



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	23-10
Applicant:	Kang Hui Lin
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	1 Bennett Street, Toowong and described as Lot 1 on SP18636 – the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Council to refuse a development application for a single unit dwelling as the proposal does not comply with the performance criteria or purpose of the Residential Design – Single Unit Dwelling Code.

Date of hearing:	9.00am Tuesday 20 July.
Place of hearing:	Meeting Room C, Level 5, 63 George Street, Brisbane
Committee:	Ain Kuru – Chair Kari Stephens – General referee Peter Folker – General referee
Present:	Kang Lin – Applicant Steve Adams – Brisbane City Council Dennis Verner – Brisbane City Council Milena Mog – Brisbane City Council

Decision:

The Committee, in accordance with section 564 of the *Sustainable Planning Act 2009* (SPA), finds that it does not have jurisdiction under sections 802 and 519(1) to hear the appeal.

Background

The application was received by Council on 23 March 2009. The application was for a material change of use (MCU), building work and reconfiguration of a lot (ROL), though an IDAS 'Form 7 - Reconfiguring a lot' does not appear to have been lodged. The development is described by the applicant as involving the renovation and construction of two town houses, defined on the application form as two multi-unit dwellings.

Council subsequently issued an acknowledgement notice dated 6 April 2009 stating the development was

for a MCU and ROL, and described under its planning scheme as single unit dwelling (3 units) and ROL (1 into 3 lots). The notice also stated that the application was subject to impact assessment.

Council extended the information period and issued an information request dated 7 May 2009. A response to the information request was received by Council on 27 November 2009.

The application was subsequently advertised for public comment, and while the Committee was not provided with full details, it accepts Council's advice that no properly made submissions were received.

The application was subsequently refused by the Council on 19 March 2010.

An appeal was made to the Building and Development Committees on 14 April 2010. The grounds were listed as a refusal or refusal in part of a development application under section 4.2.9 of the IPA.

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 14 April 2010.
2. Development application and submission received by Council on 23 March 2009.
3. Acknowledgement notice dated 6 April 2009.
4. Information request dated 7 May 2009.
5. Applicant's response to information request received by Council on 27 November 2009.
6. Council delegate report dated 22 February 2010.
7. Council decision notice dated 19 March 2010.
8. Written submission by Council dated 22 June 2010.
9. Written submission by appellant dated 2 July 2010.
10. Legal advice by J.G. Lyons submitted at the hearing.
11. Further information provided by the appellant on 29 July to support claims that the Council had advised him the Building and Development Committees were the appropriate avenue for appeal.

Findings of Fact

The Committee makes the following findings of fact:

1. That under section 802f the SPA, development applications made under repealed IPA, but not decided, before the commencement of that Act, must continue to be dealt with under that Act as if the SPA had not commenced. Under section 4.2.7 of IPA, a Tribunal established under that Act does not have jurisdiction to hear an appeal about a decision relating to a material change of use; and
2. That notwithstanding the above, the Committee does not have jurisdiction under section 519(1) to hear the appeal. This is because the development application is for a MCU, building work and ROL. The jurisdiction under section 519(1) only extends to applications only for a MCU.

Reasons for the Decision

At the preliminary hearing, the Council representative was asked to outline why they believed the Committee did not have jurisdiction to hear the appeal. In summary, Council advised that the Committee did not have jurisdiction to hear the appeal for the following reasons:

- It did not have jurisdiction to do so under the transitional provisions of SPA; and
- Notwithstanding the above, did not have scope under SPA to hear an appeal unless it was only for a MCU of premises.

Transitional Provisions of the SPA

The Committee accepts the argument put forward in a detailed submission submitted at the preliminary hearing by Council. In summary, that submission argued that the development application was made under IPA. While IPA was repealed in December 2009, section 802 of SPA provides that IPA should continue to apply to the application as it had been made under that Act. As a result, the appeal provisions of IPA apply. Section 4.2.7 of IPA details the scope of appeals to the Tribunal (now Committee) under IPA, and this does not include dealing with an application made for a material change of use. The Council's argument is fully detailed in its written submission which was submitted at the preliminary hearing.

The Committee provided the appellant an opportunity to respond in writing to the Council's submission by the agreed date of Monday 26 July. On Tuesday 27 July the appellant advised that they had been misled into lodging an appeal with the Committee instead of the Planning and Environment Court. As a result, the appellant was asked by Committee staff to provide further information supporting this view. A further submission was received on 29 July, however none of this information was able to demonstrate that the appellant had been misled by Council into lodging an appeal with the Committee instead of the Court.

Scope of Appeal Provisions under SPA

Section 519 of SPA provides a general right of appeal to the Committees in relation to a development application only for MCU of premises that involves the use of a prescribed building. A prescribed building is defined in schedule 3 of the SPA and includes Class 1 and 10 buildings as defined under the Building Code of Australia. Again the Committee accepts the argument put forward in writing by Brisbane City Council that it cannot consider the appeal because it does not comply with the restriction specified in section 519(1) which limits the Committee to considering development applications only relating to MCU. The Council's argument is fully detailed in its written submission circulated prior to the hearing.

A copy of the Council's written submission was provided to the appellant on 24 June prior to the hearing.

Other Matters

While the purpose of the hearing was to determine whether the Committee had jurisdiction to hear the appeal, there were a number of other matters raised.

Firstly the appellant sought to discuss the planning merits of the proposal. The Committee decided that it could not address the planning merits of the case until it believed it had jurisdiction to hear the appeal.

Secondly, it was evident at the hearing that Council supports a higher density outcome for the site provided it is defined as a multi unit development, but that a new application would be required. The Council advised that it would assist the appellant by organising a free pre-lodgement meeting to advise on its preferred options, and that to demonstrate its goodwill it would waive the pre-lodgement fee.

Ain Kuru
Building and Development Committee Chair
Date: 26 August 2010

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 Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248