



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	32 -13
Applicant:	Sandsky Developments Pty Ltd
Assessment Manager:	Steve Morley (Assessment Manager)
Concurrence Agency: (if applicable)	Ipswich City Council (Council)
Site Address:	25 Halvard Crescent, Augustine Heights and described as Lot 150 on SP 251864 – the subject site

Appeal

The Appeal was lodged under section 527 of the *Sustainable Planning Act 2009* (SPA) in relation to conditions imposed in a development approval by Council acting as a Concurrence Agency. However, the Applicant stated the grounds for appeal related to whether Council should have been a Concurrence Agency for the Application.

Date of hearing:	10am on Friday 31 January 2014
Place of hearing:	Mineral House, Level 16 / 41 George Street, Brisbane
Committee:	Ain Kuru – Chair
Present:	Steve Morley – Respondent and on behalf of Applicant Jo Pocock, Planning and Development Manager, Ipswich City Council – Co-Respondent Martin Wallace, Team Co-ordinator, Ipswich City Council – Observer Katie Saddler, Technical Support Officer, Ipswich City Council - Observer Sean Dickson, Senior Town Planner, Ipswich City Council - Observer Stacey Kennedy, Australian Institute of Building Surveyors - Observer

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 508(b) of the *Sustainable Planning Act 2009* (SPA) finds it has no jurisdiction to make a decision in this matter.

Background

Sandsky Developments Pty Ltd lodged a building work application (Application) for a house with a Private Certifier (Licence Number A41498) as the Assessment Manager for the Application. The proposal involved a new single storey house. The subject site is located on a tight bend in the road, which effectively creates two road frontages. The proposed house is sited a minimum of 7.473 metres from the narrower primary street frontage, and 3.095 metres from the longer secondary street frontage. The front door and garage of the house face the longer secondary street frontage.

The approved building envelope plan for the site provides for a minimum road frontage setback of 4.5 metres and minimum secondary road frontage setback of 3.0 metres.

The Application was approved by the Assessment Manager in a Decision Notice dated 12 July 2013 believing it was in accordance with the approved building envelope plan. The Council subsequently advised the Assessment Manager that they had made an error as the proposed house was not sited in accordance with the approved plan as it was less than 4.5 metres from the road frontage.

The Council requested the Assessment Manager to lodge a Referral Agency application with them as Concurrence Agency for a siting variation pursuant to Schedule 7 of the Sustainable Planning Regulation 2009 (SPR) for the reduced setback of the house from the road frontage or the design amended to comply with the approved building envelope plan.

Specifically Council advised the setback from the front porch to the secondary road frontage on Hallvard Crescent must be 4.5 metres as this was now the primary road frontage. Council also advised that if the siting variation was not submitted by a particular date, it would lodge a complaint about the professional conduct of the Assessment Manager to the Building Services Authority (now the Queensland Building and Construction Committee (QBCC)) on the grounds that all necessary approvals had not been obtained before the Application was approved. Section 84 of the *Building Act 1975* (BA) requires that an approval issued by a private certifier must not be inconsistent with particular earlier approvals.

The Assessment Manager subsequently lodged an Application to the Council as referral agency for the design and siting of the house under Schedule 7 of the SPR. The Council then issued a referral agency response dated 12 September 2013 approving the siting variation subject to conditions. Pursuant to s251 of SPA and Schedule 7 of SPR, the Council had Concurrence Agency jurisdiction. The Assessment Manager then issued an amended Decision Notice dated 22 October 2013 which reflected the Council's advice response as Concurrence Agency.

The Assessment Manager acting on behalf of the Applicant lodged an appeal with the Committee Registrar on 24 October 2013. The appeal was lodged on the following grounds:

- that the Concurrence Agency Application was made under duress of a complaint being made to the QBCC;
- that the approved building envelope plan shows an envelope for the site with a 3 metre setback to the secondary frontage;
- that the handling of the Application through the referral process was incorrect as the building envelope plan and associated approval documents would need to be amended; and
- that the Concurrence Agency response issued by Council did not provide for appeal rights as required under s336 of SPA.

On reviewing the appeal documents, the Committee sought written clarification from the Applicant as the above grounds for Appeal were diverse. The Applicant responded advising that the appeal was lodged under s527 of SPA which allows an appeal to be lodged to the Committees in respect of any condition stated in a development approval.

The Council wrote to the Committee advising they did not believe the Committee had jurisdiction to hear the appeal as the Applicant did not identify which condition was being appealed.

Given the lack of clarity about the grounds for appeal, the Committee wrote to all parties seeking agreement to decide the appeal by written submissions instead of proceeding to a hearing.

The Council subsequently wrote to the Committee questioning whether the Private Certifier had standing in the appeal to make submissions in respect of preliminary jurisdictional matters as he was not the Applicant stated on the Development Application.

In response to Council's submission, the Private Certifier provided a letter authorising him to act on behalf of the Applicant, and reiterated the grounds of appeal under s 527(b) of SPA. He also requested that the appeal look at the broader processes of Council and how disputes about interpretation are handled. The Private Certifier requested that the matter proceed to a hearing instead of the appeal being decided on the basis of written submissions.

The hearing was held on 31 January 2013 at 10am in the Department of Housing and Public Works office in Brisbane City. At the hearing the Committee advised jurisdictional matters would be considered prior to issues related to the siting of the proposed house.

At the hearing, the Applicant stated that the grounds for appeal related to the Council condition included in the Assessment Manager's Decision Notice. That condition makes reference to the siting relaxation issued by the Council. However, the Applicant also stated that the grounds for appeal included what had been written in the Form 10 Application for Appeal and attached correspondence- notably, that the handing of the Application through the referral process was incorrect.

Council requested to know which condition was being appealed, stating that the appeal does not relate to any condition and that the Council, in giving its concurrence to the application only endorsed the application. Council also stated that an Applicant can only appeal conditions imposed by a referral agency, noting that the Assessment Manager's conditions only make reference to Council concurrence and conditions.

There was also some discussion about the status of the approved building envelope plan, and how the Council deals with proposals to build outside the envelope. This discussion resulted in the following statements by the various appeal parties:

- Council advised that the envelope plan and the associated approval documents predated the *Integrated Planning Act 1997* and were subject to transitional provisions under that Act.
- The Applicant argued that the building envelope plan prescribes a setback of 4.5 metres to the primary frontage and 3.0 metres to the secondary frontage. Therefore the proposal complies with the approved building envelope plan.
- Council responded by advising that the meaning of "Front Setback" described in the building envelope plan includes the entrance of a house. To support the argument, Council referred to the Ipswich Planning Scheme, Part 12, Division 6 – Residential Code, sub section (8) Building Entrances – Specific Outcomes which states:
... entries to buildings are exposed to the main street frontage and are clearly delineated and legible.
- The Applicant responded that there are separate provisions for corner sites under sub section (7) which provides for buildings to address both street frontages.

The hearing concluded with Council questioning the need for the appeal given the reduced frontage setback of the proposed house had been approved.

Material Considered

The material considered in arriving at this decision comprises:

1. Development application (undated) for building work lodged with the Private Certifier (Licence Number A41498) by Sandsky Developments Pty Ltd.
2. Decision Notice dated 12 July 2013 including approved plans issued by the Private Certifier.

3. Referral Agency Response dated 12 September 2013 issued by Ipswich City Council.
4. Amended Decision Notice dated 22 October 2013 including approved plans issued by the Private Certifier.
5. 'Form 10 – Application for Appeal/Declaration' dated 16 September 2013 providing grounds for appeal and accompanying correspondence lodged with the Committees Registrar on 9 October 2013.
6. Second Form 10 – Application for Appeal/Declaration' dated 23 October 2013 providing grounds for appeal and accompanying correspondence lodged with the Committees Registrar on 24 October 2013,
7. Several emails dated from 22 July 2013 to 9 August 2013 between the Private Certifier and Council regarding compliance with the building envelope plan, where eventually Council threatened that if a siting variation was not lodged, it would make a complaint to the QBCC pursuant to s84 of the Building Act 1975.
8. Correspondence from Applicant dated 27 November 2013 regarding jurisdiction.
9. Correspondence from Ipswich City Council dated 27 November 2013 regarding jurisdiction.
10. Correspondence from Ipswich City Council dated 12 December 2013 regarding the Private Certifier's standing.
11. Correspondence from Sandsky Developments dated 21 November 2013 authorising the Private Certifier to represent their company in the appeal.
12. Email from the Applicant dated 6 January 2014 responding to concerns raised by Council.
13. Email from Ipswich City Council dated 21 February 2014 responding to request by Committee for clarification about relevant town planning provisions in the Ipswich Planning Scheme.
14. Email from the Applicant dated 21 February 2014 providing extract from Decision Notice 6171/10 Building Envelope Plan.
15. Email from Council dated 24 February 2014 advising that extract provided by the Applicant on 21 February 2014 was incorrect.
16. Development Application Decision Notice 6171/10 including Building Envelope Plan issued by Ipswich City Council on 15 November 2010.
17. Ipswich Planning Scheme, including the Residential Code and Springfield Structure Plan.
18. *Sustainable Planning Act 2009* (SPA)
19. Sustainable Planning Regulation 2009 (SPR)
20. Building Regulation 2006 (BR).
21. *Integrated Planning Act 1997* (IPA)
22. Queensland Development Code 2006 (QDC).

Findings of Fact

The Committee makes the following findings of fact:

- A development application for building work was lodged with the Private Certifier by Sandsky Developments Pty Ltd;
- The Council requested the Private Certifier to lodge a siting variation application, and advised in writing that they would make a complaint to the QBCC pursuant to s84 of the BA if this was not done;
- The Private Certifier subsequently referred the application to the Council on behalf of the Applicant,
- The Private Certifier then issued a Decision Notice approving the proposed house including the Referral Agency response issued by Council.

Reasons for the Decision

Jurisdiction of the Committee

Section 508 of SPA provides the jurisdiction of Committees, and this includes appeals about building applications under Divisions 4 to 7 of Chapter 7. Under Division 6 of this Chapter, s527 states that appeals about development applications can be heard about:

... any condition of a development approval and another matter ... stated in a development approval (SPA; s527(1)(b)).

This section is intended to provide appeal rights in respect of conditions included in a Decision Notice by an Assessment Manager or Referral Agency.

The Applicant's grounds for appeal were two fold:

- About a condition on the Decision Notice which makes reference to attached Concurrence Agency conditions; and
- Whether or not the Council should be a referral agency for the application and the manner in which the Application was handled by Council.

Under s325 of SPA, if a Concurrence Agency requires conditions to be attached to a development approval, the Assessment Manager must attach them in the exact form given by the Concurrence Agency. An appeal can only be made against a condition stated in the Decision Notice. The Assessment Manager's condition is only a reference to Council concurrence, and not a condition in itself.

Chapter 6, Part 3 of SPA governs the process for Referral Agency assessment of development applications, with the referral triggers and jurisdiction prescribed under Schedule 7 of SPR.

Under s272 of SPA, an Applicant is responsible for giving material, including a development application, to a Referral Agency including referring the Application to any prescribed agencies under the SPR. Therefore the responsibility for referring an Application to a referral agency lies with the Applicant and in this matter, the Applicant engaged the Private Certifier to undertake this role as Assessment Manager.

The jurisdiction of the Committee under Chapter 7, Part 2 only extends to Divisions 4 to 7. Division 3 of SPA (Committee Declarations) does not extend to declarations about the jurisdiction of Referral Agencies. In this regard, the Applicant may consider seeking legal advice about the jurisdiction of the Planning and Environment Court to hear this appeal under s456 of SPA.

Other Matters

Whilst the Committee finds it does not have jurisdiction to hear this appeal, it makes the following observations about the dispute which led to the lodgement of this appeal.

Siting of the proposed house

The land is subject to a Development Application Decision Notice by the Council including an approved building envelope (Council reference 6171/10). The Council advises these approval documents form part of the Springfield Structure Plan approved under the repealed *Planning and Environment Act* pursuant to s857 of SPA.

In short, Part 4 of that Decision Notice identifies the Ipswich Planning Scheme Residential Code (Part 12, Division 6) as the relevant code for self-assessable development. Conditions 29 and 30 required the developer to prepare a plan of proposed building setbacks for lots where building setbacks were to differ from those contained in the SBR.

It should be noted that the SBR was repealed in 2006 and replaced by the Building Regulation 2006. Apart from this, building setbacks are contained in the Queensland Development Code (QDC) MP 1.1 and MP 1.2, which is referenced by both the repealed and current regulations.

The dispute is over the meaning of “Front Setbacks” referred to in the approved building envelope plan, which is shown at 4.5 metres. The Council believes that as the front of the house faces the secondary frontage, this setback must be 4.5, even though the secondary frontage is shown as 3 metres in the plan.

To support its argument, Council refers to sub section (8) of its Residential Code - Building Entrances which states:

... that entries to buildings are exposed to the main street frontage and are clearly delineated and legible.

However this provision is not relevant to self-assessable development, as it is not included in the Specific Outcomes listed in Table 12.6.1 of the Residential Code.

There are no specific provisions in the building envelope plan which require front entrances of dwellings on corner lots to face or be exposed to the front setback. Similarly, there are no similar provisions applicable to non-corner lots, therefore one would expect that a house with a concealed entry could be approved pursuant to the self assessable provisions of the Planning Scheme.

“Front Setback” is not specifically defined in the Development Application Decision Notice issued by Council and building envelope plan. Therefore, given Conditions 29 and 30 required alternative setbacks to the QDC to be nominated in the plan, the meaning under the QDC should be considered.

“Front Setback” is not defined in the QDC, however the following definition is given to “Frontage”:

Frontage means the road alignment of a lot.

The planning intent of the provision is to ensure building forms create a uniform street setback and create a particular streetscape. No provisions in the QDC require entries to buildings to be visible from the road.

The QDC does not define secondary frontages, but does include a formula used to provide concessions where the lot is less than 24 metres wide. The building envelope plan simplifies this by allowing a 3 metre setback for the secondary frontage on each corner lot.

The Ipswich Planning Scheme contains a similar definition, and there is an additional definition for Secondary Frontage:

“Frontage” means a boundary of a lot which abuts a road.

“Secondary frontage” means the road frontage of a lot as determined by the Local Government.

Apart from the provisions contained in sub section (8) of the Residential Code - Building Entrances, which apply only to assessable development, no other references could be found in the Ipswich Planning Scheme or Springfield Structure Plan.

Therefore there are no specific provisions or intent for building entrances to face the front setback in either the building envelope plan, the QDC or the Planning Scheme where development is self-assessable.

Threat of Complaint to the QBCC

As previously addressed, the Applicant is responsible under SPA for lodging applications with referral agencies. It is not appropriate for the Committee to comment on the written threat by Council to lodge a complaint with the QBCC about the professional conduct of the Private Certifier if he did not make a referral application.

Handling of the application through the referral process

While this is no longer relevant, handling of variations to the siting of a house through the referral process under SPA and SPR is the correct mechanism intended by SPA for dealing with siting variations for houses. While some Councils require an application to depart from a building envelope plan under s369 of SPA, this is an unwieldy and unnecessary process often involving referral agencies. In addition, the principles of statutory interpretation would require that specific legislation under SPA outlining how a variation to the siting of a house should be managed should override a Decision Notice issued by a Council under that Act.

Referral agency response did not provide for appeal rights as required under s 336 of SPA

As previously addressed, Council's responsibility as referral agency is to provide advice to the Assessment Manager, in this case a private certifier. The Assessment Manager's responsibility under s 325 of SPA is to include concurrence agency conditions in the Decision Notice. It is the responsibility of the Assessment Manager under s335 of SPA to include appeal rights in the Decision Notice.

Ain Kuru
Building and Development Committee Chair
Date: 3 March 2014

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee 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 Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees
Building Codes Queensland
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 3237 0403 Facsimile (07) 3237 1248