Tribunal that this is the reason why the Appellant withdrew development application CAR17/2307 and instead lodged development application DBW17/2307, which was accompanied by an Ecological Assessment Report dated October 2017 prepared by North Coast Environmental Services. The Ecological Assessment Report provided an analysis of the Proposed Development against each of the Performance Outcomes and associated Acceptable Outcomes of the Biodiversity, Waterways and Wetlands Overlay Code.

The Appellant identified in the grounds of appeal that the "*application is Code assessable to one overlay which has been satisfied."* In the hearing, the Appellant stood by the content of the Ecological Assessment Report as satisfactorily addressing the requirements of the Biodiversity, Waterways and Wetlands Overlay Code.

The Council's decision notice does not identify the Council's position with respect to the compliance or otherwise of the Proposed Development with the Biodiversity, Waterways and Wetlands Overlay Code. Neither of the Council's two submissions to the Tribunal address the Code either.

In the absence of any evidence lead by the Council to the contrary, the Tribunal is satisfied that the Ecological Assessment Report satisfies the requirements the Biodiversity, Waterways and Wetlands Overlay Code.

Reasons for the Decision

Issue 1 – Status of the Council's Information Request

That the Information Request incorrectly described the Council is not in issue, however, what is in issue is the effect of this error on the validity of the Information Request.

In the absence of guiding provisions in the PA and any precedent decisions of the Planning and Environment Court being identified by the Appellant in this appeal, the Tribunal looked at whether the Appellant was at any time under any misapprehension as to the nature of the Council's role in assessing development application DBW17/2307.

The Tribunal is satisfied that the evidence put before it clearly demonstrates that the Appellant suffered no prejudice or misunderstanding as a result of the error and that the Appellant and its representatives was at all times aware of the Council's role in the assessment of the development application and despite the error, the Appellant still complied with the requirements of sections 13.2 and 13.3 of Part 3 – Information Request of the Development Assessment Rules in providing its response to the Council's information Request.

On this basis the Tribunal finds that the error is not a sufficient reason to overturn the Council's decision to refuse development application DBW17/2307.

Issue 2 - Compliance with the Flood Hazard Overlay

For the purposes of Acceptable Outcome AO4.1 of Table 8.2.7.3.1 of the Planning Scheme, the Tribunal is satisfied that the Proposed Development does involve filling of areas outside of the plan area, being the areas identified for manoeuvring and that the proposed filling of these areas would exceed $50m^3$ and result in net filling on the subject site. Therefore, the Proposed Development is in conflict with Acceptable Outcome AO4.1 of Table 8.2.7.3.1 of the Planning Scheme for accepted development.

The Appellant has not established to the satisfaction of the Tribunal that the Council erred in its decision that the Proposed Development will "directly, indirectly or cumulatively change flood characteristics which may cause adverse impacts external to the development site" and thus was in conflict with Performance Outcome PO4 of Table 8.2.7.3.1 of the Planning Scheme.

Accordingly, the Tribunal finds that the Proposed Development is in conflict with parts of the Flood Hazard Overlay Code and cannot be conditioned to comply with the Flood Hazard Overlay Code.

Issue 3 - Compliance with the Biodiversity, Waterways and Wetlands Overlay Code

Development application DBW17/2307 was accompanied by an Ecological Assessment Report dated October 2017 prepared by North Coast Environmental Services. The Ecological Assessment Report provided an analysis of the Proposed Development against each of the Performance Outcomes and associated Acceptable Outcomes of the Biodiversity, Waterways and Wetlands Overlay Code.

Despite the issue of compliance with the Biodiversity, Waterways and Wetlands Overlay Code being an issue of the appeal, neither the Appellant nor the Council provided any other evidence in respect of compliance or otherwise with this Code.

In the absence of other evidence, the Tribunal must consider this issue based on the evidence that was before the Council when it decided the development application. This evidence was the Ecological Assessment Report and the Tribunal finds that the Ecological Assessment Report satisfies the requirements the Biodiversity, Waterways and Wetlands Overlay Code.

Based on the Proposed Development's failure to comply with the Flood Hazard Overlay Code of the Planning Scheme, the Tribunal upholds the Council's decision to refuse development application DBW17/2307.

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Samantha Hall
Development Tribunal Chair
Date: 24 May 2018

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

(a) an error or mistake in law on the part of the Tribunal; or
(b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

Enquiries

All correspondence should be addressed to:

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