



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	17- 11
Applicant:	Frank Packer
Assessment Manager:	Fraser Coast Regional Council
Concurrence Agency: (if applicable)	N/A
Site Address:	18 Sunline Court, Wondunna and described as Lot 3 on SP 160940 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against an enforcement notice dated 8 February 2011, issued by Fraser Coast Regional Council under the *Plumbing and Drainage Act 2002* (PDA) regarding

1. The replacement of an existing sand filter installed on the subject premises with a Chief Executive (CE) approved treatment plant that produces secondary quality effluent in accordance with the (CE) approval.
2. Carry out any work necessary to the land application area to ensure any effluent generated by the treatment plant remains in the land application area.

By 10 March 2011 (the Enforcement Notice)

Date of hearing:	11:00 am on Tuesday 21 June 2011
Place of hearing:	Fraser Coast Regional Council offices
Committee:	Mr. Ian MacDonald– Chair Mr. Peter Marles-Committee
Present:	Mr. Frank Packer– Applicant Mr. David James–Fraser Coast Regional Council Mr. Andrew Rivera-property owner

Decision:

The Committee, in accordance with section 564 of the SPA allows the appeal and directs that the Enforcement Notice is of no force or effect.

Background

In October 2001 Hervey Bay City Council issued approval to Leddy Sergiacomi and Associates Pty Ltd for a Packer Wastewater System – Biological Sand Filter.

The relevant legislation at the time the above approval was issued was the “*Standard Sewerage Law*” and the “*Interim Code of Practice for On-Site Sewerage Facilities*”.

Hervey Bay City Council made the decision in 2001 to approve the above biological sand filter after corresponding with the Queensland Department of Natural resources.

A Plumbing Application was lodged with Hervey Bay City Council on or about the 9 June 2005 for a new dwelling on the subject site by the property owners A & R Rivera. The application includes details for a 3000 lt all purpose septic tank and sand filter with sub-surface effluent disposal as part of on-site sewerage facility to be constructed on the subject site. However the application details do not nominate a particular brand/type of sand filter other than to state that “*sandfilter installed to manufacturers specification*”.

Compliance Permit 056639 was issued in accordance with the Plumbing and Drainage Act 2002 with conditions relative to the sand filter to the applicants on 21 July 2005 and approving the lodged plans. An inspection Certificate for plumbing and drainage work was subsequently issued to the applicants on 14 March 2006.

Early in 2010 problems with the functioning of the biological sand filter were detected and brought to the attention of Fraser Coast Regional Council and Mr. Frank Packer by the owners

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 7 March 2011.
2. Standard Sewerage Law
3. The Interim Code of Practice For On-Site Sewerage Facilities
4. The Plumbing and Drainage Act 2002 Reprint No. 1A revised edition
5. The Plumbing and Drainage Act 2002 Reprint No. 3B
6. Written Submissions and Attachments 1 - 7 of the Respondent (Fraser Coast Regional Council)
7. Verbal submissions from the Appeal Applicant (Mr. Frank Packer) at the hearing
8. Verbal submissions form Fraser Coast Regional Council (Mr. David James) at the hearing
9. Application for a Compliance Permit for plumbing and drainage at the subject site
10. Hervey Bay City Council’s plumbing application file for the subject site
11. Fraser Coast Regional Council correspondence in relation to the sand filter dated 8 March 2010 and 19 May 2010
12. The Local Government Act 1993
13. The Local Government Act 2009
14. Show Cause Notice dated 22 December 2010
15. Enforcement Notice dated 8 February 2011
16. Instrument of Sub-Delegation dated 12 October 2010

Findings of Fact

The Committee makes the following findings of fact:

- In Queensland in 2001 plumbing and drainage was administered in accordance with the Standard Sewerage Law (SSL) under the Sewerage and Water Supply Act 1949 (SWSA).
- In accordance with the SSL type specification approval for a particular type of built item was given by the chief executive of the Department of Natural Resources.
- In accordance with the SSL a chief executive type specification approval was for 5 years.
- The packer wastewater system did not have chief executive type specification approval.
- The SSL and SWSA was repealed in 2003 and replaced by the Plumbing and Drainage Act 2002 (PDA).
- A compliance request for a compliance permit/certificate at the subject site was lodged with HBCC on 9 June 2005 and subsequently approved on 21 July 2005.
- The approved plan includes notation that “*sand filter installed to manufacturers specification*” however a specific manufacturer was not nominated on the approved plan.
- Section 96 **Approval for on-site sewerage facilities** (2) (e) of the PDA 1A rv states –
“ *The local government may give the approval only if-*
(e) *if the facility includes an on-site sewage treatment plant (other than an on-site sewage treatment plant consisting only of a septic tank)-*
 . (ii) *to the extent the plant consists of a built item – the plant conforms with a type specification approval*”.
- Section 101 **Codes and Standards for building, installing or operating on-site sewerage facilities** (4) of the PDA 1A rv states-
“*To the extent an on-site sewerage facility consists of a built item (other than an on-site sewage treatment plant consisting only of a septic tank), a person must not build, install or operate the facility unless-*
(a) *at the time the item was built, it had a current type specification approval; and*
(b) *it is operated as required by the conditions of the approval*”.
- PDA 1A rv Schedule Dictionary - “*built item means-* (b) *an element of an on-site sewage treatment plant, if the element is wholly built on the premises where the plant is, or is to be, used*”.
- Accordingly in 2001 a biological sand filter constructed as a built item where the effluent was distributed to a sub-surface land application area did not require type specification however a biological sand filter installed in 2005 required Chief Executive approval under the PDA 2002.
- HBCC accepted an endorsed Commissioning Report from Frank Packer installer of the domestic biological sand filter treatment system stating the system has been installed as per engineered drawings, the system has been tested and is fully operational.
- HBCC accepted a Designers Certification Statement from Clifford Searle of Water Wise Design Pty Ltd certifying the wastewater treatment unit and land application system is in conformity with the requirements of A.S 1547-2000. The statement also certifies that the designer inspected the on-site sewerage facility installation at the appropriate stages.
- The packer wastewater system (biological sand filter) was not constructed in accordance with the 2001 HBCC approved plans and conditions 1 and 9 – 11 of that approval have not been complied with.
- The biological sand filter has failed and gives off offensive odours.

- The decision to issue a show cause notice and enforcement notice was made by David James Plumbing Services Manager of the Assessment Manager relying on a sub-delegation made by instrument dated 12 October 2010 (the Instrument of Sub-Delegation).
- The Instrument of Sub-Delegation was stated to be made by Andrew Brien Chief Executive Officer of Fraser Coast Regional Council under section 1132 of the Local Government Act 1993 pursuant to an authority to make delegations conferred by an Instrument of Delegation from Fraser Coast Regional Council dated 19 August 2009.
- The Instrument of Sub-Delegation was executed by Lisa Desmond Acting Chief Executive Officer on 12 October 2010.

Reasons for the Decision

1. The Local Government Act 2009 (LGA 2009) commenced on 1 July 2009 and accordingly was the applicable law at the time the Instrument of Sub-Delegation was made.
2. Section 259 of the LGA 2009 states-
“(1) A chief executive officer may delegate the chief executive officer’s powers to an appropriately qualified employee or contractor of the local government”.
3. The LGA2009 Section 194(1) states -
“(1) A local government must appoint a qualified person to be its chief executive officer”.
4. The LGA2009 Section 195 states -
“A local government may appoint a qualified person to act as the chief executive officer during—
(a) any vacancy, or all vacancies, in the position; or
(b) any period, or all periods, when the chief executive officer is absent from duty or can not, for another reason, perform the chief executive officer’s responsibilities.
5. “Chief executive Officer” is defined in the LGA2009 as follows:-
“chief executive officer means a person who holds an appointment under section 194”.
6. An Acting Chief Executive Officer is not a Chief Executive officer as defined in the LGA2009.
7. The Instrument of sub-delegation was flawed in two respects:-
 - (a) it was expressed to be made pursuant to the Local Government Act 1993 on a date by which that Act had been repealed :and
 - (b) if it can be implied that the intention was to make a delegation pursuant to Section 259 of the LGA 2009 then the purported delegation was of no effect as it was not made by a Chief Executive Officer as defined in the LGA 2009 i.e. a person who holds an appointment under section 194.
8. Neither of the decisions to issue the show cause notice or the enforcement notice was made by a person to whom the necessary power to make those decisions had been delegated and accordingly the purported issue of the show cause notice and enforcement notice was not in accordance with sections 115 and 116 of the Plumbing and Drainage Act 2002.

Ian MacDonald
Building and Development Committee Chair
Date: 4 July 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
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