



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	20 - 2013
Applicant:	Mr Dusan Stankovic
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	126 Beelarong Street, Morningside and described as Lot 107 on RP 12846 — the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) in relation to an Enforcement Notice issued by the Brisbane City Council on the grounds that assessable development has been carried out without a permit and that a development offence may have been committed.

Date and time of hearing:

Place of hearing: Room 7A, Level 7, Mineral House, 41 George Street, Brisbane

Committee: Mr Ain Kuru— Chair

Ms Tamara Sticher - Member

Present:

Mr Dusan Stankovic – Applicant

Mark Higgins – Principal Investigator, Compliance and Regulatory Services, Brisbane City Council

Nicholas Goulter – Natural Environment Project Officer, Compliance and Regulatory Services, Brisbane City Council

Decision:

The Building and Development Dispute Resolution Committee (Committee) acknowledges that while there is a case for the tennis court and ancillary filling to be defined as building work, in accordance with section 564 of the SPA the Committee **dismisses** the appeal on the grounds that it does not have the jurisdiction to decide on an appeal about an Enforcement Notice issued in respect of Operational Work.

Background

The appeal was lodged by Mr Stankovic (the Applicant) in response to an Enforcement Notice issued to him by the Brisbane City Council (the Council) as the owner of the subject land. The appeal was pursuant to section 533 of the SPA.

The Enforcement Notice stated that the Applicant had carried out assessable development pursuant to section 578 of the SPA without a development permit. The nature of work carried out was Operational Work for Filling or Excavation in a Waterway Corridor, which is assessable development under the Brisbane City Plan 2000. The Enforcement Notice directed the Applicant to remove fill material outside the footprint of approved structures and provide a licensed surveyor's report demonstrating that pre development contours have been restored.

The grounds of appeal was that the earthworks was incidental to approved building work on the site, and was in accordance with the development approval issued by the Council. In particular the earthworks were necessary to maintain the structural integrity of the tennis court and to a lesser extent the house by diverting drainage water away from these structures so as to minimise movement of unstable soils. The applicant supported his appeal with a soil test and report by a registered Engineer.

Prior to the appeal against the Enforcement Notice, the Applicant had applied for and received a Development Permit for a Material Change of Use for a house and Preliminary Approval to Carry out Building Work by Council. The approved drawings show an elevated house on concrete piers and a tennis court at ground level. Condition 2 stated that no material of any description is to be deposited within the area of the waterway corridor, which covered the whole of the subject site.

The Applicant subsequently applied for a Development Permit to Carry out Building Work by PBJ Building Certification. This approval plans again show an elevated house on concrete piers and a tennis court at ground level.

The Committee reviewed the appeal documents and was concerned about whether it had jurisdiction to decide the appeal. It subsequently wrote to the Applicant and the Council pointing out that the filling of land is defined as Operational Work under section 10 of the SPA, unless it includes filling that is incidental to building work. Section 533 of the SPA is contained within Division 6, which only relates to building, plumbing and other matters. It subsequently requested written submissions from the Applicant and Council in response to this matter.

The Committee also advised the Applicant that if they decided to proceed with a hearing, the question about whether the Committee had jurisdiction would need to be resolved before the appeal against the Enforcement Notice could be considered.

The Applicant reiterated the grounds of appeal, that the earthworks were incidental to building work, and requested the Committee to proceed with a hearing.

The Council advised that in its view an appeal in relation to an Enforcement Notice under the SPA must be made to the Planning and Environment Court. The Council also acknowledged that it had made an error in the Enforcement Notice by stating that an appeal could be made to the Building and Development Dispute Resolution Committee.

On 28 June 2013, the Committee undertook a site visit. The Committee was met on site by the Applicant, but was unable to enter the site as the property was tenanted and arrangements to enter the property had not been made. In any case, the Committee was able to view the site from an adjoining easement.

The Committee observed an elevated house, which had been constructed on concrete piers, as well as a tennis court at the rear of the property. It appeared as if up to 300 mm of fill had been placed and levelled across the whole site, making it higher than surrounding land. Land around the house and tennis court appeared to fall and drain to the property boundaries. The Committee also observed that the two nearest houses were constructed on extensive fill.

Following the site visit, the Committee re-considered the appeal material provided to date and came to the view that there may be a case for the Committee to hear the appeal and proceeded to set a hearing date. The Council expressed the view that the Committee should only be dealing with the

question of whether it had jurisdiction to hear the appeal, and that it required further time to prepare its case to support the issue of the Enforcement Notice.

At the hearing, the Council stated that the proposal is defined as Operational Works under the SPA and is not within the jurisdiction of the Committee. The Council acknowledges the error in the Enforcement Notice which incorrectly stated that the applicant has appeal rights to the Committee, and that the matter should be resolved in the Planning and Environment Court.

In summary, additional points made by the Council were:

- The site is not ideally suited to housing due to its low lying conditions, and therefore special conditions were applied requiring the house to be raised, no filling material to be placed on the site and water flow was not to be impeded.
- The impact of the fill is that it pushes water onto neighbouring properties.
- The works in question were not identified on any approvals issued by Council and the presence of condition 10 of the underlying Development Approval ensures that any filling in the waterway corridor is not allowed;
- If the Development Permit to Carry out Building Work issued by PBJ Building Certification had approved the tennis court and the filling it would be contrary to the underlying development approval and therefore unlawful;
- No approved design specifications were provided by PBJ Building Certification to assess the tennis courts as a structure, and therefore it was not part of the approval.
- With the exception of the fence, the tennis court is not building work. Therefore the slab does not have to be designed and built in accordance with any specific standards.
- Even if the tennis court was defined as building work, none of the approvals issued allow for any fill.

The Council acknowledged that due to the time taken to pursue the matter with the Committee, the Applicant is outside the timeframes under the SPA however, Council would support a request to have the matter heard by the Court, even if that involved issuing a new Enforcement Notice.

Council also advised that they would consider a Development Application for Operational Works but would require survey data and engineering advice including a hydraulic assessment to ensure that the filling does not negatively impact upon surrounding properties.

The Applicant disputes that an 'offence' has been committed in that the filling was required incidental to the construction of the tennis court due to highly reactive clays. In particular the fill was necessary to ensure that surface water is drained from the area in accordance with Australian Standard AS2870, thereby protecting the footings from excessive movement.

In summary, additional points made by the Applicant were:

- The tennis court was illustrated on the plan approved by both the Council and PBJ Building Certification.
- All earthworks carried out on the site are incidental to the structures including house and tennis court.
- There is extensive fill on adjoining sites and as a result water is directed onto the Applicant's land.
- The natural ground levels used by Council for determining the extent of fill are not a true indication of the natural ground level. The Applicant claimed that the site was low lying due to previous removal of earth from the site, which is not reflected in the survey undertaken by Council.
- All earthworks undertaken were minimal so as to not create an impact.
- The request by Council to excavate the fill is technically unacceptable from an engineering perspective and Australian Standard AS2870, and would result in damage to the tennis court as well as scouring of the site. In addition, established irrigation systems and gardens would need to be removed.

The Applicant was not able to provide any survey data to support the claim that the extent of fill is not a true indication of the natural ground level. The Council advised that it might be able to provide historical survey data associated with the construction of the sewer. The Council was not able to provide this information, however provided a further submission reiterating the points made previously and providing some aerial photos dating back to 1995. This submission was not considered by the Committee.

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 22 May 2013. This includes the Show Cause Notice, Enforcement Notice, Domestic Soil Test Report, and Engineer's Inspection Report.
2. Town Planning documents for the proposed house downloaded from the Brisbane City Council website. These comprise of the Town Planning Report, related correspondence, neighbour submission, and Negotiated Decision Notice.
3. E mail from the Applicant dated 11 June 2013 responding to the Committee's request for a submission on the Committee's jurisdiction, advising that they wished to proceed with the hearing, and reiterating the reasons why they believe the earthworks are building work associated with the construction of the tennis court.
4. Submission from Brisbane City Council dated 11 June 2013 responding to the Committee's request for a submission on the Committee's jurisdiction, advising that the Committee does not have jurisdiction under the SPA to hear appeals relating to Operational Work.
5. Further e mail submission from the Applicant dated 11 July 2013.
6. *Sustainable Planning Act 2009* (SPA).
7. *Building Act 1975* (BA).

Findings of Fact

The Committee makes the following findings of fact:

Jurisdiction of the Committee

Section 508 of the SPA establishes the jurisdiction of Committees, and the particular matters are set out in Divisions 4 to 7. Division 4 deals with appeals about particular material changes of use; Division 5 about compliance assessment; Division 6 about building, plumbing and drainage and other matters; and Division 7 about infrastructure charges. The Enforcement Notice issued by the Council states it may be appealed under section 533 of the SPA to the Committee. However section 533 is contained within Division 6, which relates only to building, plumbing and drainage and other matters. Section 526 outlines matters about which a person may appeal under Division 6, and none of these matters relate to operational work as defined by the SPA.

Therefore the Committee does not have jurisdiction to decide an appeal related to an Enforcement Notice issued in respect of Operational Work.

Definition of Building Work

The Applicant's key argument is that the filling of the land should be defined as building work as it is incidental to the construction of the tennis court. However, the Council has questioned whether construction of the tennis court should be defined as building work.

Section 10 of the SPA defines 'Building Work' as:

- (a) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or*
- (b) work regulated under the building assessment provisions, other than IDAS; or*
- (c) excavating or filling -
 - (i) for, or incidental to, the activities mentioned in paragraph (a); or*
 - (ii) that may adversely affect the stability of a building or other structure, whether on the land on which the building or other structure is situated or on adjoining land; or**
- (d) supporting (whether vertically or laterally) land for activities mentioned in paragraph (a).*

The Dictionary in Schedule 3 of the SPA defines 'building' as:

... 'a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a floating building and any part of a building.'

'Structure' is not defined by the SPA, however the Dictionary in the Building Act 1975 (BA) defines 'structure' as:

... 'includes a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure.'

None of these definitions would support the Applicant's argument that construction of the tennis court and associated fill is defined as building work.

Section 10 of the SPA defines 'Operational Work' as:

- (c) excavating or filling that materially affects premises or their use; or*
- (d) placing an advertising device on premises; or*
- (e) undertaking work in, on, over or under premises that materially affects premises or their use; or ...*

While this is not clear, the Explanatory Notes for the Sustainable Planning Bill 2009 provide the following explanations which appear to imply that building work relates to structural aspects of a building, assumedly those under the jurisdiction of the BA:

Clause 10 defines the five aspects of development and other terms used in the definition of development. The five aspects are mutually exclusive – for example, an aspect of development cannot be both building work and operational work. However, a particular project or proposal may involve two or more aspects of development.

Example - A proposal to develop a vacant lot for a dwelling house involves:

- a material change of use (the start of a new use of premises);*
- building work (the structural aspects of the dwelling);*
- plumbing and drainage work (the plumbing and sanitary drains to and from the lot boundary); and*
- operational work (driveways and landscaping).*

It should be noted that this description is out of step with current planning practice, as building work has a broader interpretation under planning schemes including the form and materials used in a building or structure.

On the other hand, the Explanatory Notes state that:

... is a broad category of work which covers a range of development activities. Examples of operational work are given in the definition, and include extracting sand and gravel, earthworks for drainage purposes and constructing free-standing advertising signs ...

Neither the Act's or Explanatory Notes provide sufficient clarity as to whether a tennis court should be defined as building work.

The Committee examined the Brisbane City Plan for guidance and found that tennis courts and swimming pools were referred to as ancillary structures to a house under the House Code. The trigger for a house in the Environmental Protection Area is a Material Change of Use and/or building work, and therefore this lends weight to the Applicant's argument that the tennis court should be defined as building work.

However, the tennis court is not made assessable pursuant to section 21 of the BA, and therefore the Building Code of Australia and Australian Standard AS 2870 is not a legal requirement, though it may be good construction practice.

Filling of land is defined under section 10 of the SPA as building work if it is incidental to building work or may adversely affect the stability of a building. The Development Permit for a Material Change of Use issued by the Council and the Development Permit for Building Work issued by PBJ Building Certification do not show any filling of land associated with the proposed house, despite impact of filling of the land in this location being a clear consideration under the Brisbane City Plan.

Reasons for the Decision

Despite the Committee finding that there is a case for the tennis court and ancillary filling to be defined as building work, the Committee does not believe it has the jurisdiction to decide an appeal about an Enforcement Notice issued in respect of Operational Work.

In addition, the Committee does not believe the Applicant has provided sufficient evidence to demonstrate that the extent and amount of fill on the site was necessary. Specifically the advice provided by the Engineer did not address this issue, nor was there any supporting survey data. The Committee also believes that further advice would need to be provided by a qualified hydraulic Engineer that the proposed fill would not have a detrimental impact on surrounding properties.

Ain Kuru - Chairperson
Building and Development Committee Chair
Date: 31 July 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