



## Building and Development Dispute Resolution Committees—Decision

---

### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>45- 10</b>
<b>Applicant:</b>	The Patio Guys
<b>Assessment Manager:</b>	Matrix Certification Services
<b>Concurrence Agency:</b> (if applicable)	Gold Coast City Council (Council)
<b>Site Address:</b>	38 Bradshaw Drive, Currumbin and described as Lot 362 on SP 178607 — the subject site

---

### **Appeal**

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of Matrix Certification Services as the assessment manager to refuse a development application for a 1.2m high deck and patio within the waterfront setback. The refusal was based on advice from Council as the concurrence agency.

---

<b>Date of hearing:</b>	23 November 2010
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Chairperson – Geoff Mitchell General Referee – Greg Rust
<b>Present:</b>	Asley Cairns – Applicant’s representative Joe Dreason – Applicant’s representative Cliff Rix – Matrix Certification Services Peter Krook – Council Patrick Giess – Council Andrew McCarthy – Owner Michael Saunders – Owner’s representative

---

### **Decision:**

The Committee, in accordance with section 564 of the SPA **sets aside** the decision of the assessment manager to refuse the application. The Committee orders the assessment manager to replace the decision and approve the application with reasonable and relevant conditions.

The assessment manager is to include the conditions of the concurrence agency in its decision which are amended to read:

- **Condition 1.** The development shall be carried out generally in accordance with the plan/s submitted to Council and indicated in the table below.

Plan No.	Revision	Title	Date	Drawn by
1		Site Plan	29/04/10	Matrix Drafting Services
2		Floor Plan	29/04/10	Matrix Drafting Services
3		Elevations 1,2 and 3	29/04/10	Matrix Drafting Services

- **Condition 2.** The construction of all works to be carried out pursuant to these conditions (including demolition and operation of any plant, machinery and / or other equipment) shall be carried out only between the hours of 6:30am and 6:30 pm Monday to Saturday inclusive. No building or construction work shall be carried out outside of these hours or on Sundays or Public Holidays unless prior written approval is given by Council.

## Background

1. The assessment manager gave a development approval for building works for a deck and patio in 2007, but did not refer the application to Council as required by section 83 of the *Building Act 1975* (BA). The 2007 development approval has been completed, inspected and had a final inspection certificate issued.
2. In April 2010 the assessment manager applied to Council for consideration of the proposal in an attempt to rectify the previous oversight.
3. On 14 May 2010 Council provided the assessment manager with its concurrence advice with the following conditions:
  - The development to be carried out strictly in accordance with the endorsed plans
  - The patio roof located above the 'as-constructed deck' is to be offset a minimum 4.5m to the outermost projection from the waterfront property boundary
4. The endorsed plans from Council show the requirement for the patio roof to be cut back to achieve the 4.5m offset.
5. On 19 May 2010 the assessment manager refused the application, however no reasons were given for the refusal.
6. On 11 June 2010 the applicant lodged an appeal against the decision of the assessment manager on the grounds that the relaxation application was not granted by Council, and that a precedent exists in the area for granting of a relaxation.

## 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 11 June 2010.
2. Decision notice (Reference No. 00001688) dated 19 May 2010 from the assessment manager.
3. Request for further information from Council to the assessment manager dated 8 April 2010.

4. Correspondence from the assessment manager to Council dated 12 April 2010.
5. Request for further information from Council to the assessment manager dated 29 April 2010.
6. Correspondence from the assessment manager to Council dated the 29 April 2010.
7. Concurrence agency response dated 14 May 2010.
8. Verbal representations from all parties during the hearing.
9. Additional information that was requested from Council dated 25 November 2010
10. The *Building Act 1975* (BA).
11. The *Sustainable Planning Act 2009* (SPA).
12. The *Integrated Planning Act 1997* (IPA).
13. The *Integrated Planning Regulation 1998* (IPR).
14. The *Queensland Development Code MP1.2* (QDC).
15. Council's planning scheme (in particular the Canals and Waterway constraint code).

### **Findings of Fact**

The Committee makes the following findings of fact:

- The applicant seeks approval for an as-constructed deck and open patio.
- The deck and patio are set back approximately 2.0m from the canal alignment with a height above ground level at the canal extremity of approximately 4.5m. The setback from the adjoining property at its closest point is approximately 1.5m.
- The assessment manager purported to give approval for the structure via a development approval for building works (Reference No. BLD2705868) in 2007. However, the assessment manager neglected to refer the application to Council as the concurrence agency as required by the IPR.
- The above approval was finalised by the assessment manager and a final inspection certificate has been issued.
- The current owners advised that they are the third owner of the property since the purported approval of the deck/patio. Searches of Council records provided copies of the final inspection certificate and the owner placed reliance on the purported approval.
- The committee considered it has no jurisdiction to make any declarations on the original approval but sees the application currently before the committee as been submitted to correct the anomaly of the missed referral in the original application.
- Council's concurrence agency response to the assessment manager included a condition requiring substantial redesign/rectification of the structures.
- During its referral period, Council requested further information from the assessment manager twice. In both instances Council did not particularly state that it was not satisfied with the location put forward.
- The assessment manager refused the application based on the concurrence agency advice. The assessment manager did not include reasons for refusal within the decision notice.

## Reasons for the Decision

- Council has advised that the deck construction is acceptable. Altering the patio structure as requested by Council would have little effect in altering the visual impact of the structure.
- The Committee is of the opinion that Council should have considered refusing the application if it could not obtain the desired amendments through the information requests.
- The Committee is of the opinion that the assessment manager should have approved the application with the concurrence agency's conditions.
- The Committee can find no reference that restricts the use of structures by the occupants. The amenity considerations of shadows and air flow are considered adequate as the proposal complies with the side boundary setbacks of the QDC.
- The subject property is situated at the northern end of the canal, such that views to the site are limited to the properties on either side. The property on the southern side has a high fence and landscaping such that the views to and from the structure are not affected. The property on the northern side has landscaped the rear of the property and the private open space is located away from the structures. The open nature of the structure does not obstruct the views from this property and privacy of the adjoining property is protected by the existing landscaping.
- The patio structure as constructed responds to the waterside location and has minimal impact on adjoining properties. The Committee considered that the visual impact from the properties on the opposite side of the canal would be no different with a reduced patio length, as it would not reduce the height of the structure. The Committee considered the visual impact from along the canal and concludes that the reduction in length of 2.5m, as proposed by the assessment manager, would have little additional affect on the visual amenity.
- At the hearing it was discussed that if the assessment manager had issued an approval or the concurrence agency had issued a refusal, the decision of the concurrence agency would have been appealed.
- In its written submission to the committee Council stated that the deck construction is acceptable and complies with the acceptable solution
- At the hearing and in its written submission Council advised the proposal was not compliant with performance criteria PC1 of the Canals and Waterways Constraint Code. The relevant clause PC1 states:  
*"All buildings and structures must provide for setbacks from the waterway which ensure the efficient use of the site, respond to the waterside location, and have minimal impact on adjoining properties"*.
- At the hearing Council expressed its concern on the amenity of the adjoining property from the increased potential for the occupants to be using the deck if it remained covered for its full extent.
- In its written response Council stated that it desired the proposal to comply with PC3 and PC8 of the Canal and Waterway Constraint Code.

The Committee considers that the abovementioned criteria are not specifically relevant as they apply to code assessable or impact assessable development. However these performance criteria expand some considerations and describe amenity as being *"views, shadows and airflow"*.

- At the hearing and in its written submission Council also expressed its concern in relation to the visual aspect from the canal. At the hearing Council advised that the requirement to restrict the structure to 4.5m from the rear alignment was to achieve an approximate 45 degree setback to height.
- The Committee can find no legislative basis for the imposition of a 45 degree setback to height ratio and it appears to be inconsistent with siting requirements of other structures permitted by the Canal and Waterway Constraint Code

---

**Geoff Mitchell**  
**Building and Development Committee Chair**  
**Date: 15 February 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**