Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	**3—09—060**
Appellant:	David Clark for Ranane Pty Ltd
Assessment Manager:	Sunshine Coast Regional Council
Concurrence Agency: (if applicable)	N/A
Site Address:	339 Flaxton Drive, Flaxton and described as Lot 2 RP 818489 Por 87V - the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the Sunshine Coast Regional Council to refuse a preliminary building application for a proposed dwelling and retaining wall that required a siting variation in relation to a side boundary setback.

Date of hearing:	9.00am Friday 21 August 2009
Place of hearing:	339 Flaxton Drive, Flaxton, the subject site
Tribunal:	Robin King-Cullen – Chairperson
Present:	Robin King-Cullen – Tribunal Chairperson Cleighton Clark – Appellant's representative Helen Clark – Appellant Kaarlo Pesu – Environmental Building Designs Fred Vicary – Sunshine Coast Regional Council

Decision:

The Tribunal, in accordance with section 4.2.34 (2) (b) of the IPA **changes** the decision of Sunshine Coast Regional Council dated 29 July 2009 by directing the Local Government to approve the Preliminary Application for Building Works subject to the following condition:

(a) Landscaping to be generally in accordance with the following Plans:

- "Landscape Plan - Acreage View" and "Landscape Plan - House Area Detail" JKL:01 Revision A (pages 1 and 2) dated 12 June 2009; and

- "Overall Landscape Plan" dated 18 July 2009 revision A page 11 and "Upper Landscape Plan" dated 18 July 2009 page 12 submitted by Environmental Building Designs.

Background

The Proposal

The matter concerns the decision of the Sunshine Coast Regional Council to refuse a siting variation application for a dwelling to be constructed with a setback of 3.6m from the south west side boundary in lieu of 20m. A retaining wall 5.2m in height and located approximately 1m from the south west boundary is also shown on the siting variation application.

The subject site, having an area of 5.5759ha, is located at 339 Flaxton Drive, Flaxton. The site is hatchet-shaped with the narrow part of the hatchet at the Flaxton Drive frontage containing an existing cottage. The site slopes steeply away from the Flaxton Drive frontage down to a citrus farm in the north-east portion of the site. Approximately 60m from the Flaxton Drive frontage, the site widens to a levelled area adjacent to the "head" of the hatchet, which is the proposed location for the new dwelling. This levelled area abuts the south west boundary of the site and the retaining wall shown on the siting variation application has been constructed parallel to this boundary.

The appellants provided the following history of events to the Tribunal hearing:

- The property was purchased in November 2007 as an operating citrus farm with intention of operating as an agricultural commercial venture.
- Over the next 12-18 months work was done to repair maintain and upgrade the site, including works to existing tracks and water tank pads.
- Decision by applicants to build a retaining wall near the water tank pads because of safety and erosion concerns.
- Decision to build a new home to be sited where the water tanks were located on the basis it is the least intrusive position for neighbours' privacy and views.
- The water tanks were subsequently relocated and an application was made for the home in the proposed location.

A response was given by the appellant to each of the grounds of refusal listed in the Council's decision notice. In conclusion, the appellants drew a distinction between the works that were carried out for agricultural purposes and works intended to be carried out for the proposed house.

The Tribunal also noted the following documents provided in the attachment to the applicant's appeal:

- Opinion from Connor O'Meara Solicitors that the existing retaining wall did not require Council approval at the time it was constructed because it was work associated with an agricultural use and therefore exempt development.
- Letters of support form adjoining owners at 337 and 341 Flaxton Drive.
- Compliance Certificate dated 4 December 2008 for the design of the retaining wall.
- Form 16 Compliance Notice dated 19 December 2008 for construction of the concrete crib wall, excavated footing and tied reinforcement.

Assessment Manager Decision

The Sunshine Coast Regional Council Decision Notice dated 29 July 2009 refused the application on the grounds that "the proposed development does not comply with and cannot be conditioned to comply with the following Maroochy Plan 2000 performance criteria of:

Code 4.1, Element 2, P1
Excavation and filling must be carried out in a way that:
(a) does not cause environmental harm;
(b) does not impact adversely on visual amenity or privacy;
(c) is of a nature and scale such that natural landforms and drainage lines are maintained as much as possible.

Code 4.1, Element 8, P1
Development is designed, sited and erected to respect and be visually integrated into the streetscape and the natural surroundings by ensuring:
(d) maintenance, where possible, of natural landforms, drainage lines and vegetation;
(e) building and structures are not visually intrusive, particularly from ridge lines, public open spaces, major tourist roads and other critical vantage points, outside of the site."

In both the verbal submission and written submissions to the Tribunal hearing from Mr Vicary, it was stated that:

> *"The main object of concern is the 5.20m high retaining wall. The wall has been constructed without a permit for Preliminary Building Approval being granted (for the earthworks (cut) and the associated retaining wall) OR a Development Application for Building Works being approved for the construction of the wall. An additional concern is the fact that the retaining wall is highly visible from trafficable roadways in the area."*

The grounds of refusal stated in the Decision Notice, together with the fact that there is no reference in the Decision Notice to non-compliance with Code 4.1, Element 1 (Height and Siting of Buildings and Structures) reinforce Mr Vicary's statement that the Council does not have a concern about the proposed dwelling setback of 3600mm from the south west side boundary in lieu of 20000mm. This was further clarified at the Tribunal hearing when Mr Vicary indicated that the proposed dwelling location would result in minimum impact on adjoining properties.

The main concern leading to Council's refusal of the application was the extent of earthworks and size of the retaining wall and its visibility from trafficable roadways in the area.

The Tribunal noted that if the proposed dwelling were to be constructed in accordance with the plans submitted and if landscaping is provided as proposed on the plans, the retaining wall will no longer be visible from trafficable roadways in the area as its appearance will be effectively masked by the dwelling and associated landscaping.

Mr Vicary's written submission to the Tribunal also addresses the opinion from Connor O'Meara Solicitors that the existing retaining wall did not require Council approval at the time it was constructed because it was work associated with an agricultural use and therefore exempt development. In his submission, Mr Vicary states that "Council firmly believes the intention of the retaining wall has always been in relation to the construction of a dwelling".

Material Considered

The material considered in arriving at this decision comprises:

1. Copy of the application dated 18 May 2009.
2. Copy of the Decision Notice dated 29 July 2009 from Sunshine Coast Regional Council to EBR stating that the application had been refused.
3. "Form 10 – Notice of Appeal" lodged with the Building and Development Tribunals against the decision of the Sunshine Coast Regional Council refusing the granting of the siting variation and attachments.
4. Verbal submissions made by Mr Clark (the appellant's representative).
5. Verbal submissions made by Mr Vicary (Sunshine Coast Regional Council's representative) setting out reasons why the application was refused and why the appeal should not be upheld.
6. Code 4.1 Code for Detached Houses and Display Homes contained in Maroochy Plan 2000.
7. The *Building Act 1975*.

8. The *Integrated Planning Act 1997*.
9. The Building Code of Australia.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The site is within a Rural Precinct – Sustainable Horticultural Land.
2. The site is within Planning Area No. 27 Central Hinterland and Precinct 8 of that Planning Area – Dulong (Sustainable Horticultural Lands).
3. The proposed dwelling setback of 3.6m from the southwest boundary of the site is not disputed by the Council.
4. The retaining wall referred to in the application to which the decision relates has already been constructed.

Reasons for the Decision

The issue in dispute is the retaining wall, not the proposed dwelling setback of 3.6m from the southwest boundary.

The fact that the retaining wall already exists is not a reason in itself for approval of the application.

The Tribunal noted the conflicting views of each of the parties to the appeal about need for prior approval of the retaining wall, being:

- The retaining wall did not require Council approval at the time it was constructed as it was associated with an agricultural use at that time (the applicants' view supported by a legal opinion from Connor O'Meara Solicitors).
- The retaining wall did require Council approval at the time it was constructed as the intention of the retaining wall has always been in relation to the construction of a dwelling (the Council's view).

Whether or not the retaining wall required approval prior to its construction, the current application will resolve the situation.

The Tribunal considered that the size and extent of the retaining wall, when considered in association with the proposed dwelling and landscaping, does not offend either Code 4.1, Element 2 Performance Criteria P1 or Code 4.1, Element 8 Performance Criteria P1. In particular, if the proposed dwelling were to be constructed in accordance with the plans submitted and if landscaping is provided as proposed on the plans, the retaining wall will no longer be visible from trafficable roadways in the area as its appearance will be effectively masked by the dwelling and associated landscaping.

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Robin King-Cullen
Building and Development Tribunal Chair
Date: 28 August 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:

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