



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 48 - 12

Applicant: Leon David Gibb

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

Concurrence Agency: Not Applicable
(if applicable)

Site Address: 25 Tamworth Street, Annerley Brisbane QLD 4103 and described as Lots 187 and 188 on RP 37789 County of Stanley Parish of Yeerongpilly (the subject site)

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009 (SPA)* against the issue of an Enforcement Notice (Ref: C1434431) by the Council for carrying out assessable development without a permit and contravening a development approval.

Date of hearing: 3 December 2012

Place of hearing: The subject site

Committee: Danyelle Kelson – Chair
Greg Rust – General referee

Present: Leon Gibb – Applicant
Trevor Gerhardt – Applicant’s representative
Brisbane City Council, represented by:

- Alex Chrisafulli, Planning Compliance Officer, Compliance and Regulatory Services
- Sean Stamp, Principal Investigator, Special Investigation Unit
- Stephen Warner, Principal Urban Planner, Development Assessment, Planning Services South Team

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA confirms the decision of the Council to issue the Enforcement Notice but amends the Enforcement Notice by substituting the “Requirements” as follows:

REQUIREMENTS

The Applicant is to take the following actions by the specified time or date:

1. Cease building work associated with the Material Change of Use Development Permit – Single Unit Dwelling and the building approval dated 20 August 2012 issued by Trevor Gerhardt until further notice.

NOTE: Notice is to be given by Council when all other permits or approvals required by this Enforcement Notice have been obtained.

2. Within 14 business days of this decision, survey (or otherwise accurately measure) the fence erected at the frontage of the site and provide the results of the survey or measurement to the Council.
3. Within 21 business days of this decision make application to the Council pursuant to section 369 of SPA requesting that Council change the development approval to reflect the current built form of the single unit dwelling including setbacks, GFA, and all additional structural elements such as fencing.
4. Within 7 business days of the satisfaction of the previous requirement, and if necessary because of its height above natural ground level, make application for a development permit for building work in respect of the fence to a private certifier.
5. Within 21 business days of this decision make application to the Council for any development approval necessary for assessment of the single unit dwelling as now constructed against the relevant codes (e.g. Character Code) in the City Plan.
6. If any of the above applications are refused, restore the premises as far as practicable to comply with the existing requirements of development permit A00303043 by 30 June 2013.

Background

The site is a large (810m²) suburban allotment comprising 2 titles in the Low-Medium Density Residential zone, within a Demolition Control Precinct and the Stephens District Local Plan under the Council's City Plan 2000 (City Plan).

The site is improved with a highset pre-1946 weatherboard dwelling which has recently been relocated within the property and has undergone extensive renovation and extension, including a completely enclosed lower storey forming habitable rooms.

On 2 June 2011, Council issued a development approval under SPA for:

- Carry out Building Work Preliminary Approval under s241 – Single Unit Dwelling, Multi-Unit Dwelling
- Material Change of Use Development Permit – Multi-Unit Dwelling
- Material Change of Use Development Permit – Single Unit Dwelling
- Reconfigure a Lot Development Permit – Subdivision of Land.

On 8 August 2012, the Council, acting upon a complaint, inspected the site for compliance with the development approval. Upon inspection, the Council formed the belief that development offences were being committed and determined to issue an Enforcement Notice on the following grounds:

“Council reasonably believes you have committed, or are committing, a development offence under the *Sustainable Planning Act 2009* (“the Act”) in that under:

- a. Section 578 Carrying out assessable development without a permit, (1) a person must not carry out assessable development unless there is an effective development permit for the development; and
- b. Section 580 Compliance with development approval, (1) a person must not contravene a development approval, including any condition in the approval.”

The specific instances of non-compliance relied on by the Council to issue the Enforcement Notice were:

- a. A deck has been constructed above the carport
- b. The single unit dwelling has been enclosed on the lower floor level, which has increased the Gross floor area ("GFA")
- c. The front and rear stairs of the single-unit dwelling have been removed
- d. The carport is approximately eleven hundred millimetres (1100mm) from the side boundary in lieu of fifteen hundred millimetres (1500mm)
- e. The front fence has a maximum height of twenty-nine hundred millimetres (2900mm).

The Enforcement Notice was issued on 6 September 2012 and required the Applicant to:

1. Cease all building work on the premises until further notice. No further building work is to occur until further notice.
2. Apply for a Development Permit, with the view of gaining approval from Council for the non-compliant front fence, deck above the carport and increased gross floor area associated with the single use dwelling and conscientiously pursue the application for the purpose of obtaining development approval from Council;
3. Apply for a Development Permit (building approval) with the view to gaining approval from a private certifier and conscientiously pursue the application for the purpose of obtaining a development permit (building approval) from a private certifier and provide a copy of the approval directly to the investigating officer;
4. If the development application is refused by Council, restore, as far as is practicable, the premises to comply with the development permit A003030343.

The Enforcement Notice was issued without a show cause notice as Council had formed the view that the development was significant and further work may not be able to be remedied if works were permitted to continue while representations from a show cause were considered.

On 20 August 2012, after the inspection by Council had taken place, but before the issue of the Enforcement Notice, the Applicant engaged the services of a private certifier and made a development application for building work. The application was approved and a development permit for building work was issued on that same date. Council was notified of the appointment of the private certifier and the application and approval documents on 30 August 2012. The Enforcement Notice states that on 5 September 2012 a search of the Council's records indicated that although a private certifier had been appointed, no decision notice had been issued.

This appeal was commenced on 26 September 2012. The appeal was commenced within time and the Committee otherwise has jurisdiction to hear the appeal.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds of appeal, documents and correspondence accompanying the appeal lodged with the Registrar on 26 September 2012
2. Enforcement Notice issued 6 September 2012
3. Decision Notice, development approval package and approved plans for Application No. A003030343 dated 2 June 2011
4. Lodgement of Building Work Documentation (including approved plans) from Gecon Building Certifiers dated 20 August 2012

5. A “generally in accordance with” application made on behalf of the Applicant for an adjustment of the proposed lot boundaries to accommodate a road dedication on the Tamworth Road frontage and survey error, which was approved by Council on 21 November 2012
6. Planning application documents for Application No. A003030343 sourced from Council’s PD-Online database – including the full town planning report of Metrospect, Planning Consultants accompanying the application, excerpts of which were provided by the Applicant with the original appeal documentation
7. Submission/opinion of Mr Paul R Smith, Barrister at Law dated 26 November 2012 supplied by the Applicant
8. Joint Memorandum of Advice of Mark Hinson SC and James Lyons, Barrister at Law dated 24 August 2010 supplied by the Respondent
9. Further submission/opinion of Mr Paul R Smith, Barrister at Law dated 7 December 2012 supplied by the Applicant
10. *Sustainable Planning Act 2009* (SPA)
11. Sustainable Planning Regulation 2009 (SPR)
12. *Building Act 1975* (BA)
13. Building Regulation 2006 (BR)
14. Brisbane City Plan 2000 (City Plan)
15. The parties’ verbal submissions at the hearing

Findings of Fact

The Committee makes the following findings of fact:

The site

The site is at 25 Tamworth Street, Annerley and more particularly described as Lots 187 and 188 on RP37789 County of Stanley, Parish of Yeerongpilly.

It is comprised of two regularly shaped adjacent allotments of 405m² each with frontages to both Tamworth and Swansea Streets. The total land area of the site is 810m².

Under City Plan, the site is contained within the Low-Medium Density Residential Area. It is within a Demolition Control Precinct and within the Stephens District Local Plan.

The site is improved with a pre-1946 weatherboard dwelling, which is protected under City Plan.

The Applicant became the registered owner of the site on 12 January 2012.

The development approval

The site is subject to a development approval given by the Council to the former owners of the site on or about 2 June 2011 (the development approval).

The development approval comprised the decision notice dated 2 June 2011, the development approval package setting out the conditions of development and the approved plans stated in the approval package, subject to a later amendment to the proposed lot layout the subject of the “generally in accordance” approval dated 21 November 2012.

The development approval was for:

- Carry out Building Work Preliminary Approval under s241 – Single Unit Dwelling, Multi-Unit Dwelling
- Material Change of Use Development Permit – Multi-Unit Dwelling
- Material Change of Use Development Permit – Single Unit Dwelling
- Reconfigure a Lot Development Permit – Subdivision of Land.

The approval was intended to facilitate the development of the site for the relocation of the existing dwelling closer to the Tamworth Street frontage, its conversion to a Single Unit Dwelling, the erection of a 2 unit multi-unit dwelling and reconfiguration of the lots to accommodate the Single Unit Dwelling on a lot fronting Tamworth Street of less than 400m² and the Multi-Unit Dwelling on a 411m² lot fronting Swansea Street (the development proposal).

To give effect to the development proposal, further development permits for carrying out building works were required for both the Single Unit Dwelling and the Multi-Unit dwelling.

The application for development approval attracted submissions which were amongst other matters concerned about the GFA of the development. The GFA of the development was marginally in excess of the Acceptable Solutions in the Residential Design – Low Density, Character and Low-Medium Density Code in City Plan.

The building approval

On 20 August 2012:

- (a) the Applicant appointed a building certifier to assess a building development application;
- (b) the building development application was submitted to the private certifier to approve building work associated with the existing pre-1946 dwelling on the site
- (c) the private certifier issued a Development Permit for Building Work for the relocation of and alterations to the existing pre-1946 dwelling.

The Committee finds that on balance having regard to the material, the building approval was to further the development proposal the subject of the development approval.

The Committee also finds that on balance, it is likely that much of the building work had been undertaken before the building approval was sought and obtained.

The building approval is not in accordance with the development approval; in particular, it approved works in respect of the single unit dwelling which were not generally in accordance with the approved plans and documents, increased the GFA of the development and changed the approved setbacks.

The works

At the date of hearing, it was reasonably apparent that the building work approved by the building approval had been substantially completed. Statements to that effect were made by the Applicant's representative at the hearing.

The pre-1946 dwelling had been relocated forward on the property and had undergone renovations and extensions which included enclosing the lower level of the dwelling to create habitable rooms and the construction of a deck over the carport with access from the upper level. The front stairs to the "upper" level had been removed with an entry established on the lower level. Verandas had been constructed across the full "upper" level.

Enclosing the lower level of the dwelling has increased the GFA of the development. Access to the deck over the carport has required the demolition of certain pre-1946 elements which were not part of the development approval.

A fence of less than 50% transparency and erected on a block retaining wall has been erected on the Tamworth Street frontage. The height of the fence structure including the retaining wall appears in excess of two metres high.

The works at the site are not "generally in accordance with" the development approval.

Reasons for the Decision

It is an offence under s578(1) of SPA to undertake assessable development without an effective development permit for the development. Under the Building Act, s20 provides that all building work is assessable development and therefore requires an effective development permit before it can be undertaken, unless it falls within certain categories of self-assessable or exempt development.

The Council's inspection of the premises on 8 August 2012 revealed that building work had been undertaken at the site. Having regard to the Enforcement Notice itself, it would seem that the work undertaken was not insignificant and certainly involved assessable development.

At the time of the Council inspection, there was no permit in effect which authorised the carrying out of any building works at the site. Neither the Preliminary Approval nor the Material Change of Use Development Permit – Single Unit Dwelling authorised building work to occur. The building approval was not sought or obtained until 20 August 2012.

To the extent that building work had been or was being undertaken, up to 20 August 2012, it was undertaken without a permit in contravention of s578(1) of SPA, and a development offence had been committed.

It is perhaps regrettable that Council's search of its records on 5 September 2012, immediately before its issue of the Enforcement Notice did not disclose the building approval which had issued on 20 August 2012 and had been submitted to the Council pursuant to the Building Act on 30 August 2012, as to an extent that information may have altered the requirements for action in the Notice. In particular requirement 3 (to apply for and conscientiously pursue an application for a building permit with a certifier) has on its face been satisfied.

However, there are serious questions regarding whether the building approval is effective as, for reasons more particularly discussed below, it is not compliant with the development approval to which it is related, and there is a requirement that the Applicant obtain a preliminary approval for some parts of the development. In such circumstances a private certifier must not approve a building development application (see sections 84 and 83 of the Building Act, respectively).

This conveniently leads the Committee to a consideration of the second of the grounds the Council relied upon to issue the Enforcement Notice – contravention of a development approval including condition of approval, which s380(i) of SPA casts as an offence.

By virtue of:

- (a) s244(a) of SPA, the development approval includes all conditions imposed by the Council as assessment manager;
- (b) s245(1) of SPA, the development approval attaches to the site and binds the owner and the owner's successors in title, including the Applicant;
- (c) s241(1) of SPA, the Preliminary Approval approves development to the extent stated in the approval and subject to the conditions of the approval but does not authorise assessable development to take place;
- (d) s243 of SPA, the development permits for material change of use and reconfiguration of a lot authorise development to take place to the extent stated in the relevant permit and subject to the conditions of the permit;

- (e) s83(1) of the Building Act prohibits the private certifier from granting the building approval until all necessary preliminary approvals under SPA are effective for other assessable parts of the development;
- (f) s84(1) of the Building Act, the private certifier could not approve the building approval if it related to the earlier development approval granted by the Council and was inconsistent with the development approval.

The development approval must be read as a whole and is neither intended to nor capable of being dissected so that its constituent "parts" are developed separately without reference to each other. Each part of the approval is supportive of and contingent on the others to facilitate the overall development proposal for the site. The constituent parts of the development approval in essence create a "scheme" of development for the site. A person who chooses to exercise the rights granted under the development approval is bound by the approval, its terms and conditions.

The following conditions of approval from the Material Change of Use Development Permit – Single Use Dwelling were considered relevant to the Committee's decision:

"35 Carry Out The Approved Development

Carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)."

The condition includes the note "This condition refers to the approved plans, drawings and documents to which the approval relates and is the primary means of defining the extent of the approval. Approved plans, drawings and documents are stamped PLANS and DOCUMENTS referred to in the APPROVAL and are dated to reflect the date of approval of the application by Council's Delegate".

"36 Complete All Building Work

Complete all building work associated with this development approval, including work required by any of the following conditions. Such building work is to be carried out generally in accordance with the approved plans, drawing(s), and/or documents and, where the building work is assessable development, in accordance with a current development approval."

"37 Maintain the Approved Development

Maintain the approved development (including landscaping, parking, driveways and other external spaces) in accordance with the approved drawing(s) and/or documents and any relevant Council or other approval required by the conditions."

This condition is subject to the Guideline:

"This condition restricts changes that can be made to the approved development. Approved plans and documents are stamped PLANS and DOCUMENTS referred to in the APPROVAL and are dated to reflect the date of determination of the application by the Council's delegate. The extent to which plans can be modified is constrained by the requirements of the relevant planning legislation. Please note to investigate the legislation applicable to the approval. It will be necessary to make a new application if the change does not meet the specifications of the relevant planning legislation."

"42 Front Fence Materials and Design

Any front fence is to be constructed to either:

- A maximum height of 1.5 metres above the front alignment ground level, with a minimum 50% transparency; or
- A maximum height of 1.2 metres above the front alignment ground level, if less than 50% transparency"

If development was to proceed on the site pursuant to the development approval, the conditions relied upon by the Committee in reaching this decision make it abundantly clear that development was to take place in accordance with the approved plans and documents which are stamped and dated 2 June 2011.

The necessary first stage of the development proposal authorised by the development approval was to relocate the existing pre-1946 dwelling on the site and to undertake the works contemplated by the conditions outlined above. The form of development for the single use dwelling, its layout and limitations are as expressed in the approved plans and conditions of the development approval.

Those plans indicate that the pre-existing dwelling is to be relocated within the site closer to the Tamworth Street frontage. The plans indicate the removal of some post-1946 additions such as demolishing and replacing the front stairs. It was proposed, and the approved plans indicate, that the undercroft of the dwelling was to remain unenclosed and screened with timber battens.

The plans also indicate that the proposed carport was to be setback 1500mm from the eastern boundary of the site where an adjacent building is close to the lot alignment.

Much of the focus of the applicant's oral submissions as advanced by his representative, was on the various Codes in the City Plan and their applicability or otherwise to the assessment of a building development application. The submissions failed to address the essential substance of the Enforcement Notice, namely the development approval and compliance with it. The representative repeatedly avoided the subject and cautioned his client against responding to direct questioning by the Committee and Council representative about whether the building approval was evidence of the development approval being "enacted" or actioned as stated in the Enforcement Notice.

In reaching its finding that on balance the building approval was to further the development proposal the subject of the development approval, the Committee considered certain indicators within the material including:

- (a) the 'generally in accordance with' application made by the Applicant in November 2012;
- (b) the approved building approval plans which refer to the "critical set out" for the future subdivision (see Drawings BA 01 and BA 03 Revision A);
- (c) the Applicant's apparent admission to the Council Inspector on 8 August 2012 that the development approval was being "enacted".

As stated above, once it is accepted that the building approval was necessarily related to the development approval:-

- (a) the approval, including all conditions of approval attach to the site and bind the Applicant;
- (b) development must take place in accordance with the conditions of and to the extent stated in the relevant approvals;
- (c) the private certifier could not approve a building approval inconsistent with the development approval.

The most striking and obvious non-compliance of the building approval (and the building works) with the development approval is the enclosure of the lower level of the existing dwelling, effectively creating an additional 112m² of GFA on site, according to the building development application details. The Committee did not separately calculate GFA under the development approval, GFA for the site amounted to 435.1m² or 0.537 times the site area, which represented a minor non-compliance with the Acceptable Solutions of the Residential Design – Low Density Character and Low-Medium Density Code in City Plan. If the additional GFA as stated in the building development application is correct, it represents a marked increase in the GFA on the site, and a variation to the development approval.

In concert with GFA, site boundary clearances and setbacks are a means by which the size, bulk and scale of potential developments are mitigated or controlled. In this instance, there has also been a non-compliance with the setbacks imposed by the development approval. Although relatively minor, the Committee accepts the point well made by the Council that where an impact assessable application is made (as this was) and is publicly notified in accordance with SPA, the public has a reasonable expectation that the development will be in accordance with the plans advertised.

The Committee recognises that the submission received when the development application was publicly notified related in part to concerns about GFA. The planning report supporting the development application addressed the fact that the GFA was marginally above the relevant Acceptable Solutions arguing the development proposal met the relevant Performance Criterion partly because the proposed design otherwise resulted in a compliant building envelope having regard to building height, setbacks, open space and car parking.

There was some argument devoted to the characterisation of the structure atop the car port and whether it was a “deck” or a “trafficable roof area”.

The Committee is satisfied that having regard to the analysis of the term “deck” by the Committee constituted in Appeal 58-11 – Cowan v Brisbane City Council, the structural element in question is a “deck”.

Further, the Committee is satisfied that the construction of the deck above the car port which is not shown on the approved plans attached to the development approval, triggers a code assessable application to the Council under the Residential Design – Character Code. The purpose of the Code is not to regulate building work which is assessed under the building assessment provisions identified in s30 of the Building Act but to assess building work for its “traditional character” in terms of building form and scale, street context, materials and detailing and setting in order to retain, strengthen and complement precincts around pre-1946 housing.

Having the benefit of considered submissions on the point from both parties, the Committee is satisfied that the Council can require assessments of the character aspects of a development. Such an assessment is not inconsistent with the building assessment provisions.

The Committee is also satisfied that the partial demolition of the pre-1946 fabric of the dwelling to facilitate use of the deck from the dwelling, required preliminary approval for building work under Council’s Demolition Code.

The front fence mentioned in the Enforcement Notice does not comply with condition 42 of the development approval. It is of panel construction and sits quite significantly higher than 1.2m atop a retaining wall structure. There is evidence the retaining wall has been in situ for some time, however the fence is clearly new. It does not appear on any of the approved plans. A survey of its height was not provided, and there was some oral argument about whether it was 1.8m or 2.8m above the retaining structure. The height of the fence is to be determined for the purpose of the Building Regulation (Schedule 1 – prescribed building work for the Act, section 21) to be above natural ground level. Given the age of the existing development of the site, that information is likely to be difficult to determine. However, the fence is close enough to two metres to warrant further consideration and may require building application to be made.

Having regard to the above, the Committee is satisfied that there were sufficient grounds for the Council to issue the Enforcement Notice under appeal. However the Committee will vary the requirements for actions to be taken to better secure the outcomes sought.

Recommendations

The Committee notes that during the course of the hearing the Council raised a number of other “non-compliances” not referred to in the Enforcement Notice such as the width of the driveway crossover and the veranda which has been installed across the upper level frontage of the dwelling. These matters may also require attention and although it is not prepared to

make orders in connection with these matters, the Committee recommends that the parties meet to discuss the details of the applications the subject of its orders at a “pre-lodgement” meeting to ensure that the applications comprehensively deal with all matters of concern.

The Committee was encouraged in this regard by the indications from the Council of a willingness to discuss options to resolve the issues amicably.

Danyelle Kelson

Building and Development Committee Chair

Date: 13 March 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:

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Building Codes Queensland
Department of Housing and Public Works
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