



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	39-16
Appellant:	Red Hill Paddington Housing Collective Ltd
Respondent:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	Not applicable
Site Address:	19 Thomas Street, Red Hill and described as Lots 4 and 5 on RP 20751 (the subject site)

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009 (SPA)* against the giving of an Enforcement Notice to the Appellant by Brisbane City Council. The Enforcement Notice was given on the basis that the Council reasonably believed that the Appellant had committed and/or was committing, a development offence under SPA by erecting a class 1a habitable structure on the subject site without a development permit for building works.

Date and time of hearing:	Monday 31 October 2016 commencing at 2.30pm.
Place of hearing:	The subject site
Committee:	Michael Walton – Chair Neil de Bruyn – Member James Dunstan – Member
Present:	Appellant – Red Hill Paddington Housing Collective Ltd (Appellant) represented by: <ul style="list-style-type: none">• Anita Salter (Director Appellant)• Julian Warburton (member Appellant)• Valerie Bares (ESC Consulting)• Rikki Pieters (ESC Consulting)• Lara Nobel (co-owner of the THOW)• Andrew Carter (co-owner of the THOW) Brisbane City Council (Council) represented by: <ul style="list-style-type: none">• Glenn Davidson• Aaron Smith• Gary Rickerby

Decision:

The Building and Development Dispute Resolution Committee (**Committee**), in accordance with section 564 of the SPA, allows the appeal and **sets aside** the Enforcement Notice issued by the Council.

Background

This appeal was lodged by the Appellant against the giving of an Enforcement Notice by Council.

The subject site is owned by the Appellant. Council contends that a class 1a habitable structure has been erected on the subject site without a development permit for building works.

At the centre of this appeal is a structure aptly called a “Tiny House on Wheels” (**THOW**). This can be a little more fully described as a small dwelling on a road registered trailer.

On 20 July 2016, following a site inspection, Council issued a Show Cause Notice to the Appellant and its directors. The Appellant provided its written representations, in response to the Show Cause Notice, to Council on 26 August 2016.

Council considered the representations but determined that it was appropriate to issue an Enforcement Notice, which it did on 16 September 2016. It is not necessary to fully describe all the facts and circumstances relied on by the Council in its Enforcement Notice except to mention that Council was of the belief that the siting of the THOW on the subject site constituted building work which is assessable development and that no development permit for building work had been obtained for the THOW. The Enforcement Notice required the Appellant to, amongst other things, engage a private building certifier to obtain a development permit for the THOW and to provide to Council a copy of the engagement notice from the private building certifier.

The Appellant’s appeal was lodged on 13 October 2016. Amongst other things the Appellant contends that the THOW is a road registered moveable dwelling, more specifically a caravan, located on the subject site in a non-permanent capacity. As such the THOW is regulated by the *Residential Tenancies and Rooming Accommodation Act 2008 (RTRAA)* and the *Transport Operations (Road Use Management) Act 1995 (TORUMA)* and is not otherwise regulated by the *Building Act 1975 (BA)* as it does not constitute building works.

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 – Application for Appeal and supporting material;
2. Oral representations at the hearing;
3. *Sustainable Planning Act 2009 (SPA)*;
4. Sustainable Planning Regulation 2009 (**SPA Reg**);
5. *Building Act 1975 (BA)*;
6. *Residential Tenancies and Rooming Accommodation Act 2008 (RTRAA)*;
7. *Local Law (Caravan Parks and Relocatable Home Parks) 2000*;
8. *Transport Operations (Road Use Management) Act 1995 (TORUMA)*;
9. *Skaventzos v Vander-Lee* 31 LGRA 298 (**Skaventzos**);
10. *Ooralea Developments Pty Ltd v Civil Contractors (Australia) Pty Ltd* 2015 1 Qd R 311 (**Ooralea**);
11. *Conoid Pty Ltd & Anor v International Theme Park Pty Ltd (1999)* NSWSC 1138 (**Conoid**);
12. *Keane v Kleem* 50 SASR 66 (**Keane**);
13. *Monadelphous Engineering Pty Ltd & Muhibbah Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2015] QSC 160 (**Monadelphous**);

14. Peter Butt, Land Law, 6th edition, chapter 3, 301-312;

15. Nature Loo Classic Manual (**Nature Loo Manual**).

Findings of Fact

The Committee makes the following findings of fact:

- Construction of the THOW was completed in November 2015. It was manufactured in a factory and was constructed on a purpose-built trailer. The THOW was towed to several venues including to the Woodford Folk Festival for “open house” demonstrations before being located on the subject site.
- The THOW was moved to the subject site in April 2016 and has been positioned on the subject site since then. The Appellant is the owner of the subject site but is not the owner of the THOW. The THOW is owned by the occupants.
- The subject site is a long narrow allotment made up of two adjacent lots, namely lots 4 and 5 on RP20751. A detached dwelling is located at the front which dwelling straddles both lots 4 and 5. The THOW is located on a level pad at the back of the subject site.
- The THOW is built on a dual axle trailer with wheels and a towbar and is registered with the Department of Transport and Main Roads. The number plates were affixed to the trailer. The overall dimensions of the THOW are 2.5m x 7.5m with a 3.5 metre ceiling.
- The THOW has a gross floor area of approximately 18m² and is self-contained having a kitchen, bathroom, composting toilet, bed (elevated) and store room (elevated).
- The THOW can perhaps be differentiated from a caravan by its robust structure and the construction materials which are more akin to a regular house. In this case, the THOW is clad with corrugated iron and cement sheeting. The THOW does not include gutters or downpipes for stormwater.
- Electrical connection to the THOW is via an extension lead from the dwelling on the subject land. Water is connected to the THOW via a garden hose.
- Greywater is discharged by hose pipe from the THOW underground to a rubble pit at the back of the subject site.
- The THOW includes a Nature Loo composting toilet facility with a rubble pit for discharge of treated liquid waste.
- The Nature Loo system comprises two chambers which are swapped intermittently based on the capacity of the composting tank.
- The Nature Loo system can be easily detached and moved for relocation of the THOW as confirmed by the Nature Loo Manual.
- The THOW is supported on the subject site with cement blocks on compacted ground. In other words, the blocks are not on foundations and the THOW simply rests on its own weight.
- A timber deck (approximately 10m²) sits on the northern side of the THOW. The deck provides an “entry” to the THOW and an external seating area. No foundations have been installed to support the deck as it is supported by adjustable jacks sitting on blocks for stability and levelling. The

hearing of the appeal occurred on the deck and comfortably accommodated all those attending the hearing.

- It is accepted that the timber deck can be dismantled in about 2 hours and that the THOW itself can be moved to a different location in about half a day.
- A couple and their baby are living in the THOW. They could not say how long they would propose to continue to live in the THOW at the subject site but there was no suggestion that it was intended to be an indefinite or permanent position.

Reasons for the Decision

Central to the issue of the Enforcement Notice is Council's contention that the siting of the THOW on the subject site constitutes "building work" and is assessable development.

Relevant Legislative provisions

A person must not carry out assessable development unless there is an effective development permit for the development.¹ All "building work" under the BA is assessable development unless it is exempt development or self-assessable development.² It does not seem to be in dispute that should the THOW constitute building work it will not otherwise qualify as exempt or self-assessable development.

Relevantly, "building work" is:

"building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure"³(emphasis added).

A "building" is defined to be a "fixed structure that is wholly or partly enclosed by walls or is roofed". Further, the term includes a floating building or any part of a building.⁴

"Structure" is not separately defined except to make it clear that it includes a "wall or fence and anything fixed to or projecting from a building, wall, fence or other structure"⁵.

For the establishment of the THOW on the subject site to be "building works" under the BA it must be either:

- (a) "a building", namely a fixed structure that is wholly or partly enclosed by walls or is roofed; or
- (b) "a structure", which may include a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure.

Meaning of "building"

There seems to be very little (if any) Queensland case law on the meaning of the relevant terms under the BA. For that reason, the Committee has had some recourse to case law in other jurisdictions albeit with caution given the different statutory framework.

Keane involved the consideration of the term "building works" under the South Australian *Building Act 1971*. The issue was whether a movable type of greenhouse erected in the back yard of a property was "building work". Building work was defined in a somewhat analogous way to the position in

¹ SPA, s578.

² BA, s20; SPA Reg, Schedule 3, Part 1, Item 1.

³ BA, s5.

⁴ BA, Schedule 2.

⁵ BA, Schedule 2.

Queensland to mean “work in the nature of the erection, construction ... of any building or structure ...” The word building was not defined. The Court held that building works as defined was confined to buildings or structures that are in the nature of fixtures to the land to which they are or are to be attached. The Court found that the moveable greenhouse was not in the nature of a fixture to the land and hence was not building work.

Skaventzos, another decision of South Australian Full Court, also considered whether a structure constituted a building. The structure was described as consisting of a converted caravan and an adjoining shell of a caravan with an awning on top. They were standing side by side so that, in effect, the awning acted as a veranda to the caravan proper, which was used as a shop for selling fruit and vegetables. The wheels of each structure were resting in holes in the ground to enable the frames to be levelled and stabilised; and they were supported by mechanical jacks and masonry supports. There was a gutter and downpipe affixed to the awning on the north side and in the south east corner of the caravan structure there was a reverse cycle air-conditioning unit. Each had provision for the attachment of a vehicle, though it would have taken some hours actually to remove them. The caravan was connected to electricity and telephone cables. The Court found that the structure properly constituted a building and in doing so commented:

“The alleged building in the present case was not one formerly mobile structure. It was two structures, extensively modified and put together to provide the attributes usually manifested by a building. It had not only the attributes of a building, but it also had connected to it services and facilities which demonstrated an intention that it should have a considerable degree of permanence in its existing location.”

Conoid, a decision of the Supreme Court of New South Wales provides brief consideration as to whether a VW Kombi Van was a “building” in a very different legislative context. The van was converted for use as a photo concession operation and was found to be permanently located resting on four metal stands next to each wheel and surrounded by a garden bed and having other features entitling it to properly be described as a “building”.

Ooralea, a decision of the Queensland Supreme Court, involved consideration as whether the construction of a water reticulation system, sewerage system or storm water drain fell within the definition of building work under the *Queensland Building Services Authority Act 1991*. Building works was defined to mean, amongst other things, the erection or construction of a building. Building was defined to include “any fixed structure”. The Court said that the term “fixed” was readily understood and that a structure is fixed if it is attached such as to become part of the land. A similar approach was taken in the recent decision of the Supreme Court of Queensland in *Monadolphous* which considered the term “building works” under the *Queensland Building and Construction Commission Act 1991*.

It is considered that the phrase “fixed structure” as used in the BA definition of “building” should be interpreted in the same way to mean that it is attached such as to become part of the land.

Meaning of “structure”

As previously mentioned, the term “structure” is not separately defined in the BA other than to extend its meaning to include “a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure”.

The Macquarie Dictionary relevantly includes the following definition for structure-

“Something built or constructed; a building, bridge, dam, framework, etc.”

In *Keane* the Court considered the significance of the words “or structure” in the applicable definition of “building works” and expressed the view that structures must, by implication, be structures of a building nature, of a fixture nature. Accordingly if structures are not part of the

land or part of buildings which are part of the land, such structures are not covered by the building legislation. This reasoning appears to be equally applicable to the Queensland legislation.

Some support for this may be gained from the building classes as set out in the Building Code of Australia. Class 10b lists a “structure” as being a fence, mast, antenna, retaining or free standing wall, swimming pool or the like.

Is the THOW a building or structure?

The facts in this case raise some difficult questions.

The Committee has formed the view that the THOW is neither a building or structure as defined under the BA.

There is no intention that the THOW would become fixed to the subject site. The concrete blocks supporting the trailer are not designed to give the impression of permanence or immovability. Nor does the timber deck. The deck is an attractive feature of the THOW but it can be dismantled relatively easily because it is not built on foundations but placed on moveable blocks so that it is resting on its own weight. This is similar in intent and use to the annexe attachments on more traditional caravans.

One feature which has caused the Committee some concern is whether the connection of greywater and the composting toilet via a hose to a rubble pit causes the THOW to be affixed to the land. The Committee considers that the degree of annexation is modest due to the fact that it would be a very simple and quick process to disconnect the greywater and composting toilet hose. Further the composting toilet facility would be able to be easily removed and transported with the THOW for relocation.

Another relevant consideration is the different ownership of the subject site and the THOW. It was clear from the discussion at the hearing that it was not the intention of the owners of the THOW that it be annexed to the subject site so that it becomes the property of the Appellant.

While the THOW has been located on the subject site for some months it continues to have the features of a moveable dwelling, in that it is resting on its own weight, continues to be registered as a trailer and could easily be relocated. From the evidence it is clear that there was no intention that the THOW should become part of the subject site.

For these reasons the Committee has formed the view that the THOW does not constitute building works as defined under the BA and accordingly the Enforcement Notice issued by the Council should be set aside.

Michael Walton
Building and Development Committee Chair
Date: 15 November 2016

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
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