



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	3—09—032
<b>Applicant:</b>	Kerry McCaw
<b>Assessment Manager:</b>	Sunshine Coast Regional Council (Council)
<b>Site Address:</b>	27 Nambour Bli Bli Road, Bli Bli and described as Lot 7 on RP121186 - the subject site.

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### **Appeal**

Appeal under section 4.2.13 of the *Integrated Planning Act 1997* (IPA) against the issuing of an Enforcement Notice by the Assessment Manager. The notice relates to an alleged development offence pursuant to section 4.3.1 of IPA (carrying out assessable development without a permit) which includes the erection of structures over a sewer without permission on the subject site.

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<b>Date of hearing:</b>	9.00am – Monday, 27 April 2009
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Debbie Johnson – Chair Chris Harris – Member
<b>Present:</b>	Kerry McCaw – Applicant

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### **Decision:**

The Tribunal **dismisses** the appeal as it does not have jurisdiction to hear the matter, for the following reasons:

Section 4.2.7 of the IPA states an appeal to a tribunal under this act may only be about a matter relating to *Building Act 1975* (BA).

The BA is the relevant legislation designed to deal with incidences relating to building applications and a subsequent decision notice.

The Enforcement Notice in this instance was issued under section 4.3.11 of IPA and it was not related to a permit or decision issued under the BA.

The Tribunal therefore considers this is a matter for the Planning and Environment Court in accordance with section 4.1.32 of IPA.

The Tribunal also considers that it does not have the jurisdiction to hear that part of the appeal that relates to building over a sewer as this is a matter for Council pursuant to the *Water Supply (Safety and Reliability) Act 2008* (Water Supply Act).

## Background

In 2006 the Applicant, having been granted a development approval, constructed an in ground swimming pool on the subject site. As a result of the approval and construction of these works it was noted that the swimming pool was located within the vicinity of an existing sewerage line that ran in part through the site.

At a later stage, the Applicant employed a registered building contractor to undertake further building works which included erecting shade sails and decking in the vicinity of the swimming pool and additional covered decking as an extension to the existing dwelling on the site. The Applicant believed that the building contractor had obtained all necessary development applications relating to the works. It has since been established that no permits were sought and the covered decking in the pool area has been constructed over the existing sewerage line.

The Council contacted the Applicant in 2008 following complaints from a neighbour concerning stormwater matters. As a result of investigations into the complaint, it became apparent that works had been undertaken without a permit. Council advised the Applicant to seek a development approval for the building works and issued a Show Cause Notice relating to the development offences on 16 July 2008. The Show Cause Notice also stated that the covered decking around the pool would require an assessment against the provisions of the Queensland Development Code MP1.2, Part 1.0 Siting and Amenity, as the structure was erected within 1.5 metres of the side and rear boundaries of the lot.

The Applicant subsequently sought the services of a building designer and had working drawings prepared for the works that had been undertaken without permit. These drawings were submitted to a building certifier on September 2008. The following is a chronology of the events that subsequently occurred:

- On the 9 October 2008, the building certifier issued the applicant with an information request which stated in part: *"The as constructed gazebo is located above the Council sewer. Please provide written advice from Council permitting it in this location"*.
- On the 24 December 2008, the Applicant applied to the Council for permission to build over the sewer infrastructure.
- On the 23 March 2009, Council advised the Applicant by email that the request to build over the sewer was to be refused.
- On the 24 March 2009, a further email was sent to the applicant, offering information and stating: *"It is regretful that this gazebo has been constructed without council approval but the building over sewer policy does not allow for such a structure"*.
- On the 25 March 2009, the Enforcement Notice was issued to the applicant under the provisions of IPA, section 4.3.11. The Enforcement Notice offered a right of appeal to the Planning and Environment Court or the Building and Development Tribunals under the provisions of IPA 4.2.13. On the 26 March 2009, the Council issued a Notice of Refusal against the application for building over a Council sewer with no rights of appeal nominated. However, the same day Council sent an email to the Applicant which stated in part: *"I am obligated to issue you with a refusal letter however you do have rights under the Water Act to appeal this decision if you wish and perhaps legal advice would be appropriate in this regard"*.
- On the 27 March 2009, the Applicant lodged an appeal against the Enforcement Notice with the Building and Development Tribunal.

## Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 27 March 2009.
2. Council's Enforcement Notice, dated 25 March 2009.
3. Council's Show Cause Notice, dated 16 July 2008.
4. Council's information notices (emails of the 23 and 24) sent to the Applicant in response to the request to build over the sewerage infrastructure.
5. Property details, including mapping and the Maroochy Plan available through Council's website.
6. The development application material including drawings detailed by Jake Long of Complete Design.
7. The Applicant's written grounds for appeal against the Enforcement Notice.
8. Verbal submissions made by the Applicant at the hearing.
12. IPA.
13. BA.
14. *Building Regulation 2006* (BR).
15. The Queensland Development Code (QDC).
16. The Building Code of Australia (BCA).

## Findings of Fact

The Tribunal makes the following findings of fact:

1. The existing two storey dwelling is located on the highest part of the subject site which has an approximate area of 800sq/m. There is a slight fall to the street and a pronounced slope to the rear or western corner of the site where the swimming pool and associated decking is sited along both the rear and side boundaries. The site is basically rectangular and faces the street with a north easterly aspect. The existing sewer line runs slightly askew to the rear alignment, but through the property, between the swimming pool and the fence line, directly under the pool deck structure.
2. The decking and shade sail associated with the swimming pool is erected within the 1.5M setback as prescribed by the provisions of the QDC MP1.2. This area of decking is substantial enough to allow a reasonable gathering of people to be comfortably accommodated around a dining table.
3. At the hearing, the Applicant indicated that the building certifier was prepared to issue a part approval for the additional covered decking which has been attached to the dwelling. This approval was subject to certification being provided by a competent person.
4. Council issued a Show Cause Notice to the Applicant under the provisions of section 4.3.9 of IPA upon discovering that a development offence was established from the evidence gathered.
5. The Applicant has taken steps to remedy the offences by seeking the relevant development approvals retrospectively.
6. The Council have subsequently issued an Enforcement Notice under the provisions of section 4.3.11 of IPA which stated the appeal rights under the provisions of section 4.2.13 of IPA. The Enforcement Notice was issued immediately after Council sent the Applicant an information notice by email,

stipulating that the deck structure could not be approved as it was built over the Council's sewerage infrastructure and could not be readily removed if required for access.

## Reasons for the Decision

The Enforcement Notice was issued the day before but effectively in consideration that the Applicant's was to be issued with a Notice of Refusal with respect to construction over Council's sewer. Section 4.2.7 of IPA states that an appeal to a Building and Development Tribunal may only be about a matter relating to the BA.

Relevantly, IPA provides that:

- IPA Part 1 Planning and Environment Court

Section 4.1.32 Appeals against enforcement notices states:

- (1) A person who is given an enforcement notice may appeal to the court against the giving of the notice.*
- (2) The appeal must be started within 20 business days after the day notice is given to the person.*

- IPA Part 2 Building and Development Tribunals

4.2.13 Appeals against enforcement notices states:

- (1) A person who is given an enforcement notice may appeal to a tribunal against the giving of the notice.*
- (2) The appeal must be started within 20 business days after the day the notice is given to the person.*

4.2.7 Jurisdiction of tribunals

- (1) A tribunal has jurisdiction to decide any matter that under this or another Act may be appealed to it.*
- (2) However, an appeal to a tribunal under this Act may only be about—*
  - (a) a matter under this Act that relates to the Building Act 1975...*

- IPA Part 3 Development Offences, Notices and Orders  
Division 1 Development offences

Section 4.3.11 Giving enforcement notice states in part:

- (1) If an assessing authority reasonably believes a person has committed, or is committing, a development offence, the authority may give a notice (an enforcement notice) to the person requiring the person to do either or both of the following—*
  - (a) to refrain from committing the offence;*
  - (b) to remedy the commission of the offence in the way stated in the notice.*

It is the opinion of the Tribunal that the Enforcement Notice does not relate to a permit or a Decision Notice issued under the provisions of the BA and therefore the Tribunal does not have the jurisdiction under section 4.2.7 of IPA to decide this appeal.

In addition, the Tribunal considers that it does not have the jurisdiction to hear that part of the appeal that relates to building over a sewer. Section 83(1)(f) of the BA provides that a private certifier must not grant an approval if the building work is over or adjacent to a sewer or water main until consent is given under section 192 of the Water Supply Act. This section creates an offence for not obtaining consent and provides an avenue for enforcement under section 475(2)(c) of the Act, but no rights of appeal to the Tribunal.

**Debbie Johnson**  
**Building and Development Tribunal Chair**  
**Date: 11 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:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
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