



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	64 - 10
Applicant:	Path Developments Pty Ltd
Assessment Manager:	Caboolture Building Approvals
Concurrence Agency: (if applicable)	N/A
Site Address:	1 Adam Court, Kallangur and described as Lot 24 on SP211090 — the subject site

Appeal

Appeal under section 532(1)(b)(ii) of the Sustainable Planning Act 2009 (SPA) against the decision by Chris Diggles for and on behalf of Caboolture Building Approvals as the assessment manager to issue a non-compliance notice requesting a form 16 from a fire engineer.

Date of hearing:	9:00am on Thursday 9 September 2010
Place of hearing:	The subject site
Committee:	Richard Prout – Chair David Mansell – General Referee
Present:	Peter Luckmann – Applicant Joanne Gough – Applicant Ngon Vo – Des Newport Consulting Engineers Aaron Ruhle – Preferred Plaster Michael Leonardi – MAW Electrical Pty Ltd Michael Duck – Fyreguard Pty Ltd Chris Diggles – Assessment Manager Trevor McLean – Caboolture Building Approvals Lachlan McLean – Manager, Caboolture Building Approvals

Decision:

The Committee, in accordance with section 564 of the SPA instructs the following;

1. The assessment manager shall within 20 business days of the date of this decision lodge a development application with Moreton Bay Regional Council (Council) for a material change of use (MCU) for a Class 1 dwelling and Class 1 associated unit not in accordance with the requirements of the specific plan of development for the allotment. The applicant must provide the owner's consent to the

assessment manager shall fully cooperate with Council in obtaining the required MCU development approval and if requested to provide additional information shall provide such information within 20 business days from the date of any such request; and

2. The assessment manager shall within 30 business days from the date of a development approval having been issued by Council for the MCU, and in consultation with the property owner, shall ensure that any conditions of the development approval have been satisfied or take reasonable measures to enable the finalised development to comply with the approval to ensure a compliant certificate of classification can be issued;
3. The applicant shall within 20 business days from the date of this decision carry out any required alterations to the separating fire wall between the dwellings to ensure compliance with the requirements of the Building Act 1975 (BA). The assessment manager shall on request of the applicant inspect the separating fire wall to ensure compliance with the requirements of the BA and ensure the safety of the building's occupants;
4. The assessment manager shall on completion of the building work onsite carry out a final inspection of the dwellings and fire wall and shall work with the applicant to ensure a certificate of classification is issued within 30 business days from the date of a development approval having been issued by Council for the MCU.

Background

1. On 16 February 2010 the assessment manager issued a development approval for building work for a Class 1a dwelling (Reference No. 20100139).
2. On 22 July 2010 the assessment manager issued a Form 61 – Non-compliance notice following an inspection of the site. The issues identified in the form were:
 - Certificate required Form 16 - Timber Frame;
 - Certificate required Form 16 from a Fire Engineer for the separation between units for both the vertical and horizontal separation fire walls and floors;
 - Occupants to vacate the building until form 21 issued (Council has been advised);
 - Unable to gain access for inspection;
 - Reinspection will be required;
 - A fee of \$165.00 will be payable.
3. On 17 August 2010 Path Developments appealed the requirements of the Form 61 under section 532(1)(b)(ii) the SPA with the following grounds:
 - Form 16 from Fire Engineer not required for Class 1a dwelling;
 - Certifier took 3 weeks from request to complete inspection, property was then under agents management with contact details provided for access.

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 17 August 2010;
2. Form 61 – Non-compliance notice issued by the assessment manager on 22 July 2010;
3. Caboolture Building Approvals engagement & fee agreement reference No 20100139 dated 2 February 2010;

4. Decision notice (Reference No. 20100139) dated 16 February 2010 from the assessment manager;
5. The approved drawings issued by the assessment manager dated 16 February 2010;
6. Form 15 – Compliance certificate for building design or specification from for the footings and slab design signed by Ngon Vo of Des Newport Consulting Engineers, dated 19 January 2009;
7. Form 15 – Compliance certificate for building design or specification from for the structural timber framing and tie down design signed by Ngon Vo of Des Newport Consulting Engineers, dated 19 January 2009;
8. Photographs taken of the separating fire wall prior to the completion of the roof sheeting photos provided by the applicant;
9. At the hearing a minor section of the separating wall between the dwellings was inspected and found to be non complying;
10. Verbal presentation at the hearing from Mr Trevor McLean who advised the following;
 - That Trevor McLean would act as spokesperson for Chris Diggles (Chris Diggles was at the hearing and did not object);
 - That the building approval issued by the assessment manager was for a single Class 1a dwelling and not for two Class 1a dwellings;
 - That the assessment manager had received the required Form 16 inspection reports for the mandatory inspections including the frame inspection;
 - That the assessment manager requested sufficient information from Mike Duck of Fyreguard as a competent person to be included in the assessment manager's competent person register;
 - That the assessment manager requested a form 16 from Mike Duck of Fyreguard as a competent person for the fire wall including any penetrations;
 - That if the non-conforming items related to the separating wall were rectified that the assessment manager believed a compliant certificate of classification could be issued;
 - That the assessment manager would review their files and provide further written advice to the Committee;
11. Verbal presentation from Mr Peter Luckmann who advised the following;
 - That the design was for a Class 1a dwelling with a separate associated unit as allowed under the Pine Rivers Plan;
 - That he was prepared to rectify any non-compliant issues related to the building in order obtain a compliant certificate of classification for his client.
12. Email dated 9 September 2010 from Lachlan Mclean to the applicant and a letter dated 9 September from the assessment manager to the applicant;
 - That a Form 16 from Fyreguard was not required;
 - That the assessment manager would be issuing a revised development application decision notice for a Class 1a dwelling, Class 1a associated unit and two Class 10a private garages;
 - That in order to finalise the project the following was required;
 - The rectification of the non-conforming elements of the separating wall between the dwellings noted at the hearing;
 - The submission of the Form 16 for the frame inspection from the applicant's engineer.
13. Email from Richard Konarski of Council dated 20 September 2010 advising the following;
 - That the associated dwelling does comply with the Pine Rivers Plan code for associated units; and
 - That the building does not comply with the plan of development for small lot setback for the estate

for the following reasons;

- Maximum building location envelope is encroached; and
 - The private open space does not comply with the 5.0m diameter circle requirement (for the larger of the two buildings).
14. Letter to the Committee dated 22 September 2010 from the assessment manager providing a summary of the inspection of the fire wall carried out at the hearing and a number of emails between themselves and the applicant since the onsite hearing;
 15. An amended development application decision notice (Reference No. 20100139) dated 16 February 2010 from the assessment manager for a Class 1a dwelling, Class 1a associated unit and two Class 10a garages;
 16. A Form 22 – Notice of discontinuance of engagement issued by the assessment manager on 21 September 2010 with the following reasons for the discontinuance;
 - Applicant/builder has refused to comment/confirm on the status of rectification work of non compliant issues relating to firewalls at this property.
 17. Email dated the 27 September from Lachlan McLean, Manager, Caboolture Building Approvals in response to the email from Richard Konarski of Council dated the 20 September 2010.
 18. The BA
 19. The Building Code of Australia 2009 (BCA)
 20. The SPA

Findings of Fact

The Committee makes the following findings of fact;

1. The Development Approval issued by the assessment manager on 16 February 2010 did not comply with the requirements of the specific plan of development for the allotment which formed part of the Council development approval conditions for the reconfiguration of the allotment.. As such the development approval for building work should not have been issued until an MCU application had been approved by Council; and
2. The design of the subject building certified under the development approval issued by Private Certifier Chris Diggles on 16 February 2010 did constitute two Class 1a dwellings as per Volume Two of the BCA for the following reasons;
 - The drawing showed the building separated by a wall described on the drawings as a Intertenance Fire & Acoustic Rated Wall (inter-tenancy fire & acoustic rated wall) which was intended to comply with section 3.7.1.8(a) (separating walls) of Volume Two of the BCA which states the following;
3.7.1.8 Separating walls
 - (a) A separating wall between Class 1 buildings, or a wall that separates a Class 1 building from a Class 10a building which is not appurtenant to the Class 1 building must have an FRL of not less than 60/60/60 and –
 - (i) Commence at the footings or ground slab; and
 - (ii) Extend –
 - (a) if the building has a non combustible roof covering, to the underside of the roof covering; or
 - (b) if the building has a combustible roof covering, to not less than 450mm above the roof covering.
 - There was no internal connection between the two dwellings; and

- Each building contained the facilities required for a Class 1 building as per section 3.8.3.2(a) (Required Facilities) of Volume Two of the BCA which states the following;
 - 3.8.3.2 Required facilities
 - (a) A Class 1 building must be provided with-
 - (i) a kitchen sink and facilities for the preparation and cooking of food; and
 - (ii) a bath or shower; and
 - (iii) clothes washing facilities, comprising at least one washtub and space in the same room for a washing machine; and
 - (iv) a closet pan and washbasin.
- The design of the separating wall between the Class1 dwellings was intended to comply with Section 3.8.6.2 Sound insulation requirements and Table 3.8.6.2 Acceptable Forms of Construction of Volume Two of the BCA.
- The decision notice issued by the assessment manager made no statements in the conditions of the approval preventing the use of the building as two separate Class 1 dwellings.

The Committee is of the opinion that the amended development application decision notice (Reference No. 20100139) dated 16 February 2010, issued on or about the 22 September 2010 for a Class 1a dwelling, Class 1a associated unit and two Class 10a garages is generally in accordance with the intended use of the building.

Reasons for the Decision

It is clear from the design of the building that the intended use was for two self contained dwellings. As per Section 1.3.1 (Principles of classification) of Volume Two of the BCA, the assessment manager had a responsibility to ensure building approval reflected this use.

Section 1.3.1 (Principles of classification);

The classification of a building or part of a building is determined by the purpose for which it is designed, construction or adapted to be used.

As per section 83 and section 84 of the BA it is an offence for a private certifier to issue a development approval for building work that does not comply with the requirements of a prior approval or has been issued prior to all necessary development permit having become effective. In this case the building approved by the assessment manager did not comply with the requirements of Council's approved specific plan of development for the allotment. As such, when issuing the development approval for building work, the assessment manager breached the requirements of section 83 and section 84 of the BA.

Section 84 of the BA states the following:

- (1) The private certifier must not approve the application if—
 - (a) the building development application relates to an earlier development approval granted by the local government or an SPA compliance permit; and
 - (b) the earlier approval or permit has not lapsed; and
 - (c) the application is inconsistent with the earlier approval or permit.

Maximum penalty—165 penalty units.

Section 83 of the BA states the following:

- (1) The private certifier must not grant the building development approval applied for—

under the Planning Act, all necessary development permits and SPA compliance permits are effective for the other development; and

Section 11 of the BA states the following;

- (1) Generally, the assessment manager for a building development application is the assessment manager for the application under the Planning Act, section 246(1).
- (2) However, if under section 48 a private certifier (class A) is performing functions for the application, the certifier is the assessment manager for the application.

As per this section of the BA the assessment manager for this development was private certifier Chris Diggles of Caboolture Building Approvals.

Section 532 of the SPA states the following

- (1) If—
 - (b) a person—
 - (i) was an applicant for a building development approval; and
 - (ii) is dissatisfied with a decision under the Building Act by a building certifier or referral agency about inspection of building work the subject of the approval; the person may appeal against the decision to a building and development committee.
- (2) An appeal under subsection (1) must be started within 20 business days after the day the person is given notice of the decision.

As per section 532 of SPA, the applicant had the right to appeal the Form 61 issued by the assessment manager subject to the appeal commencing within the required 20 business days. The appeal was lodged within the timeframe and as such the Committee is of the opinion that even though Chris Diggles has attempted to disengage himself from the project after the hearing he still remains the Respondent and the Committee has the ability to issue directions to him.

Richard Prout
Building and Development Committee Chair
Date: 22 October 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