



## Building and Development Dispute Resolution Committees—Decision

---

### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>79-10</b>
<b>Applicant:</b>	<b>Peter Folker for and on behalf of Ken Reed</b>
<b>Assessment Manager:</b>	<b>Sunshine Coast Regional Council (Council)</b>
<b>Concurrence Agency:</b> (if applicable)	<b>N/A</b>
<b>Site Address:</b>	25 Millgrove Place, Buderim and described as Lot 1 on SP203469 – the subject site

---

### **Appeal**

Appeal under section 526 of the *Sustainable Planning Act 2009* (SPA) against the decision dated 8 October 2010 by Sunshine Coast Regional Council, as the assessment manager, to refuse and application for preliminary building approval for building work for a tennis court.

---

<b>Date of hearing:</b>	Wednesday 19 January 2011	
<b>Place of hearing:</b>	25 Millgrove Place, Buderim	
<b>Tribunal:</b>	Ernest Harvey Geoff Cornish	– Chair – General Referee
<b>Present:</b>	Peter Folker Ken Reed Alan Thompson	– Town Planner for Mr Reed – Applicant – Sunshine Coast Regional Council

---

### **Decision:**

The Committee, in accordance with Section 564 of the SPA **sets aside** the decision of the assessment manager to refuse a development application for preliminary approval for building work for a tennis court; and replaces it with the following decision:-

The Committee, in accordance with Section 564 of the SPA **directs** the assessment manager to **approve** the development application, subject to compliance with the following condition:-

- Hours of operation of the tennis court including use of the tennis court lighting system are restricted as follows:
  - 8.00am to 8.00pm Monday to Friday; and
  - 8.00am to 10.00pm weekends and public holidays

## Background

On 8 October 2010 Council issued a decision notice under the SPA to Mr Reed refusing an application for preliminary building approval for building work for a tennis court. The decision notice stated that the application was refused as the development did not comply with and could not be conditioned to comply with the performance criteria of Maroochy Plan 2000 Code 4.1, Element 11, P1 and P2.

In this case the appellant made an application for preliminary building approval for building work assessable against a planning scheme and not for a development permit for a material change of use. The building work being a tennis court had been constructed by the applicant Mr Reed prior to obtaining the relevant development approval as required under the Maroochy Plan 2000. The application the subject of this appeal was made in response to show cause notice "notice number: SC COM09/1573" issued by Sunshine Regional Council on or about 27 October 2009.

On 12 October 2007 a development approval was issued to Mr Reed by The Building Certifier Pty Ltd for building work assessable under the *Building Act 1975* (BA) for construction of a new dwelling and swimming pool at 25 Millgrove Place, Buderim. This approval specifically excluded approval for construction of a tennis court by crossing out reference to the tennis court on the approved plans WD01 & WD02. In addition the building certifier conditioned the approval to exclude the proposed tennis court and surrounding areas from the approval. The building application made on behalf of Mr Reed for the house and swimming pool had included siting of the proposed tennis court.

Council argued that the tennis court had been excluded from the development approval given for the residence at 25 Millgrove Place on or about 12 October 2007 for reasons that this component of the application required code assessment against the planning scheme.

Council also argued that the application for preliminary approval for building work for a tennis court could not be supported by council on the basis that siting of the tennis court would cause unreasonable disturbance to neighbouring properties by way of noise and lighting impacts. Council referenced the Maroochy Plan 2000 Code 4.1, Element 11, performance criteria P1 & P2 and were of the opinion that the use of the tennis court could not comply with the acceptable measures A1.1 & A2.1. In particular A2.1 identifies siting issues requiring setbacks to adjacent residential dwellings: "Tennis courts are located at least 60 metres from the façade of an existing or approved residential dwelling on an adjacent or nearby lot (as measured from the centre line of the court)" Council representative could not produce nor had knowledge of any history of complaints from adjoining neighbours supporting the argument that the tennis court caused disturbance to neighbours due to its location adjoining the eastern and southern boundaries.

Council argued that siting of the tennis court could be accommodated on the northern side of the residential dwelling at 25 Millgrove Place and that the tennis court could be demolished and constructed in this location.

Photographic evidence provided in correspondence by Acoustic RB Pty Ltd (figure 1) showed that the tennis court had been constructed and was operational prior to the construction of the dwelling house at 24 Millgrove Place.

The appellant argued that the application made to council for preliminary building approval for building works for the tennis court should have been approved by Council as their lighting engineer had addressed acceptable measure A1.1 and that their lighting engineers assessment of lighting identified compliance with AS4282. Hence siting of the tennis court was in an appropriate location.

The appellant also argued that the application made to council for preliminary building approval for building works for the tennis court could have been approved and conditioned by Council to comply with performance criteria P2 by restricting use of the tennis court to specific hours of operation. The

appellant produced information from their noise engineers that supported this argument.

The Committee received written submissions from the parties and conducted a hearing which was followed by a further submission from the appellant's lighting engineer Mr Goodall in relation to lighting compliance with the Australian Standards for Outdoor Obtrusive lighting AS4282.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice for Appeal/Declaration', including a statement of grounds for appeal lodged with the Registrar on 8 November 2010;
2. Show cause notice number SC COM09/1573 issued to Mr K Reed by Council dated 27 October 2009;
3. Development application decision notice reference BA07-30 issued to Mr Reed by The Building Certifier Pty Ltd dated 12 October 2007;
4. Correspondence from Dillon Folker Stephens to Council dated 3 March 2010;
5. Council information request to Mr Reed dated 9 March 2010;
6. Acoustics PB Pty Ltd correspondence to Mr Reed dated 29 April 2010;
7. Response to Council information request by Dillon Folker Stephens dated 20 August 2010;
8. Written submissions from Peter Folker to the Registrar dated 8 November 2010;
9. Written submission from Council received by the Building and Development Committee Chair on 19 January 2011;
10. Verbal submissions from both parties at the hearing;
11. Written submission by Mr Goodall of Pierlite Australia Pty Ltd, received by the Registrar on 4 February 2011, responding to Council's issues raised during hearing;
12. The Maroochy Plan 2000;
13. The Queensland Development Code (QDC);
14. The Building Code of Australia;
15. The BA;
16. The SPA.

## **Findings of Fact**

The Committee makes the following findings of fact:

The appeal is against a decision notice issued by Council on 8 October 2010 refusing an application for preliminary building approval for building work for a tennis court.

The assessment manager's decision to refuse the application was based on two assumptions being non-compliance with the performance criteria and acceptable measures of Code 4.1 Element 11 performance criteria P1 & P2. While the acceptable measure A1.1 of performance criteria P1 related to compliance with Australian Standard AS4282, the acceptable measure A2.1 states siting issues requiring set backs to lots containing residential dwellings.

Section 33(1) describes work assessable under the BA. In particular Section 33(1)(b) identifies class 10 building or structures to be relevant work. Section 33(2),(5) & (6) also defines alternative

planning scheme provisions to QDC boundary clearance and site cover provisions to include qualitative statements and quantifiable standards regulating siting of structures. Hence performance criteria P1 & P2 and acceptable measures A1.1 & A2.1 of the Maroochy Plan 2000 may be considered by the Committee when assessing appeals under the Building Act 1975 Division 6, Subdivision 1, Section 526.

Building Code of Australia 2010, Part A3, Section A3.2 defines the structures forming the tennis court as a being class 10a & 10b buildings. Additionally the QDC performance criteria P2 and acceptable solution A2(a) for lots over 450m<sup>2</sup> references side and rear boundary clearance for a part of a building or structure under 4.5m in height as requiring setbacks of 1.5m.

Based on the assessment of facts, it is the Committee's decision that the decision notice being appealed against be **set aside** and that the preliminary building approval for building work for a tennis court be **approved**, subject to compliance with the following condition:

1. Hours of operation of the tennis court including use of the tennis court lighting system are restricted as follows:
  - (a) 8.00am to 8.00pm Monday to Friday; and
  - (b) 8.00am to 10.00pm weekends and public holidays

### **Reasons for the Decision**

The Committee accepts that the Maroochy Plan 2000 is a performance-based planning scheme, and compliance with an acceptable measure is only one way of meeting the performance criteria.

The assessment manager's submission stated that its decision was based primarily on performance criteria and acceptable measures of Code 4.1 Element 11 performance criteria P1 & P2.

In terms of the impact of vertical illumination not exceeding the Australian Standard AS4282, Mr Goodall lighting engineer for Mr Reed, confirmed that obtrusive lighting effects to surrounding residential boundaries complied with the Australian Standard AS4282.

In terms of the impact of noise nuisance to adjoining properties it is the Committees opinion that by restricting use of the tennis court to hours of operation it can be conditioned to comply and Council have the ability to enforce these conditions. It was noted by the Committee that Council had previously applied similar conditions restricting hours of operations to recent approvals issued by Council.

In regards to the issue raised by the appellant about the jurisdiction of Building and Development Committees to decide the appeal under section 519 of SPA, the Committee is limited to the matters specified in section 508 of SPA.

Section 508 of SPA provides four separate heads of power for an appeal to the Committees, namely:

- Division 4 of Part 2 Chapter 7 of SPA – this division deals with an appeal if the application is only for a material change of use of premises that involves the use of certain prescribed buildings – this head of power does not apply in this instance.
- Division 5, Part 2, Chapter 7 of SPA – this division deals with appeals about compliance assessment – this head of power does not apply in this instance;
- Division 6, Part 2 of Chapter 7 of SPA – this division deals with appeals about building, plumbing, drainage and certain other prescribed matters – **this division does apply in this case;**

- Division 7, Part 2, Chapter 7 of SPA – this division deals with appeals about charges for infrastructure – this head of power does not apply in this instance;

It is the Committees opinion that the application for preliminary approval for building work for a tennis court submitted on behalf of Mr Reed in March 2010 is a matter under SPA that relates to the BA and therefore falls under Section 526 of SPA.

---

**Ernest Harvey**  
**Building and Development Committee Chair**  
**Date: 28 February 2011**

## **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**