Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number: **3-08-036**

Applicant: *withheld*

Assessment Manager: Sunshine Coast Regional Council

Site Address: *withheld*-'the subject site'

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision by the Sunshine Coast Regional Council, to refuse an application for a Preliminary Approval of Building Works for a Boat Shed and Gazebo, to be built on the subject site.

Date of Hearing: 2pm, Wednesday 11 June 2008

Place of Hearing: The subject site

Tribunal: Debbie Johnson – Chairperson
Liz Woollard – General Referee

Present: Applicant
Stewart Magill – Representative, Building Surveying Professionals
John Dunn – Representative, Sunshine Coast Regional Council

Decision

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

(a) The Tribunal does not have the jurisdiction under section 4.2.7 of the IPA to hear a matter relating to a Preliminary Approval for Building Works where this does not relate to the concurrence agency requirements given through the *Building Act 1975* (BA).
(b) The Tribunal considers this is a matter for the Planning and Environment Court.
(c) The Tribunal also considers that Council's response to the private certifier on 4 March 2008 was not an information request and without further responses was deemed to be refused under section 3.3.16(4) of the IPA. In this case, the private certifier could have issued a decision notice noting Council's refusal and this decision would have been appealable to the Tribunal.

Background

On 21 February 2008, the owner of the subject site engaged Building Surveying Professionals to approve the construction of a Boat Shed and Gazebo. Subsequently, on 25 February 2008, the application was referred to Maroochy Shire Council (now the Sunshine Coast Regional Council) for advice in accordance with IPA section 3.3.15. The application was referred for a relaxation with regards to the building line setbacks required from the adjacent waterway.

There was no response received from the concurrence agency (Council) within the five days as specified under schedule 4, section 6 of the *Integrated Planning Regulation 1998*. Under IPA section 3.3.16 (4)(c) this may be taken as a deemed refusal. However shortly after this time, on 4 March 2008, Council wrote to the private certifier listing other issues in relation to the proposed works. Council also suggested that further information may be provided by phoning Council's nominated representative. Similarly the letter stated a future Information Request may be issued.

The Applicant contacted Council by telephone and on 19 March 2008, an 'on site' meeting took place between Council's representative and the Applicant. The two parties discussed issues that had been raised in Council's letter and potentially negotiated an outcome for the Boat Shed only. No agreement was finalised however, and on 14 April 2008 the private certifier, acting on behalf of the Applicant, contacted Council via facsimile, stating that further information was not going to be provided. Further, the private certifier requested that Council make a decision on the drawings and information as had already been provided.

On 11 April, just prior to receiving this facsimile, Council also sought written advice from both the Brisbane North and the SEQ Planning Southern Regional office of the Environmental Protection Agency (EPA) with regard to development being proposed on the subject site. Council received written responses from each in turn, on 24 April and 13 May 2008. Copies of this information was supplied at the hearing and distributed to all parties.

On 23 April 2008, following discussions with Council's representatives, the private certifier lodged all relevant IDAS forms on behalf of the Applicant, to make an application for Preliminary Approval of Building Works relating to the Boat Shed and Gazebo as proposed. There were no additional drawings or other supporting documentation provided at this time, nor any application fee. This application is taken to have been properly made in accordance with section 3.2.1(9) of IPA as Council accepted it after due consideration.

The Sunshine Coast Regional Council, by written notice dated 28 April 2008, refused the application for Preliminary Approval of Building Works being the subject of this appeal.

Material Considered

- 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 29 May 2008.
- 'Form 18 – Notice of Election' lodged with the Building and Development Tribunals on 5 June 2008.
- Maroochy Shire Council's letter to the private certifier dated 4 March 2008.
- Sunshine Coast Regional Council's Decision Notice dated 28 April 2008.
- Property details, including mapping as available through PD Online; Maroochy Shire Council's website.
- The application material including cadastral survey as submitted to Maroochy Shire Council.

- The Applicant's grounds for appeal against the Sunshine Coast Regional Council's reasons for refusal submitted with the application to the Tribunal.
- Written submission to the tribunal from Council's representative at the hearing (copies were also requested for the Applicant and private certifier) This information included in part references to-
  - SEQ Regional Coastal Management Plan, August 2006;
  - Eccoaccess third party advice; and
  - Flood Search information;
- Verbal submissions made at the hearing by the Applicant.
- Verbal submissions made at the hearing by the private certifier.
- Verbal submissions made at the hearing by Council's representative detailing its concerns relating to the application and the reasons for refusal.
- Written comments by the Applicant sent via email on 13 June 2008 to the Building and Development Tribunals, in response to the written submission produced at the hearing by Council's representative.
- Relevant sections of the Maroochy Plan 2000 including amendments.
- The *Integrated Planning Act 1997*.
- The *Building Act 1975*.
- The *Building Regulation 2006*.
- Queensland Development Code MP1.2.

Findings of Fact

The subject site is basically rectangular and relatively large, being 7.59 Ha. To the north, the site is accessed via *withheld* and defined by the banks of the Maroochy River to the south. Historically, this site and the lands adjoining were considered ideal for cane farming, being predominately flat, low lying and adjacent to the river. There is no evidence of remnant vegetation on this site as a result of the previous cultivation. In very recent years, cane farming has been abandoned and the owners have cleared the remnant cane and planted over 5,000 trees, both rain forest and cabinet species.

The Applicant is currently seeking a building approval for both a Boat Shed and a Gazebo with the eventual desire to build a substantial home for his family.

The site offers a beautiful surrounding, however it is clearly identified in local mapping as being flood prone and drainage deficient. Council records indicate the site was almost completely flooded in 1992, with flood levels reaching 4.31AHD in this location. Contour and detail survey of the subject site indicates approximately 80% of the site is below 2.0 AHD. The Boat Shed and Gazebo are proposed to be sited within 8M of the river bank, where the site's natural ground lines are at their lowest level.

The Applicant has filled and prepared a large platform towards the rear of the site overlooking the river for his future home site. A survey plan provided to the Tribunal indicates that the depth of fill varies to achieve a suitable building platform, given the constraints inherent on this flood prone land.

The survey indicates that there is up to 2 m depth of fill through parts of the platform, however this didn't appear evident when on site.

Council has identified that the site is in an erosion prone area as defined by the SEQ Regional Coastal Management Plan 2006 (RCMP). Similarly this site abuts the Maroochy River which is designated as a State significant wetland in the same document. This land however has previously been cleared therefore no riparian vegetation is evident on the site.

Consequently, Council sought advice with regard to this application from the EPA and its response was primarily based on the content found in the SEQ RCMP. This document however, does not appear to have been adopted by Council in its Planning Scheme to date. The SEQ RCMP states that "degraded or modified coastal wetlands must be retained and values and ecological functioning enhanced and rehabilitated" The subject site is within a designated erosion prone area, and the SEQ RCMP does not support the location of permanent building works within 40 m of the mean high-water mark. Council's current requirement, as prescribed in the Maroochy Plan, is for a 25 m buffer to be provided between any development and the top of the bank.

The relevance and standing of the SEQ RCMP can be found in the IPA Chapter 2, Part 4:

2.5A.10 What is a regional plan

(1) A regional plan for a designated region is an instrument made under section 2.5A.14(2) by the regional planning Minister for the region.

(2) A regional plan is a statutory instrument under the *Statutory Instruments Act 1992* and has the force of law.

2.5A.21 (3) Effect of regional plan on other plans, policies or codes

For this Act, to the extent there is an inconsistency between a regional plan and any other plan, policy or code under an Act of a planning nature, including any other planning instrument, the regional plan prevails.

Therefore, in this instance, the 40 m stipulated in the SEQ Regional Coastal Management Plan 2006 overrides the 25 m setback requirement, as prescribed in the Maroochy Plan.

Further, under the Maroochy Plan the proposed structures are defined as "outbuildings as are incidental to and necessarily associated with a Detached House." As such, these structures are required to comply with Council's Code for the Development of Detached Houses and Display Homes. The purpose of this code is to facilitate and encourage the development of a range of Detached House and Display Home types and densities at suitable locations across the Shire, in ways that integrate new premises:

- with the natural landscape
- with the character and amenity of surrounding premises
- with movement networks
- with utility and community infrastructure and
- that ensures such development does not adversely impact on environmentally sensitive areas within the Shire.

The planning scheme codes are set out with a series of Performance Criteria (requirements), and acceptable solutions (how these requirements can be met). It allows an applicant who cannot comply with the acceptable solutions scope to provide an alternative that may comply with the performance criteria. Council's Decision Notice stated that the proposal did not comply with the Code for the Development of Detached Houses, and cited the following extracts from the Maroochy Plan as the basis for its refusal:

1. *Code 4.1, Element (6), Performance Criteria P1*

A buffer is maintained to protect and enhance the environmental values, ecosystem services and visual amenity of waterways, wetlands and fish habitat areas, having regard to:
Fauna habitats;
Adjacent land use impacts;
Stream integrity;
Sustainable aquatic and wetland ecosystems;
Recreational amenity; and
The amenity of adjoining residential land.

The acceptable solution given for this performance criteria is:

a) a vegetated buffer is provided of the following width, as measured from the top of the defining bank (refer Figure 4- 2.1.2(c) in the Code for Waterways and Wetlands):
(i) 25 m for a waterway shown as stream order 3 or above; or
(ii) 10 m for a waterway shown as stream order 1 or 2; as shown on Figure 4-2.1.2(a) in the Code for Waterways and Wetlands.

2. Code 4.1, Element (9), Performance Criteria P1 & A1.1

P1 Floor levels of Detached houses and Display homes are provided at a height above flood levels at which the safety of people on the site is maintained and potential damage to property on the site is minimised.

The acceptable solution given for this performance criteria is:
A1.1 In any Flood Prone or Drainage Constraint Area as shown on Regulatory Map No 1.5, the floor levels of all buildings are:
(a) the greater of:
(i) 2.5 m AHD (to provide protection from storm surge events);
or
(ii) 400 mm above the 100 year ARI flood level; or
(iii) 600 mm above the highest recorded flood level;
OR
(b) where an extension to an existing building, not less than the floor level of existing habitable rooms.

3. The proposed gazebo and boat shed location does not comply with the SEQ Regional Coastal Management Plan, August 2006, Policy 2.2.2 "Erosion Prone Area"

The SEQ RCMP, August 2006, Policy 2.2.2 "Erosion Prone Area" does not specifically prohibit building works within 40 m of the Mean high water mark. It states that "Development of land within an undeveloped erosion prone area is not supported unless it can be demonstrated that potential adverse impacts on coastal resources and values, in particular natural coastal processes, can be avoided. In particular, permanent building works are located outside the erosion prone area."

Reasons for the Decision

Increasing development within the Maroochy region is creating a desire to utilise land previously thought unsuitable for development. For development to proceed in these marginal areas, mechanisms to ensure adequate environmental and physical safeguards have been provided. Apart from being a beautiful area, Maroochy River and environs contains a wide range of biodiversity. It is this fact that assisted in its designation as a 'State significant wetland'.

The initial referral to the Maroochy Shire Plan was from a private certifier to a concurrence agency and there was no response given within the prescribed five days (Schedule 4 IPR). Council did have 10 days under IPA to request further information and although it wrote to the private certifier on the eighth day the Tribunal does not accept that this letter was an 'Information Request'.

Section 3.3.15 (1) of the IPA causes the concurrence agency to consider all laws, State policies and planning scheme matter and the Tribunal considers that this was the basis upon which Council would have written the letter dated 4 March 2008. However in accordance with 3.3.15 (2)(b), Council whilst acting as a concurrence agency on a siting matter, should have disregarded the planning scheme, other than as it may have prescribed alternative QDC setbacks.

In accordance with IPA 3.3.16 (4) the application was a deemed refusal. The private certifier could have proceeded at this time to determine his decision accordingly, but did not do so.

A preliminary building application was ultimately lodged by the Applicant and accepted by Council as being properly made. The preliminary application was for a boat shed and gazebo using the IDAS Form A, E and checklist. The uses proposed are called up and included under the Maroochy Plan (Council's planning scheme) as a 'Detached House' use. Within the Maroochy Plan, a Detached House is self assessable in both the Material Change of Use and Building Assessment tables. There appear to be no instances where a Detached House would become code assessable. In some instances however, an impact assessment is triggered. For example, a house removal, or a three storey application. Council has assessed the application being considered, against their Detached House Code 4.1 and refused it for noncompliance against Elements (6) and (9). Similarly Council stipulated it does not comply with the SEQ RCMP.

The Tribunal's jurisdiction does not extend to planning matters. Section 4.2.7 of the IPA states:

> (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* (other than a matter under that Act that may or must be decided by the Building Services Authority) or the *Plumbing and Drainage Act 2002*; or
> (b) a matter prescribed under a regulation.

Section 33 of the BA outlines that a planning instrument may provide alternative siting requirements from that which is prescribed under the QDC, for Class 1 and 10 structures. As the QDC is a building assessment provision under the BA, then it follows the alternative siting provisions within a planning scheme may be considered in the same way, with any appeals for siting decisions being within the jurisdiction of a tribunal. This is regardless of the assessment having been against the QDC or its alternative. This appears to be a unique situation in relation to planning scheme provisions.

In accordance with IPA 3.3.16 (1) Council, as the concurrence agency, could have responded to the private certifier and refused the siting request. In addition, Council's concurrence agency response could have stated the self assessable planning provisions that it was ultimately concerned with and reminded the Applicant of their responsibility for compliance. Had the response been addressed in this manner, the private certifier would then have had to refuse the original building application made to him by the Applicant. This would have given a right of appeal through the Building and Development Tribunals (subject to Section 83 of the BA).

Debbie Johnson
Building and Development Tribunal Chairperson
Date: 18 July 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:

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Department of Infrastructure and Planning
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