



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

**Appeal Number:** 22 - 2013

**Applicant:** Mr Raymond David Foley

**Assessment Manager:** Brisbane City Council (Council)

**Concurrence Agency:**  
(if applicable)

**Site Address:** 131 Agnew Street, Norman Park and described as  
Lot 1 on SP 240016 — the subject site

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### Appeal

The appeal is made pursuant to section 533 of the *Sustainable Planning Act 2009* (SPA) in relation to an Enforcement Notice issued by Council. The Enforcement Notice was issued on the grounds that Council reasonably believes that a development offence under the SPA has been committed because Assessable Development has been carried out without a permit and the development does not comply with conditions of the Development Approval.

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**Date and time of hearing:** Wednesday 24 July 2013 at 10am

**Place of hearing:** The subject site

**Committee:** Mr Ain Kuru – Chair  
Mr Peter Rourke - Member

**Present:** My Raymond Foley – Applicant  
Ms Linda Rutherford – Observer  
Mr Steve Adams - Principal Urban Planner, Appeals Unit, Brisbane City Council  
Mr Mark Wighton - Built Environment Officer, Compliance and Regulatory Services, Brisbane City Council  
Ms Michaela Wright - Built Environment Officer, Compliance and Regulatory Services, Brisbane City Council

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### Decision:

In accordance with section 564 of the SPA, the Building and Development Dispute Resolution Committee (Committee) **dismisses** the appeal on the grounds that it does not have the jurisdiction to decide an appeal about an Enforcement Notice issued in respect of particular matters associated with a Material Change of Use of premises or a Reconfiguration of a Lot.

## **Background**

On 30 March 2010, Council issued a Development Approval for a Reconfiguration of a Lot, a Material Change of Use of the premises and a Preliminary Approval to carry out building work, which included the construction of a carport up to the Agnew Street property boundary.

The approval was subject to a number of conditions. Conditions 12, 13 and 15, which Council confirmed at the hearing were imposed pursuant to the Acceptable Solutions of P11 of the Single Unit Development Code of the Brisbane City Plan 2000, are relevant to this appeal.

In summary, condition 12 states that visitors parking bays are not to be fitted with a roller door or similar device. Condition 13 states no gates or similar devices are to be placed at the vehicle entrance. Condition 15 states the carport facing Agnew Street is to remain unenclosed with no garage doors.

On 8 March 2013, a Council officer inspected the subject site. The inspection revealed that a garage door had been installed in the entry to the carport in contravention of the conditions of the Development Approval.

On 8 March 2013, Council issued the Applicant with a Show Cause Notice providing them with an opportunity to make written representations as to why an Enforcement Notice should not be issued.

On 4 April 2013, the Applicant responded to the Show Cause Notice.

On 12 June 2013, Council issued the Enforcement Notice on the grounds that the Applicant had not shown sufficient cause why the Enforcement Notice should not be issued.

The Enforcement Notice states the Applicant has committed a development offence because:

- Under section 578 of the SPA, assessable development has been carried out without a permit. The Enforcement Notice states that pursuant to provisions of the Brisbane City Plan 2000, the construction of an open carport with a garage door does not comply with the Acceptable Solutions of the Residential Design – Single Unit Dwelling Code; and
- Under section 580 of the SPA, the Applicant has failed to comply with conditions of the Development Approval. The Enforcement Notice states that a garage door has been installed on the vehicle entry of the carport in contravention of conditions 12, 13 and 15 of the Development Approval, which requires the vehicle entry into the carport to remain open.

The Enforcement Notice also states that the premises are located in a Low-Medium Density Residential Area, and subject to the Bulimba District Neighbourhood Plan and Residential Design - Small Lot Code as defined in the Brisbane City Plan 2000. The Residential Design - Small Lot Code does include provisions that do not permit garage doors on open carports. However, it was confirmed at the hearing that the Small Lot Code does not apply in this case.

The Enforcement Notice, and in its correspondence to the Applicant (for example – refer to correspondence from Mr Colin Jensen dated 15 May 2013 – ref: CO14519-2013), Council indicated that an option was for him to seek a decision from the Committee.

The appeal was subsequently lodged by the Applicant in response to the Enforcement Notice issued to him as the owner of the land by the Council pursuant to section 533 of the SPA.

The Committee reviewed the appeal documents and was concerned about whether it had jurisdiction to decide the appeal. Despite its earlier advice, the Council also questioned whether the Committee could decide the matter as the Enforcement Notice was issued because of non-compliance with aspects of the

SPA outside the jurisdiction of the Committees. The Council argued that such matters can only be appealed to the Planning and Environment Court.

In view of the uncertainty about jurisdiction, both the Applicant and the Council were advised that the hearing would proceed and that the Committee would listen to their respective arguments about the appeal and would consider the question of jurisdiction before the Committee's final decision about the Enforcement Notice was made.

The Applicant considers grounds for the appeal are that the three conditions upon which the Enforcement Notice from Council are based are not relevant to the Applicant's situation because sufficient on-street parking is available on the Agnew and Little Bennett Street frontages.

The Applicant advised at the hearing that he had decided to install the garage door on the carport due to concerns about the security due to the ease by which people could enter the property. The Applicant also advised that in support of this action that:

- the Residential Design - Single Unit Dwelling Code does not prevent the placement of a door on the entry to a carport;
- there are sufficient car parking spaces available on the street; and
- the requirement for a visitor parking bay in a carport was not a sensible condition as visitors would use the available street parking, and would need to be invited to use the space.

At the hearing the Applicant explained that he was not aware that there was a statutory period of 20 days after an approval is given for negotiating changes to conditions (provided under section 361 of SPA). Further he advised that changes to condition 49 relating to stormwater had subsequently been agreed by Council outside the 20 day statutory period.

Council confirmed at the hearing that the Residential Design - Single Unit Development Code applies and that Performance Criterion P11 in particular, applies to the garage door in question. However, the Committee could find no apparent provisions in that Code that directly addressed the placement of garage doors on carports.

Questions arose at the hearing as to whether the Queensland Development Code (QDC) applied to the subject development.

The Council advised at the hearing that the arguments put forward by the Applicant had merit, but that the correct procedure for dealing with the matter would be an application for a Permissible Change under section 367 of the SPA. The Applicant objected to having to pay fees to correct what they believed are Council errors. The Council subsequently undertook to facilitate an application, including a possible concession of application fees.

On 8 August 2013 Marisa Menin, Team Manager, Development Assessment Branch, Brisbane City Council advised that application fee would be \$750, which the Committee understands is the full application fee.

### **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 Committees Registrar on 25 June 2013.
2. Council's Single Unit Development Code and Small Lot Code.
3. Queensland Development Code Part MP1.1 & MP1.2 (QDC MP 1.1 & QDC MP1.2).
4. *Sustainable Planning Act 2009* (SPA).

5. *Building Act 1975* (BA).
6. Brisbane City Plan 2000.
7. E mail from Steve Adams dated 8 August 2013 enclosing advice provided to the Applicant by Marisa Menin, Team Manager, Development Assessment Branch, Brisbane City Council.
8. Email from Applicant dated 8 August 2013 requesting the Committee decide the appeal.

### **Findings of Fact**

The Committee makes the following findings of fact.

A Development Approval with conditions was given for a Material Change of Use of the premise, a Reconfiguration of the Lot and a Preliminary Approval for building work.

The conditions of the Development Approval were imposed pursuant to the Residential Design - Single Unit Development Code of the Brisbane City Plan 2000. The Residential Design - Small Lot Code does not apply to the development.

The Development Approval included conditions that did not allow the placement of a garage door on the entry to the carport.

A garage door has been placed on the entry to the carport in contravention of the conditions of approval.

The Residential Design - Single Unit Development Code does not appear to contain any specific criteria relating to the design of carports. Whether the conditions of the Development Approval are relevant and reasonable are matters which can be resolved between the Applicant and Council, using the procedures for requesting a change to a development approval available under section 369 of SPA.

The QDC does not apply to the siting of the carport as the Council has applied alternative siting provisions under its planning scheme pursuant to section 33 of the *Building Act 1975* (BA).

Section 508 of the SPA establishes the jurisdiction of Committees. Among other things, the Committee has jurisdiction to decide any other matter that may be appealed to a Building and Development Committee under Divisions 4 to 7 of the SPA.

Division 4 deals with appeals about particular matters associated with a Material Change of Use. Division 4 is not relevant in this case as the jurisdiction of Committees does not extend to appeals against the issue of Enforcement Notices. Division 5 relates to Compliance Assessment and is not relevant in this case.

Division 6 deals with building, plumbing and drainage and other matters, including section 533, appeals against Enforcement Notices. However, the Enforcement Notice issued subject of the appeal is issued in respect of carrying out Assessable Development without a permit and compliance with a Development Approval. These are associated with a Decision Notice for a Material Change of Use of premises and a Reconfiguration of a Lot, and therefore not covered by Division 6.

Division 7 is about infrastructure charges and is not relevant in this case.

## **Reasons for the Decision**

Pursuant to section 526 of the SPA, an appeal to a Committee may only be about a matter that relates to the BA or a matter that under another Act may be appealed to a Building and Development Committee.

The Enforcement Notice was issued by Council on the basis that:

- Assessable Development had been carried out without a permit in contravention of section 578 of the SPA; and
- the conditions of the Development Approval had not been complied with in contravention of section 580 of the SPA.

The conditions imposed by Council have been imposed as part of the Development Approval for a Material Change of Use of the premises and a Reconfiguration of the Lot. The conditions do not relate to matters that can be appealed to the Committee pursuant to section 526 of the SPA. Therefore, the Committee does not have jurisdiction to decide whether the conditions in this case are relevant and reasonable.

An appeal in response to the subject Enforcement Notice can only be made to the Planning and Environment Court. Whether the conditions of the Development Approval are relevant and reasonable are matters which can also be resolved between the Applicant and Council, using the procedures for requesting a change to a Development Approval under section 369 of SPA.

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**Ain Kuru**  
**Building and Development Committee Chair**  
**Date: 27 August 2013**

## **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**