



## Building and Development Dispute Resolution Committees—Decision

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### ***Sustainable Planning Act 2009***

<b>Appeal Number:</b>	36- 12
<b>Applicant:</b>	Rockhampton Building Approvals
<b>Assessment Manager:</b>	Rockhampton Building Approvals
<b>Concurrence Agency: (if applicable)</b>	Mackay Regional Council (Council)
<b>Site Address:</b>	7 Maryvale Circuit, Beaconsfield and described as Lot 67 on SP237257 - the subject site

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### **Appeal**

Appeal under Section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of Rockhampton Building Approvals as the Assessment Manager and Mackay Regional Council as the Concurrence Agency, to approve with conditions, a Development Application for Building Works, for the existing shed to be dismantled and relocated (within 3 months of the approval) to a minimum setback of 4.7m from the road boundary.

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<b>Date of hearing:</b>	Wednesday 26th September 2012 at 9.30am.
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Gordon Heelan - Chairperson
<b>Present:</b>	Bruce Krenske - Applicant/Assessment Manager John Caldwell - Council representative Bob Rowley - Sunstate Garages

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### **Decision:**

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(1) of the SPA dismisses the appeal on the grounds that the statutorily approved Application for Appeal Form 10 was invalid.

The original Application for Appeal (Form 10) lodged with the Committee Registrar on 9 August 2012 was signed by the Building Certifier (Rockhampton Building Approvals) and not the property owners despite the form clearly stating that a Building Certifier cannot sign the form. In addition, the accompanying Decision Notice was dated 6 July 2011 and therefore, the Application for Appeal received by the Committee Registrar on 9 August 2012 exceeded the 20 business days of the Decision Notice being given to the Applicant as required by section 461(2)(a) of the SPA. Given the invalidity of the Application for Appeal, the Committee does not have jurisdiction to make a decision.

## Background

The Assessment Manager's (Building Certifier's) letter dated 6 August 2012 to the Committee Registrar with the first Application for Appeal stated the Development Application (DA) to build a shed was assessed by him on 1 June 2011 and he did not consider a Concurrence Agency application was required. The Certifier subsequently approved the DA and the owners proceeded to build the shed in line with that approval.

Sometime in June 2012 the shed came to the attention of the Council planning officers whilst they were conducting a routine inspection of the subdivision. Council notified the Certifier that the development required Council approval as the Concurrence Agency.

The Certifier submitted an application to Council which according to the Concurrence Agency response dated 18 July 2012, was received by Council on 4 July 2012.

The Certifier then re-issued the same Decision Notice to the property owner that was originally sent to them dated 6 July 2011; however the Certifier changed the content to read "*with reference to your application for development approval, I wish to advise that your application has been assessed and was refused on the 6 August 2012 subject to conditions.*" As this Decision Notice was not issued as an 'Amended Decision Notice', the Decision Notice was invalid.

After contact from the Committee Registrar regarding the conflicting dates in the Application for Appeal, Decision Notice and accompanying letter from the Certifier, the Certifier then issued a second Decision Notice, dated 5 Sept 2012 to match a second Application for Appeal which was signed by the property owners this time and received by the Registrar on 6 September 2012. However, the body of the second Decision Notice now states the refusal date as 5 September 2012. This Decision Notice was also invalid as it was not issued as an 'Amended Decision Notice'.

The Certifier as the Assessment Manager did not comply with section 83 (1) (b) and (d) (i) of the *Building Act 1975* (BA) which states;

- The private certifier must not grant the building development approval applied for –
    - (b) until all necessary preliminary approvals under the Planning Act are effective for other assessable parts of the development
- Example-*
- The application must not be decided until all necessary preliminary approvals are effective for the assessment of the building work against the planning scheme*
- (d) if, under the Planning Act, a concurrence agency has jurisdiction for a part of building assessment work—
    - (i) that part has been assessed by the concurrence agency, under the building assessment provisions;

## Appeal Documentation – Application for Appeal/Declaration- Form10

The first Application for Appeal was signed and dated by the Certifier on 6 August 2012 and stamped as received by the Committee Registrar on 9 August 2012. This Application stated that the date the Decision Notice was given as 19 July 2012 however the Decision Notice attached to the Application was dated 6 July 2011. The accompanying letter from the Certifier with the Application stated that he assessed the BA on 1 June 2011 and approved the building of the shed and the client proceeded to have the shed built based on this approval. The contents of this letter confirm the date on the 6 July 2011 Decision Notice as accurate.

Following contact from the Committee Registrar about the conflicting dates in the Application for Appeal, a second Application for Appeal was received by the Registrar but this was now signed by the property owner, dated 4 September 2012, and stamped as received by the Registrar on 6

September 2012. This Application stated that the date the Decision Notice was given as 8 August 2012 however the Decision Notice attached was dated 5 September 2012 and states in the body of the Notice that "I wish to advise that your application has been assessed and was refused on the 5/09/2012 subject to refusal by Mackay Regional Council".

Both the above Applications for Appeal and attached Decision Notices were invalid for several reasons:

- The Decision Notices attached to both Applications for Appeal conflict and none of the accompanying Decision Notices were issued as an 'Amended Decision Notice'.
- The accompanying letter from the Certifier with the first Application for Appeal states that he assessed the application on 1 June 2011 and approved the building of the shed and the client proceeded to have the shed built based on this approval. This letter confirms the date on the first Decision Notice dated 6 July 2011. Section 461(2)(a) of the SPA states that the appeal must be started within 20 business days if a Decision Notice is given – the day the Decision Notice or negotiated Decision Notice is given to the Applicant. The Application for Appeal is clearly outside the required 20 business days for lodgement.
- The first Application for Appeal was signed by the Certifier. The Form clearly states immediately above the signature block "Applicant's signature: **NOTE: This section MUST be signed by the appeal applicant(s) and not the representative of the applicant (e.g. building certifier).**
- The second Application for Appeal was signed by the property owner but the dates on this Application contradict those on the attached Decision Notice.

Therefore, both Applications for Appeal received by the Committee Registrar were invalid as were the accompanying Decision Notices..

## Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for Appeal/Declaration', and correspondence accompanying the appeal lodged with the Registrar on 9 August 2012.
2. The *Sustainable Planning Act 2009* (SPA).
3. The *Building Act 1975*.(BA)
4. Discussions and verbal submissions from attendees at the appeal hearing.

## Findings of Fact

The Committee makes the following findings of fact:

- The Assessment Manager had assessed the Application for the shed on 1 June 2011 and the shed was constructed.
- The two Applications for Appeal received by the Committee Registrar were invalid as they were lodged outside the Applicant's appeal period and the first Application was signed by the Building Certifier and not the property owner.

## Reasons for the Dismissal

The Committee is required to comply with the Legislative requirements of the SPA. The appeal was not validly lodged and as such the Committee has no alternative other than to dismiss the appeal.

The Committee in accordance with section 564(1) of the SPA dismisses the appeal on the grounds that the two statutory Form 10's - Application for Appeal/ Declaration were invalid and a

valid Application for Appeal is required under section 527(2) of the SPA.

The appeal should not have progressed to a hearing however the Applicant may take benefit from the meaningful discussion at the hearing during which Council confirmed they would consider a 4.0 metre setback in-lieu of a 6m setback provided dense leafy landscaping, to be approved by Council, was provided.

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Gordon Heelan  
Building and Development Committee Chairperson  
Date: 20 November 2012

## **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  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**