



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	30- 14
Applicant:	Mr Ronald Donaldson
Assessment Manager:	Mackay Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	3034 Bruce Highway, Kuttabul and described as Lot 23 on SP105837 (the subject site)

Appeal

Appeal under section 533 of *Sustainable Planning Act 2009* (SPA) against an Enforcement Notice (Ref: CRS No. 417074-417065-417077) dated 17th July 2014, issued by Mackay Regional Council (Council) under section 590 of the SPA for carrying out assessable development without a permit at the subject site.

Date and time of hearing:	Friday 12 th September 2014 at 12.57pm
Place of hearing:	The subject site
Committee:	Mr Gordon Heelan – Chair Mr Ian Mac Donald - Referee
Present:	Mr Bob Donaldson – Applicant and property owner Mr John Viklund - Applicant representative (Town Planner) Mr Andrew Cridland - Council representative Mr Steven Gatt - Council representative Mr Robert Maher - Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(c) of the SPA **sets aside** the decision of Council to issue the Enforcement Notice dated 17 July 2014. The Committee makes the following amendments to the relevant sections of the Enforcement Notice and directs the Council, under section 564(1) to re-issue the Enforcement Notice to the Applicant.

1. On page three under Section 4 titled '*Details of Required action*' replace the five points currently in the Enforcement Notice with the following four points:
 - Within 40 business days upon receipt of the Committee Decision engage a Private Building Certifier to submit an Application for building approval to enable finalisation of the re-site high set manager's house on Lot 23 on SP 105837. The Applicant is required to complete all work associated with the building approval within 18 months from the date of the approval. In the event the layout of the original building approval floor plan changes then an amended plumbing approval may be required as the existing plumbing

permits were issued jointly with the original building approval. It should be noted that if a new building approval allows changes to the building layout (e.g. adds more bedrooms and /or plumbing fixtures) then the existing plumbing approval is not appropriate given Council withdrew the two plumbing related Enforcement Notices on 28 October 2014 which were the subject of appeals 28-14 and 31-14 respectively.

- Completely remove the **Clay Brick Toilet Block** from the site and return Lot 23 on SP 105837 to the condition it was in prior to the illegal development commencing;
 - Within 40 business days upon receipt of the Committee Decision apply for the required approvals (e.g. town planning, building, etc.) to for the Buffalo Lodge.
 - The Applicant is required to complete all work associated with the required approvals (e.g. town planning, building, etc.) within 24 months of receiving approval to enable a Certificate of Classification (Form 11) to be issued. In the event the building cannot comply with the current building codes the building will be demolished.
- 2 On page four under Section 5 titled '*Compliance Date*' change to '*Close of Business 50 business days from the date of the Committee decision*'.
 - 3 On page four under the Section 6 titled '*Authorisation*' change the date of issue from 17 July 2014 to the date of the Committee decision.

Background

General background

It is relevant to note that this appeal is one of five appeals lodged by the Applicant with the Building and Development Committees for five individual Enforcement Notices issued by Council in respect of the subject property. The Committee consisted of the same members for all five appeals and the hearings for all appeals were held consecutively on the subject site on Friday 12 September 2014.

The Committee has issued final decisions for four of the five appeals (i.e. 27, 28, 29 and 31-14) with this appeal being the last to finalise.

Appeals 28-14 and 31-14 related to Enforcement Notices issued for plumbing and drainage matters on the subject site and the decisions for these two appeals were sent to appeal parties on 7 October 2014 via email and mail. Council's actions since receiving the decisions for these two appeals directly impact on the outcome of this decision therefore correspondence sent by Council to the Committee on 28 October 2014 is appropriate to include as 'Material considered' in the reasons for this decision.

The current appeal - 30-14

The subject site is lot 23 on SP 105837. The site is a large rural lot that contains a hotel building and variety of other buildings. The buildings that are the subject of this appeal have a history that dates back to between 1991 and 2000.

In November 2012 Council issued Show Cause Notices to the Applicant for building work and subsequently issued Enforcement Notices for the building work associated with these buildings in January 2013.

On 12 June 2014 Council withdrew all the Show Cause and Enforcement Notices related to the subject site and advised the Applicant that Council intended to further pursue the matter. Council advised the Committee at the hearing that the reason for Council withdrawing all Notices was based on legal advice to Council that precedence could be set from another similar case currently before the Courts.

The Committee was advised that upon withdrawing all previous Notices, Council reissued a Show Cause Notice which required a written response by 15 July 2014. A copy of the Show Cause Notice was not provided to the Committee by the Applicant or Council for review but it is understood Applicant did not respond to the Show Cause Notice.

Council subsequently issued an Enforcement Notice dated 17 July 2014 under section 590 of the SPA for carrying out assessable development without a permit at the subject site. Council states in the Enforcement Notice 'A search of Councils records indicated that no development application has been submitted or development permit given in respect of the development work that has been carried out'.

The Applicant lodged an appeal against the Enforcement Notice with the Committee Registrar on 20 August 2014 stating he had received the Enforcement Notice on 12 August 2014. The Applicant provided a Statutory Declaration dated 20 August 2014 declaring he had been away from Mackay at the time the Enforcement Notice was issued assisting his family members with the administration of his deceased brother's estate.

A hearing was held on site on 12 September 2014 at 12.57pm.

Structure of the Enforcement Notice

The Enforcement Notice is inconsistently constructed and poorly written for the intended audience (the average citizen) who are unfamiliar with the building approval process including enforcement action as evidenced by the below examples.

Example One

Page two of the Enforcement Notice states the following under the section titled '*Particulars*'

- (a) *A number of structures exist at the subject site;*
 - i. *High Set Managers House;*
 - ii. *Clay Brick Toilet Block;*
 - iii. *Buffalo Lodge;*
 - iv. *Pink (coloured) Three (3) Room Transportable Quarters;*
 - v. *Main Olive (colour) Four (4) Door Shed;*

The above provides inconsistent descriptions in brackets of numbers and colours next to the listed structures and this format is not used in any other section of the Enforcement Notice.

Example Two:

The descriptions of the structures in the Enforcement Notice are inconsistent and confusing.

For example, when reading point v. below it describes the structure as an '*Old transportable building - mounted on raised platform...*' however as demonstrated below on Page three of the Notice under '*Details of required action*' number 4, the same structure is described as a '*pink coloured three (3) room transportable building*'. The description of the same building in different parts of the Notice is inconsistent and the reader could easily form the view that there are up to (3) three different structures involved however the Committee, as a result of undertaking a site inspection, were able to clarify that the inconsistent descriptions used in the Notice were referring to the same single building.

Page 2 under '*Further particulars*':

- ii. *Re-site house – timber frame - steel pipe stumps - no steps - completely guttered*
- iii. *Red Clay Block on concrete floor - iron roof.....*
- iv. *Old Buffalo Lodge Hall - timber frame - weather board exterior - timber floor.....*
- v. ***Old transportable building - mounted on raised platform behind.....***
- vi. *Four (4) bay metal shed - concrete floor - located behind the.....*

Page three under '*Section 4- Details of required action*':

1. Completely remove the re-site high set manager's house...
2. Completely remove the Clay Brick Toilet Block from the site...
3. Completely remove the old buffalo hall from the site...
4. Completely remove the **pink coloured three (3) room transportable building...**
5. Completely remove the four (4) bay olive coloured shed from the site...

Content of the Enforcement Notice

Page Two and Three on the Notice Under '*Further Particulars*':

ii. RE-site house – timber frame – steel pipe stumps – no steps – completely guttered internally - dilapidated condition – located adjacent to Lot 23 southern boundary – Development (Building) Permit 1998/2280 reinstated 1997/092 – previous legal action withdrawn 12/06/14

During the on-site hearing Council advised that the building approval 1998/2280 for the re-site house related to the '*High Set Managers House*' has now lapsed in accordance with the building approval conditions. Also during the hearing, Council provided a copy of the following documents;

- a) A three page building approval 98/2280 issued by the Council for the Resite House – Class 1A issued on 30 December 1998 with conditions. The approval was accompanied by 10 pages of A3 plans stamped with the word '*COPY*' in red on the cover page. The plans were also stamped by the plumbing section and dated 29-1-97.

However, the Applicant was able to provide the Committee with a set of Council approved stamped plans permit number 97/0092 dated 3.2.97.

- b) A one page document titled 'Property Search Part 'B'' dated 7/11/89. Under the heading '*Water & Sewerage Department Requisitions*' is notated '*ST 6017*' and dated 6/11/89. The search number is 1782/89. There is no reference to a property or a building approval on the document.

iii. Red Clay Block on concrete floor - iron roof – dilapidated condition - located on the southern side of the motel units adjacent to the Kuttabul Rural Fire Brigade Queensland Shed - no record of a Development (Building) Permit Application nor any Permit being issued – previous legal action withdrawn 12/06/14.

During the on-site hearing the Committee noted the above structure has been partly demolished.

iv. Old Buffalo Lodge Hall - timber frame - weather board exterior - timber floor - iron roof - resting on builders pig sty's (not secured to the earth) - located on the eastern side of the Kuttabul Rural Fire Brigade Queensland Shed and adjacent to the western end of the motel units - dilapidated condition - no record of any Development (Building) Permit Application nor any permit being issued - previous legal action withdrawn 12/06/14.

v. Old transportable building - mounted on raised platform behind hotel - current used as a store room - no record of a Development (Building) Permit Application nor any permit being issued - previous legal action withdrawn 12/06/14.

vi. Four (4) bay metal shed - concrete floor - located behind the Hotel towards the eastern site boundary - no record of a Development (Building) Permit Application nor any permit being issued - previous legal action withdrawn 12/06/14.

During the on-site hearing the Committee noted the above three structures appear to have been in their current location for a number of years. Council advised the buildings were visible on the Mackay Regional Council 2009 aerial photo.

NOTE: The term '**structures**' is used as a general term for the purposes of this decision and refers to the **specific** description of each structure noted in the Enforcement Notice (e.g. shipping containers, low set re-site house/cabin, etc.)

The Enforcement Notice contains the following:

'You are required to immediately refrain from committing the offence by:

*Completely removing the **structures** from the site and return Lot 22 on SP105837 to the condition it was in prior to the illegal development commencing;'*

Council has instructed the property owner to completely remove each structure from the site. The Committee has formed the view that:

- Council has not provided sufficient evidence to support their direction to the property owner about why the all of the structures are to be completely removed from the site. (E.g. the buildings are structurally unsafe, etc.)
- Council has not provided the property owner with an opportunity to demonstrate if any of the buildings have a building approval and/or are capable of being approved. Council records appear to be incomplete.

Outcomes of the on-site hearing

The outcomes of discussion at the on-site hearing were as follows:

- The building referred to as '*High Set Managers House or RE-site house*' was issued a building approval by Council in 1997, reinstated in 1998 and the approval has now lapsed in accordance with the building approval condition. The building was placed on site and no further building work was undertaken on the structure. The building is in need of major repair including structural upgrade.

A structural report from a Registered Professional Engineer in Queensland (RPEQ) will be required to establish if the existing building and building elements (e.g. footings, timber framing, flooring etc.) are structurally adequate (loadbearing capacity, etc.) and will comply with the Building Code of Australia (BCA) 2014 and relevant Australian Standards (e.g. AS1170, AS1684, etc.) for the wind rating for that particular location.

The Applicant agreed to engage a private building certifier to complete the High Set Managers House building work and have a Final Inspection Certificate (Form 21) issued. In the event the building cannot comply with the current building codes the building will be demolished.

- Council agreed the structure referred to as '*Clay Brick Toilet Block*' is in the process of being removed from site.
- The Applicant agreed to apply for a demolition approval for the removal of the plumbing items.
 - It should be noted that the Enforcement Notice the subject of appeal 28-14 directed the Applicant to obtain written authorisation from Council for the dismantling or taking away of the redundant plumbing and on-site sewerage facility for the clay brick toilet block. However, as Council withdrew this Enforcement Notice on 28 October 2014, the Applicant has a duty to comply with the requirements of the *Plumbing and Drainage Act 2002* by applying to Council for approval for the dismantling or taking away of the redundant plumbing and on-site sewerage facility for the clay brick toilet.
- Council and the Applicant agreed the structure referred to as '*Old Buffalo Lodge Hall*' is not secured and does not have a building approval in accordance with the *Building Act 1975* (BA 1975). The Applicant agreed the hall was located on the site without the necessary approvals and the building is not tied down and secured for the wind classification of the location (e.g. C2 or C3).

The Applicant agreed to apply for all the required approvals (e.g. town planning, building, etc.) to enable the building to remain on the property and to have a Certificate of Classification (Form 11) issued. In the event the building cannot comply with the current building codes the building will be demolished.

- The Applicant and Council agreed that the structure referred to as the '*pink coloured three (3) room transportable building or Old transportable building - mounted on raised platform behind hotel*' may have been constructed prior to 1989 and it was accepted as being approved.
- The Applicant advised the structure referred to as the '*Main Olive (colour) Four (4) Door Shed / Four (4) bay metal shed - concrete floor - located behind the Hotel*' was on the subject site when he purchased the property and was approved by the previous Pioneer Shire Council in the early 1970's.

As Council records appear to be incomplete with respect to when the shed was approved, Council agreed to check aerial photos of the area to establish when the shed was built. The Council subsequently advised the Committee on 9 October 2014, that they were unable to obtain any photos from the State Government to assist with this matter however they did obtain some aerial photographs from Mackay Sugar. The imagery is not 100% conclusive and Council has conceded to remove this shed from the current Enforcement Action.

Impact of Council correspondence to the Committee on 29 October 2014

As stated at the beginning of the 'Background' section of this decision, Council provided correspondence to the Committee related to the decisions for appeals 28-14 and 31-14 that directly impact on the decision for this appeal.

On 29 October 2014 Mr Robert Maher, Development Compliance Officer in the Council emailed an unsigned copy of a letter under his signature block dated 27 October 2014 to the Committees Registrar to be forwarded to the Committee. The letter was addressed to the Applicant and property owner with respect to the subject property in this appeal. It states:

'Further to the Enforcement Notices issued by Council on Thursday 17 July 2014 for the above mentioned property under the provisions of the Plumbing and Drainage Act 2002. On 7 October 2014 Building and Development Dispute Resolution Committee (Committee) issued their written decision in relation to Appeal 28 & 31-14. The Committee directed that the current Enforcement Notice should be set aside, and that an amended Notice should be issued to you.

As a consequence of the Committee's decision, Officers from the Development Services Department have reviewed Council's position in relation to the two (2) Enforcement Notices issued in relation to plumbing and drainage matters on the above mentioned properties. You are hereby advised that:

- *Lot 22 Hotel Site – as at 28/10/14 Council has withdrawn all Show Cause and Enforcement action in relation to plumbing and drainage on the Hotel Site;*
- *Lot 23 Caravan Park Site – as at 28/10/14 Council has withdrawn all Show Cause and Enforcement action in relation to plumbing and drainage on Caravan Park Site.*

Officers from the Development Services Department fully believe that the matters addressed in the Plumbing and Drainage Notices, will be rectified and certified during future works and improvements by the Owner, Licence Inspections by The Queensland Licensing Commission and Council Health Inspectors and future improvements by the Hotel Licensees.....'

The Committee makes the following comment on the above Council correspondence and their associated non-compliance with the directions of the Committee by withdrawing the plumbing and drainage Enforcement Notices instead of re-issuing them with amendment contents:

- The Entities nominated in the correspondence above (i.e. Qld. Licensing Commission and Council Health Inspectors) may recognise issues involving plumbing however the administration of the

Plumbing and Drainage Act 2002 (PDA) must be carried out by an appropriate person who holds delegated authority issued under the PDA. Generally this delegation is given to a licensed plumber/drainer.

- The Notice the subject of Appeal 28-14 required the Applicant to obtain a Compliance Permit for the removal of the septic tank and plumbing for the Clay Brick Toilet Block. Council's correspondence notifying the Applicant of their decision to withdraw this Notice did not provide any direction to the Applicant about how to obtain the necessary permit for the removal of the septic tank and plumbing. The Committee therefore advises the Applicant of his duty to comply with the requirements of the *Plumbing and Drainage Act 2002* by applying to Council for approval for the dismantling or taking away of the redundant plumbing and on-site sewerage facility for the clay brick toilet.
- Council's withdrawal of the Notice the subject of Appeal 28-14 means that the Council must now be accepting the land application area at the rear of the Hotel as they are aware that a compliance permit has not been given for the land application area. This contradicts the views that Council held during the hearing when they showed significant concern about this area not having a compliance permit.

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 20th August 2014.
2. The Enforcement Notice dated 17th July 2014.
3. Verbal representations by the parties at the hearing
4. Additional information provided by the Council at the hearing:
 - a. A three (3) page building approval **98/2280** issued by Mackay City Council for the Resite House – Class 1A issued on 30 December 1998 with conditions.
 - b. A one (1) page document titled '**Property Search Part 'B'**' dated 7/11/89. It is noted under the heading 'Water & Sewerage Department Requisitions is 'ST 6017' and dated 6/11/89.
5. Additional information provided by the Council after the hearing:
 - a. Email from Mackay City Council dated Thursday, 9 October 2014 11:34 AM advising the outcome of the investigate to try and ascertain when the shed was built, as Mr Donaldson was of the opinion that the shed was built when he purchased the property.
6. The *Sustainable Planning Act 2009* (SPA)
7. The *Building Act 1975* (BA) current version and 1984 version.
8. Standard Building Regulation 1993 (SBR)
9. The Sustainable Planning Regulation 2009 (SPR)
10. The *Plumbing and Drainage Act 2002* (PDA)
11. The Building Code of Australia 2014 (BCA)
12. Inspections and observations made during the on-site hearing.
13. Correspondence from Council to the Committee on 28 October 2014 that included a letter to Applicant dated 27 October 2014 in relation to appeals 28-14 and 31-14.

Findings of Fact

The Committee makes the following findings of fact:

- Council has not provided sufficient evidence to support their direction to the property owner in the Enforcement Notice, with respect to why all the structures are to be completely removed from the site. (E.g. the buildings are structurally unsafe, etc.)
- Council has not provided the Applicant with the opportunity to demonstrate if any of the structures (e.g. the *Four (4) bay shed* and the *High set Managers House*) have a building approval or may comply with the building legislation.
- Council and the Applicant have agreed the 'Clay Brick Toilet Block' as documented in the Enforcement Notice; will be completely removed from the site. Given Council withdrew the Enforcement Notice for plumbing matters related to the Clay Brick Toilet Block on 28 October 2014, the Applicant will need to apply for a demolition approval for the removal of the plumbing items.
- The Applicant agreed the 'Old Buffalo Lodge Hall' was located on the site without the necessary approvals and the building is not tied down and secured for the wind classification (e.g. C2 or C3) in the location.
- Council and the Applicant agreed it was possible the 'pink coloured three (3) room transportable building/ Old transportable building - mounted on raised platform behind hotel' may have been constructed prior to 1989 and it was jointly accepted as being approved.
- Council has accepted the '*Main Olive (colour) Four (4) Door Shed / Four (4) bay metal shed - concrete floor - located behind the Hotel*' may have existed when the Applicant purchased the property.

Reasons for the Decision

- During the hearing Council and the Applicant agreed the '*High Set Managers House*' was issued with a building approval however it has lapsed and no further building work has been completed.
- Council and the Applicant agreed the structure referred to as the '*Old Buffalo Lodge Hall*' does not have a building approval in accordance with the *Building Act 1975*. The Applicant agreed to apply for all the required approvals (e.g. town planning, building, etc.) to enable the building to stay on the property and to obtain a Final Inspection Certificate (Form 21). In the event the building cannot comply with the current building codes the building will be demolished.

Gordon Heelan
Building and Development Committee Chair
Date: 6th November 2014

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 Housing and Public Works
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 3237 0403 Facsimile (07) 3237 1248