Defending costs applications at the Building Appeals Board
Borghesi v MBS for Shire of Mornington Peninsula – 455878 (Costs decision 6 March 2026)

In a very helpful decision for Councils and MBSs, the Building Appeals Board has refused an application for costs against an MBS in circumstances where the Board had found that the MBS's decision to issue building orders was invalid.

This proceeding involved an appeal from a decision of the municipal building surveyor (MBS) to issue Mr and Mrs Borghesi with an emergency order and building order following two landslides that occurred on their property in McCrae in 2022. After the landslides, orders were issued to adjoining owners prohibiting the occupation of several homes. The orders the subject of this appeal prohibited the Borghesis from accessing parts of their land and required them to undertake stabilisation works on their land.

The Board handed down its decision in the appeal in May 2025. Four months earlier, in January 2025, two further landslides occurred on a different part of the Borghesi's property. The January 2025 landslides resulted in the evacuation of several homes, destroyed one home and damaged another. Both the 2022 and the 2025 landslides were the subject of a Board of Inquiry.

The decision in this appeal was that the MBS was not 'jurisdictionally empowered' to make the emergency order and building order issued to Mr and Mrs Borghesi. The Board held that an emergency order and a building notice and order can only be issued in respect of buildings or 'land on which building work is being or is proposed to be carried out.' In this case, the emergency order and building notice and order was issued due to the condition of the land impacted by the landslide. That land was on a part of the property that was away from any buildings and there was no building work being carried out or proposed to be carried on the affected land. Following the determination, the Board proceeded to quash the emergency order and building order.

The Borghesis made an application for their costs. They argued that they were entirely successful on all grounds and that orders issued by the MBS suffered from material jurisdictional error and were effectively a nullity. The Applicants also said that they had attempted to avoid costs by writing to the Council before they lodged the appeal, pointing out that the orders were invalid for reasons they later argued in the appeal and which reasons were accepted by the Board. They said the Council's arguments on statutory interpretation had no reasonable basis and were untenable. The applicants claimed costs in the sum of $120,000.

Weir Legal was engaged by Council after the Board handed down its decision in May 2025. We assisted the MBS and Council to prepare their submissions defending the costs application. Our submissions noted that the BAB is a no costs jurisdiction, meaning that the mere fact of success in an appeal does not justify a costs order being made. We referred to the matter of Blythe v Stonington City Council (No 2) [2024] VBAB 2 in which the Board had not awarded costs against the Council even through the successful applicant had previous asserted the council's case was hopeless.

The Council's submissions highlighted the impact that the landslides had had on homes in the area and the need for the MBS to take immediate action to mitigate the significant risks to life and property. The MBS made his decision to issue the orders in good faith and having regard to these public safety concerns. Whilst the Board had found against the MBS and Council, the arguments raised had merit, and it was reasonable for the Council to have defend their interpretation of the Act in the way they did. Whilst the BAB proceeding had taken over 18 months to progress, it was also noted that the MBS had not caused any delays or acted unreasonably in any way.

The Board refused the application for costs in its entirety. Key passages from the decision follow:

> *29. We find that that the legally complex issues of statutory interpretation which, to a large extent, impacted on the validity of the Building Orders and Emergency Order, indicated that the position adopted by the MBS was far from tenuous, weak or hopeless. Moreover, the issues of statutory interpretation raised industry wide questions concerning the functions and powers of municipal building surveyors or private building surveyors. In our view, this is not a case where the position taken by the MBS was so far removed from the functions and powers under the Act that would justify an order for costs. Similarly, we appreciate that the circumstances which gave rise to the building notices and subsequent Building Orders and Emergency Order were serious and required an immediate response.*
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> *30. This case raised genuine questions of law, which, to a large extent arose because the relevant provisions of the Act were ambiguous or capable of being interpreted with more than one meaning. There was an ambiguity within the relevant provisions of the Act that required the application of principles of statutory interpretation, not unlike the task before the VCAT in Luxor Corporation Pty Ltd v Brimbank CC (Costs),24 where the VCAT refused to order costs, notwithstanding that the proceeding was legally complex.*

This is a very helpful decision for Councils and MBSs. It is important that MBSs not be deterred from acting in good faith to mitigate risks to life and property for fear of being ordered to pay costs by the BAB if it turns out their interpretation of the Act was not legally correct. Having said this, the Council and MBS must always be able to show they acted reasonably.

Please don't hesitate to reach out to Weir Legal if you require legal advice on whether to issue a building notice or order or if you require assistance to respond to an application made against Council for costs in a Building Appeals Board matter.

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