



APPEAL
Integrated Planning Act 1997

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council
Site Address: *withheld*- 'the subject site'
Applicant: *withheld*

Nature of Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Maroochy Shire Council to refuse to issue a preliminary development approval required to enable the construction of a retaining wall on 'the subject site'.

Date and Place of Hearing: 9.00 am Friday 18 January 2008 and reconvened 1.00 pm Tuesday 18 March 2008 at 'the subject site'

Tribunal: Geoff Cornish – Tribunal Chairperson
Robin King-Cullen – Tribunal Member

Present 18/01/2008: Applicant;
Applicant's Consulting Engineers; and
John Dunn – Maroochy Shire Council Representative.

Present 18/03/2008: Applicant's Consulting Engineers;
John Dunn – Sunshine Coast Regional Council Representative; and
Roger Chalmers – Sunshine Coast Regional Council Representative.

Decision

In accordance with Section 4.2.34 (2) of the IPA, the Tribunal **confirms** the appeal by the applicant and **sets aside** the decision of Maroochy Shire Council and directs Council to grant a preliminary approval to enable retaining walls to be positioned on "the subject site" in accordance with the details set out on plans prepared by the applicant's consulting engineers, subject to the following conditions:-

1. Construction of the retaining walls and associated earthworks and drainage shall be undertaken strictly in accordance with the requirements of plans defined as Issue CAD009 of drawings numbered 160907.01 and 160907.02 issued by the applicant's consulting engineers on 3 April 2008;

2. Construction of the retaining walls and associated earthworks and drainage shall be undertaken in strict compliance with the conditional written approval granted by the Chief Executive Officer of the Sunshine Coast Regional Council, dated 4 April 2008, for undertaking permanent building works within the Council easement at the rear of 'the subject site';
3. Prior to any works commencing on the site, a development approval for building works shall be obtained. The development approval so obtained shall be consistent with the conditions contained within this decision and those of the above referenced written approval granted by the Chief Executive Officer of the Sunshine Coast Regional Council;
4. Construction of the retaining walls and associated earthworks and drainage shall be undertaken by a contractor holding the appropriate Queensland Building Services Authority licence for that class of work;
5. Construction of the retaining walls and associated earthworks and drainage shall be supervised by an appropriately qualified professional engineer registered to practise in Queensland (RPEQ);
6. At the completion of the retaining walls and associated earthworks and drainage, the supervising engineer (RPEQ) shall certify that the works have been completed in accordance with the approved design and provide the Sunshine Coast Regional Council with a certificate to that effect;
7. The fill batter within the parkland to the west of the subject site shall be grassed to provide stabilisation;
8. The western boundary of the site, from the point where the retaining wall joins it to a point adjacent to the north western corner of the dwelling, shall either be provided with solid fencing to a height of 1.8 metres above finished ground level or screen planted to reduce the visual impact of the retaining wall from the street and from those properties on the northern side of *withheld*. That fencing or planting shall also extend from the side boundary to the north western corner of the dwelling.

Background

The matter concerns the decision of Maroochy Shire Council to refuse to issue a preliminary approval necessary for obtaining a development permit for the construction of a retaining wall on 'the subject site'. The wall was required to rectify a problem of a collapsed embankment between the rear of the existing dwelling and the rear property boundary. The extent of excavation undertaken on the site, with and without specific Council approval, has been subject to question.

The amount of restoration of the embankment that should be undertaken, by way of backfilling, is also a matter of contention. Collapse of the embankment behind the dwelling appears to have occurred as a consequence of a number of contributing factors and the appeal is aimed at establishing a basis on which the necessary work to stabilise the embankment can be carried out. The actions of the private certifier in initially approving the construction of the dwelling and issuing of the final certificate, when additional approvals were outstanding, are also drawn into question. The adequacy of the existing timber retaining wall to the east of the dwelling also needs to be addressed.

Material Considered

1. Copy of the application dated 11 October 2007 made to Maroochy Shire Council for a preliminary approval;

2. Copy of the notification dated 27 November 2007 from Maroochy Shire Council to the applicants stating that the application for a preliminary approval had been refused;
3. 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals, dated 20 December 2007, against the decision of the Council to refuse the application and setting out the grounds of the appeal;
4. Verbal submissions made by the applicant and the applicant's consulting engineer on 18 January 2008 stating reasons for the appeal and setting out why the appeal should be allowed;
5. Verbal submission made by John Dunn of Maroochy Shire Council on 18 January 2008 setting out why Council had refused the application and why the appeal should not be allowed in its present form;
6. A further verbal submission made by the applicant's consulting engineer on 18 March 2008;
7. Further verbal submissions made by John Dunn and Roger Chalmers of the Sunshine Coast Regional Council on 18 March 2008;
8. Copy of a letter of approval dated 4 April 2008 from the Chief Executive Officer of the Sunshine Coast Regional Council to the applicants regarding the undertaking of building works within the easement at the rear of the subject site;
9. Copy of the Code for the Development of Detached Houses and Display Homes contained in Maroochy Plan 2000;
10. The *Building Act 1975*;
11. The *Integrated Planning Act 1997*; and
12. The Building Code of Australia.

Findings of Fact

The Tribunal made the following findings of fact:

1. There has been a substantial collapse of the embankment at the rear of the property resulting in the partial failure of an existing timber retaining wall behind the dwelling and the loss of support for the Council drainage easement and open earth drain contained within that easement;
2. The extent of total excavation carried out on the site exceeds that authorised as part of the original development approval granted for subdivisional works;
3. No other approvals have been sought or given for additional earthworks on the site;
4. Some unapproved excavation has been undertaken on the site. Due to the lack of available definitive "as constructed" level and plan area information from any specific excavation stage, it was not possible to determine the precise extent of unapproved excavation;
5. It was not possible to attribute a precise extent of over-excavation to any particular person or organisation;
6. The embankments at the rear and at the south western corner of 'the subject site' need to be stabilised, restored and permanently retained to prevent further damage to the property. There is also a need to protect Council's drain and drainage easement and to avoid possible future damage to adjoining properties to the south;

7. The extent of the fill batter to the west of the site, projecting into the adjacent parkland and drainage reserve, exceeds that shown on the original approved plans for the subdivision;
8. The collapsed embankments are visible from the street and from properties to the north on the opposite side of the road;
9. The adequacy of the existing timber retaining wall to the east of the dwelling also needs to be addressed;
10. In accordance with the terms of the easement document, work can only be undertaken within the Council easement at the rear of 'the subject site' with the express approval of the Chief Executive Officer of the Council as the Council's representative.

Reasons for the Decision

1. The collapsed embankments require urgent repair of a permanent nature. The problems have been exacerbated further by heavy rain during December 2007 and January 2008;
2. The initial approval granted for the construction of the dwelling appears to be flawed. The approval, granted by a private certifier, enabled the dwelling to be constructed closer to the drainage easement than originally envisaged by the subdivisional approval. This involved additional excavation and retaining walls that required the prior approval of Council, which approval was neither sought nor obtained. The final certificate issued at completion of the dwelling also appears to be in error for a similar reason. The owners of the property, relying on the advice of their certifier, have therefore unwittingly contributed to the problem;
3. A number of factors contributed to the actual collapse of the embankment at the rear of the property. These included the extent of excavation undertaken on the site, the height and steepness of the excavated batter, together with the nature and limited extent of retaining structures constructed prior to the collapse;
4. The proximity of the existing dwelling to the drainage easement means that now, unless the dwelling is partially demolished, the only feasible method of stabilising the embankment in a permanent way is by constructing a single full height retaining wall that encroaches into the easement between the dwelling and the rear of the property. This retaining wall could then taper down to minimum height at an angle across the rear of the property to the western side boundary. This would minimise the amount of filling required, and maximise replacement of the over-excavated ground;
5. The open drain constructed within the drainage easement is unlined and subject to restrictions in flow due to poor maintenance. High debris levels were observed in the drain due to vegetable matter that had fallen from trees on adjoining properties and that had not been cleared. There was potential for the drain to overtop in heavy rain events and for water to penetrate the cut embankment, thus affecting its stability. Responsibility for maintenance of the drain rests with the Council and not with the property owner. The Tribunal holds serious doubts as to the adequacy of the drain as designed and its suitability in an unlined form;
6. The excavated area where the collapse has occurred is visible from the street and from a number of properties on the opposite side of the road. In order to mitigate the visual aspects of this and the remedial work of an extensive retaining wall, it is proposed that the rear of the property should be suitably screened from view. It is proposed to achieve this by way of fencing and/or suitable plantings along the western boundary of the property, extending as far forward as the north western corner of the dwelling, and then extending from the side boundary across to that corner of the dwelling;

7. The extent of the fill embankment to the west of the subject site, spilling into the adjoining parkland and drainage area, is currently greater than originally shown on the approved subdivisional drawings. The additional earthworks carried out on site for the dwelling have contributed to this. Grassing is required to stabilise this embankment;
8. The applicants have committed themselves to having work carried out at their expense as indicated by their initial application submitted to, and refused by, Council; and
9. The decision provides for the construction of walls that can be expected to perform the necessary functions of providing stability for the rear portion of the site and the adjoining eastern boundary, reinstatement of the drainage reserve and screening of the rear of the property from views from properties to the north.

Geoff Cornish
Building and Development Tribunal Chairperson
Date: 8 April 2008

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
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