



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	24 - 16
Applicant:	Professional Planning Group (PPG) (on behalf of Simmonds Homes)
Assessment Manager:	Professional Certification Group Pty Ltd (PCG)
Concurrence Agency: (if applicable)	Moreton Bay Regional Council (Council)
Site Address:	80 Swan Parade, Warner, Qld, 4500 and described as Lot 167 on SP267535 - the subject site

Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to refuse a development application for a development permit for building work for the construction of a class 1a dwelling house. The decision notice issued by the Assessment Manager stated the reason for the refusal was the Council not issuing a concurrence agency response within 10 business days as required under schedule 15 of the *Sustainable Planning Regulation 2009* (SPR).

Date and time of hearing:	1.30 pm Thursday, 1 September 2016
Place of hearing:	Building Codes Queensland Office, Mineral House, Level 16 / 41 George Street, Brisbane, Queensland
Committee:	Samantha Hall – Chair Linda Tait – Member
Present:	Ain Kuru - Director, Professional Certification Group Pty Ltd & Professional Planning Group John Reeve - Director, Professional Certification Group Pty Ltd Chris Trewin - Building and Plumbing Manager, Council Chris Hyde - Development Compliance, Council Ben Rolf - Development Compliance, Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(c) of the SPA, **sets aside** the decision of the Assessment Manager to refuse the development application and instead decides that the development application lapsed pursuant to section 273 of the SPA.

Background

The background to this appeal is complicated.

Development application and decision

On 14 January 2016, a development application was lodged with the Assessment Manager and was considered to be properly made. The development application was for a development permit for building work to construct a class 1(a)(i) building, being a single detached dwelling in a residential subdivision on the subject site (development application).

On 2 February 2016, the Assessment Manager approved the development application subject to conditions (the approval). The Assessment Manager did not refer the development application to the Council prior to deciding the development application.

Following receipt of the development approval, Simmonds Homes commenced construction of the dwelling house.

Referral

The subject site forms part of the land which is subject to an existing approval, being a material change of use (preliminary approval overriding the planning scheme) and development permit for reconfiguring a lot (reference DA/20033/2008). The approval includes a condition requiring development to be generally in accordance with the approved plans, including the Plan of Small Lots Ref: 114551-15 prepared by RPS (Small Lot Plan). Further the approval includes a condition identifying that the level of assessment and applicable codes for material change of use, operational works and building works applications carried out on the land forming part of the approval shall be assessed in accordance with the Residential A Zone of Part 2, Chapter 4 of the PineRiversPlan.

It follows that as the subject site has an area of 426m², the abovementioned existing approval requires any development on the subject site to comply with the Small Lot Plan and also with the Detached Houses on Small Residential Lots Code of the *Pine Rivers Plan 2006*. Where the two conflict, the Small Lot Plan prevails.

The parties have acknowledged that the siting of the dwelling on the subject site, the subject of the development application, does not comply with the Small Lot Plan, as it is not located within the building envelope shown on that plan.

On 28 April 2016, the Council contacted the Assessment Manager to advise that the dwelling, already under construction, was not located within the approved building envelope shown on the Small Lot Plan.

Later on 28 April 2016, the Assessment Manager lodged a "generally in accordance" application (GIA) with the Council.

On 4 May 2016, the Council advised the Assessment Manager that it did not support the GIA.

On 13 May 2016, the Assessment Manager referred the development application to the Council, seeking a relaxation for the siting of the dwelling as being not in compliance with the *Pine Rivers Plan 2006* (first referral).

On 17 May 2016, the Assessment Manager and the Applicant met with officers of the Council, who advised that it was their view the only way the dwelling could be approved was by amending the preliminary approval, specifically the Small Lot Plan, by way of an impact assessable development application.

On 24 May 2016, the GIA was withdrawn.

On 27 May 2016, the adjoining property owner contacted the Assessment Manager objecting to the siting variation.

On 9 June 2016, Mr Trewin of the Council advised the Assessment Manager that the Council did not have jurisdiction as a concurrence agency to assess the concurrence referral and the development application was returned.

On 28 June 2016, the Assessment Manager referred a development application to the Council, this time seeking a relaxation for the siting of the proposed house on the subject site as being not in compliance with the *Moreton Bay Regional Council Planning Scheme 2016* (MBRC 2016) (second referral).

There is contention between the parties as to whether a new development application was made which was the subject of both the first referral and the second referral or whether both those referrals were with respect to the development application.

The Assessment Manager and Applicant contend that new development applications were made.

The Council asserts that it was given no evidence of new development applications having been made.

On 1 July 2016, the Council advised the Assessment Manager that it was not a concurrence agency for the development application.

The Assessment Manager considered the Council's refusal to provide a concurrence response as a deemed refusal in accordance with section 286(2) of the SPA, subsequently issuing a refusal of the development application by decision notice dated 13 July 2016.

On 18 July 2016, the Applicant filed an appeal with the Committee's Registrar against the Assessment Manager's decision to refuse the development application.

On 30 August 2016 at 3pm, the Committee members undertook an inspection of the subject site. The following day, 1 September 2016, the appeal hearing was held off site with all parties present.

The Applicant, in its written submission given to the Committee at the hearing, identified the grounds of appeal in summary as being:

- (a) that the Council is a concurrence agency in accordance with the SPR, and did not provide a response within the prescribed period of 10 days; and
- (b) the proposed house and built to boundary wall satisfies the performance criteria of the MBRC 2016 and therefore should be approved.

On 26 July 2016, the Council informed the Committee that it believed the appeal was invalid for the following reasons as summarised:

- (a) the second referral identified the incorrect trigger or jurisdiction for the referral within Table 1, Schedule 7 of the SPR;
- (b) the second referral was in respect of the development application but the development application had already been decided by the Assessment Manager and the SPA does not deal with a referral being made to a concurrence agency after a development application has been decided;
- (c) the second referral was referred after the decision notice was issued approving the development application and consequently, the Assessment Manager issued both an approval and a refusal in respect of the same development application.

The Council's issues are based in the Council's understanding that the second referral was in respect of the development application and that no further development application had been made. The Applicant and the Assessment Manager disagree with this.

The Council's assertions were the subject of additional materials provided to the Committee by each party and following the hearing of the appeal, additional time was given to the parties for the purposes of seeking an alternative resolution of the issues.

No alternative resolution was achieved and the Committee proceeded to consider and decide this appeal.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for appeal/declaration', grounds for appeal and correspondence accompanying the appeal lodged with the Committee's Registrar on 18 July 2016.
2. Email from Ain Kuru of the Applicant to the Committee's Registrar dated 18 July 2016.
3. Email from Chris Trewin of the Council to the Committee's Registrar dated 26 July 2016.
4. Email from Ain Kuru of the Applicant to the Committee's Registrar dated 1 August 2016, enclosing legal advice prepared by Gadens lawyers dated 1 August 2016.
5. Email from Chris Trewin of the Council to the Committee's Registrar dated 9 August 2016.
6. The Committees' on site inspection of the subject site and immediate locality on 30 August 2016.
7. Numerous documents and extracts provided by the parties at the hearing, including written submissions provided by the Assessment Manager and site photographs and other materials provided by the Council.
8. Email from Ain Kuru of the Applicant to the Committee's Registrar dated 9 September 2016, enclosing legal advice prepared by Gadens lawyers dated 9 September 2016.
9. Letter from the Council to the Committee's Registrar dated 19 September 2016, enclosing additional materials.
10. *Sustainable Planning Act 2009 (SPA)*.
11. *Building Act 1975 (BA)*
12. *Sustainable Planning Regulation 2009 (SPR)*.

Findings of Fact

The Committee makes the following findings of fact:

Issues in the appeal

The parties presented voluminous materials to the Committee which considerably broadened the issues in the appeal as initially identified in the Application for Appeal.

The Committee has distilled the issues down to the following:

- (1) Was the second referral made to the Council in respect of the development application or a subsequent development application lodged with the Assessment Manager?
- (2) Was a concurrence agency referral to the Council the appropriate mechanism to obtain approval of the proposed dwelling?

- (3) Does the proposed dwelling and specifically the built to boundary wall of the proposed dwelling, satisfy the relevant planning provisions such that the development application should be approved?

Issue 1 - Status of second referral

Making a development application for building work to a private certifier

Pursuant to sections 11 and 48(1) of the *Building Act 1975* (BA), PCG, as a private certifier, was the Assessment Manager for assessing a development application for a development permit for building work (described as a building development application under the BA).

Generally, a building development application is assessable development under section 20 of the BA.

Building development applications are assessed and decided in accordance with the relevant IDAS stages in the SPA, specifically Chapter 6, parts 2 to 5.

General requirements for making building development applications are those set out in the IDAS process in sections 260 to 264 of the SPA (in Chapter 6, part 2).

Sections 260 to 263 of the SPA, relevantly provide that each application must be made to the assessment manager, be in the approved form, be accompanied by any mandatory supporting information identified in the approved form, be accompanied by the prescribed fee and provide the owners consent.

Chapter 3 of the BA sets out requirements in addition to those in the SPA, for making building development applications. Specifically:

- (1) section 23 of the BA sets out the supporting documents that are required for building development applications and section 24 of the BA describes the required information for supporting documentation;
- (2) section 25 of the BA relevantly provides that the supporting documents must demonstrate that the building work will comply with the building assessment provisions (BAP), other than IDAS.

Section 30 of the BA relevantly provides that building assessment work must be carried out under IDAS subject to the other BAPs (section 34 of the BA).

Chapter 6, part 3 of the SPA sets out the information and referral stage of IDAS.

Section 272 of the SPA, relevantly provides that an applicant must, within 20 business days after receiving an acknowledgment notice, give to a referral agency the following (referral agency material):

- (1) a copy of the application;
- (2) a copy of the acknowledgement notice;
- (3) the referral agency's fee.

Pursuant to section 273 of the SPA, a development application lapses if the relevant material is not given to the referral agency in accordance with section 272 of the SPA.

Section 274 of the SPA relevant provides that an application that would otherwise lapse may be revived if within 5 business days of it otherwise lapsing, the applicant gives the assessment manager a notice that the applicant seeks to revive the application.

Section 285 of the SPA, requires a concurrence agency to give its referral response to the assessment manager within the prescribed assessment period.

Pursuant to schedule 15 of the SPR, the prescribed assessment period for a local government as concurrence agency for building assessment work for a single detached class 1(a)(i) building is 10 business days.

Section 286(2) of the SPA, relevantly provides that if a concurrence agency does not provide a referral response within the prescribed assessment period, it is taken to be a refusal of the building development application.

It is worth noting that section 46 of the BA provides the jurisdiction for a concurrence agency to carry out building assessment work under the BAPs, including IDAS.

Pursuant to section 83(1)(d) of the BA, a private certifier must not grant a building development approval if there is a concurrence agency for a part of the building assessment work, until that concurrence agency has assessed that that building work under the BAPs. It is noted that this is an offence provision which carries a maximum penalty of 165 penalty units.

Sections 357 to 359 of the SPA deal with missed referral agencies.

Section 357 of the SPA, relevantly provides that if an applicant has not referred an application to a referral agency as required under section 272 of the SPA, a written notice can be given by the applicant, the assessment manager or a referral agency advising that the referral has not been carried out.

Section 358 of the SPA, relevantly addresses what happens in the IDAS process if a notice is given under section 357 of the SPA during the information and referral stage or the notification stage for the application.

Section 359 of the SPA, relevantly addresses what happens in the IDAS process if a notice is given under section 347 of the SPA during the decision stage.

If a notice is given under section 357 of the SPA and either section 358 or 359 apply, then the application does not lapse under section 273 of the SPA.

The SPA does not make any provision about the effect of a missed referral agency after an application has been decided.

The facts

The material accompanying the appeal lodged with the Committee's Registrar, included IDAS Forms 1 and 2, both of which are undated. It is unclear whether these forms are the IDAS forms for the development application or whether they were lodged at a later date and evidence a subsequent development application.

The following is noted in respect of the Forms 1 and 2:

- (1) the Form 1 identifies the applicant's reference number as 00029984;
- (2) the applicant is Simmonds Homes;
- (3) the premises is 80 Swan Parade, Warner more particularly described as lot 167 on SP 267535;
- (4) the proposed building work is "New Construction of Dwelling - 2 Storey";
- (5) the Form 1 has been left blank in the sections "Office Use Only", "Notification of Engagement of a Private Certifier" and "QLeave Notification and Payment".
- (6) the Form 2 has also been left blank in the sections "Office Use Only" and "For Completion by the Building Certifier".

No other material has been provided in respect of the development application.

The following is noted in respect of the decision notice approving the development application:

- (1) The Building Certifier Reference Number is 00029984;
- (2) the applicant is Simmonds Homes;
- (3) the address of the site is 80 Swan Parade, Warner more particularly described as lot 167 on SP 267535;
- (4) the works are described as "New Construction of Dwelling - 2 Storey".

The email sent to the Council on 13 May 2016 by the Assessment Manager as the first referral, did not identify the documents that formed part of the referral material. However, it seems the first referral included a Council form titled "Concurrence agency referral in relation to Class 1a and Class 10 buildings & structures" (first concurrence form), a one page note supporting the application and a bundle of plans.

It is unclear whether any IDAS Forms 1 and 2 were provided to the Council in the first referral.

The following is noted in respect of the first referral:

- (1) the subject line in the email sent to the Council on 13 May 2016 is "Relaxation Application for Your Ref No: q2370 / Our Ref File: 00029984 Lot 167 No: 80 Swan Parade WARNER";
- (2) the referrer is Simmonds Homes, care of the Assessment Manager;
- (3) the address of the site is 80 Swan Parade, Warner more particularly described as lot 167 on SP 267535;
- (4) the proposed building work is described as a dwelling.

The Committee finds that the first referral was made in respect of the development application for the following reasons:

- (1) the applicant, site details, description of proposed work and most significantly the Assessment Manager's reference number are the same for the development application, the approval and the first referral; and
- (2) no new IDAS Form 1 and Form 2 were provided to the Council.

It was unclear to the Committee from the material accompanying the appeal lodged with the Committee's Registrar as to what documents accompanied the second referral. At the hearing of this appeal, Mr Trewin of the Council provided the Committee with a copy of an electronic file titled "Pathway (Production)" which was the electronic file uploaded by the Assessment Manager to the Council's website and comprised the documents accompanying the second referral.

The second referral comprised the following documents:

- (1) an email sent by the Assessment Manager dated 28 June 2016 with the subject line "Concurrent Application - 80 Swan Parade WARNER - For Your Ref No: q2370 / Our Ref File: 00029984 Lot 167 -";
- (2) a cover letter dated 28 June 2016 with the re:
"Concurrence application for BA ref No 00029984
Lot: 167 on SP
80 Swan Parade
WARNER 4500";
- (3) a Council form titled "Concurrence agency referral in relation to Class 1a and Class 10 buildings & structures" (second concurrence form), in which the following is noted:

- (a) the referrer is Simonds Homes, care of the Assessment Manager;
 - (b) the address of the site is 80 Swan Parade, Warner more particularly described as lot 167 on SP 267535;
 - (c) the proposed building work is described as a dwelling;
- (4) a letter to the Council from Gadens lawyers dated 27 June 2016;
 - (5) a document titled "Submission to Support Concurrence Application";
 - (6) a bundle of plans.

The Committee finds that the second referral was also made in respect of the development application for the following reasons:

- (1) the applicant, site details, description of proposed work and most significantly the Assessment Manager's reference number are the same for the development application, the approval and the second referral; and
- (2) no new IDAS Form 1 and Form 2 were provided to the Council.

The Committee's decision

A properly made development application was lodged with the Assessment Manager on 14 January 2016.

Pursuant to section 272 of the SPA, referral should have been made to the Council within 20 business days after an acknowledgement notice was issued and the referral should have included the referral agency material.

The Committee has not been provided with any material regarding the issue of an acknowledgment notice, however, there is no dispute that the Assessment Manager issued a decision notice approving the development application on 2 February 2016.

The first referral did not occur until 13 May 2016, nearly 4 months after the development application was lodged and nearly 3 months after the development approval was granted.

The second referral occurred on 28 June 2016, nearly 6 months after the development application was lodged and nearly 5 months after the development approval was granted.

At no time between the making of the development application and the making of the second referral, did a party give a notice under sections 274 or 357 of the SPA.

Neither the first referral nor the second referral included a copy of the IDAS Form 1 and Form 2, nor a copy of any acknowledgement notice.

The Committee is therefore satisfied that section 272 of the SPA has not been complied with and that none of the relevant notices that may have revived the development application pursuant to sections 274 or 357 of the SPA have been given by the parties. Accordingly, the development application lapsed under section 273 of the SPA.

The Committee considered whether its power under section 564(1) of the SPA to make "the orders and directions it considers appropriate" would be broad enough to revive a lapsed application, similar to the powers of the Planning and Environment Court under section 440 of the SPA.

A decision in this regard has not been necessary, however, as the Committee is satisfied that even if the power in section 564(1) of the SPA is sufficiently broad, the Committee does not "consider it appropriate" to exercise the power, given that the Council, as referral agency, had not

been given the opportunity to consider the development application prior to the purported approval of the development application by the Assessment Manager.

Issues 2 and 3

Given the Committee's decision that the development application lapsed, there is no need to proceed to consider issues 2 and 3.

Reasons for the Decision

The development application lapsed pursuant to section 273 of the SPA, as section 272 of the SPA was not complied with in respect of the provision of the referral agency material to the Council, nor the making of the referral within the prescribed time period.

The parties did not revive the lapsed development application by issuing a notice pursuant to either section 274 or 357 of the SPA.

The Committee did not need to consider whether it had power pursuant to section 564(1) of the SPA to revive the lapsed application, because even if it did have such power, the Committee does not "consider it appropriate" to exercise the power.

Samantha Hall
Building and Development Committee Chair
Date: 14 October 2016

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
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