Building and Development
Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	**40-10**
Applicant:	Terrence Davis
Assessment Manager:	Banana Shire Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	63 Grevillea St, Biloela and described as Lot 404 on B7442 — the subject site

Appeal

1. Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against the giving of an enforcement notice by Council under section 248 of the *Building Act 1975* (BA). The enforcement notice was issued by Council in relation to building works being carried out without an effective development permit.
2. Appeal under section 532 of the SPA against an information notice that should have been given under section 85(10) of the *Plumbing and Drainage Act 2002* (PDA) by Council for the refusal to give a compliance permit for regulated work or on-site sewage work.

Date of hearing:	Section 533 hearing held at 10.30am on Friday 2 July 2010 Section 532 heard by written submissions
Place of hearing:	Biloela Courthouse
Committee:	Steve Adams – Chair Trevor McCubbin – Referee Jim Graham – Referee (not present at hearing)
Present:	Terrence Davis – Applicant Rick Drew – Applicant's representative Andre Dalton – Council representative John McDougall – Council representative

Decision:

1. Appeal under Section 533

The proposed 'food premises' is in excess of 200m^2 'total use area' and in accordance with the Banana Shire Planning Scheme (the scheme) requires a development permit for a material change of use (MCU).

As a result of the error in calculating 'total use area', the private building certifier did not comply with

section 83 of the BA and ensure all other necessary development permits had been acquired, therefore the development permit (carrying out building work) issued by Burnett Country Certifiers (the certifier) on 30 March 2010 is invalid.

The Committee, in accordance with section 564(1) of the SPA **confirms the validity of the enforcement notice** served on the applicant by Council on 28 May 2010. The Committee also **amends** the enforcement notice by replacing the existing points 28 and 29 of the notice with the following new points 28 and 29:

28. It is considered that the works are of a minor nature, being merely minor filling work prior to more extensive construction, therefore a show cause notice is not required to be given under s248(3) of the BA.
29. Pursuant to section 592 of SPA, you are required to:-

    - cease all building works on the premises until further notice; and
    - apply for any and all necessary development permits for the proposed 'food premises', as required under the scheme within thirty (30) business days after the day notice of the Committee's decision is given to the parties.

      OR

    - cease all building works on the premises until further notice; and
    - modify the proposal to ensure it complies with the 'self assessable' provisions for a 'food premises' under the scheme; and
    - obtain a development permit - building approval for a class 6 building (restaurant) for the modified proposal; and
    - lodge a copy of the development permit with Council in accordance with section 86(1) of the BA within thirty (30) business days after the day notice of the Committee's decision is given to the parties.

    In the event neither of the above options are complied with you are required to restore, as far as practical, the premises to the condition it was in immediately before the assessable development was started within forty (40) business days after the day notice of the Committee's decision is given to the parties.

    Any of the previously stated timeframes may be extended with the agreement of Council.

2. Appeal under Section 532

The Committee, in accordance with section 564 of the SPA **reverts** the assessment process back to a point prior to the assessment of the compliance request under section 85(3) of the PDA and makes the following **orders**:

1. the applicant is to provide Council with any and all relevant information required by the Standard Plumbing and Drainage Regulation 2003 after obtaining a development permit (MCU) for the proposal under SPA or the design is modified to comply with the self assessable provisions of the scheme.
2. on receipt of the new information, Council will undertake its assessment in accordance with the timeframes specified in sections 85(3) to 85(12) of the PDA.

Background

The subject site is a rectangular block 624 m^2 in size, with parallel road frontages to Grevillea St and Kariboe Lane. The site is located in the 'Town Zone' and the 'Commercial Precinct' under the the scheme.

On 15 March 2010, the owner lodged a compliance request seeking a compliance permit for regulated or on-site sewerage work under section 78 of the PDA.

On 16 March 2010, the owner of the subject site engaged the certifier to assess a development permit - building approval for a class 6 building (restaurant) for the subject site.

An application for a development permit - MCU was not lodged with the Council on the basis the proposal was considered to comply with the self assessable requirements for a 'food premises' under the scheme.

On 30 March 2010, the certifiers issued a decision notice under section 334 of the SPA granting a development permit - building approval for a class 6 building (restaurant) for the subject site subject to conditions.

On 31 March 2010, in accordance with section 86(1) of the BA, the certifiers lodged with Council a copy of the development permit for archival purposes.

On 12 April 2010, Council issued an information request under section 85 of the PDA seeking additional information.

On 6 May 2010, the owner provided additional information in response to the information request.

On 27 May 2010, Council issued a second information request under section 85 of the PDA. The request also indicated that the proposed restaurant exceeded the 200m^2 'total use area' and that under the scheme a planning approval would be needed. The request indicated that the plumbing application could not be approved until the planning application was approved.

On 28 May 2010, Council issued an enforcement notice under section 248 of the BA and section 590 of SPA. The notice indicated that:

- the proposed food premises exceeded 200m^2 in 'total use area';
- in the Commercial Precinct of the Town Zone, a food premises is only self assessable under the scheme were the total use area does not exceed 200m^2;
- under the scheme a food premises exceeding 200m^2 required a development permit - MCU;
- the building approval issued by the certifier was invalid as no development permit - MCU had been granted, therefore the building approval was granted contrary to section 83 of the BA, which prohibits the issuing of a building permit prior to the granting of all other necessary permits;
- as the building approval was invalid, the works carried out on site were a development offence under section 578(1) of SPA as assessable development had been carried out without a development permit; and
- all building work was to cease immediately and the site was to be restored to its original state.

On 9 June 2010, the applicant's representative lodged an appeal with the Registrar of the Building and Development Committees against the enforcement notice and the information notice.

On 30 June 2010, Council sent a letter to the owner and applicant's representative stating their appeal was invalid and requesting the immediate withdrawal of the appeal.

On 2 July 2010, a hearing was held in the Biloela Courthouse to discuss the issues in relation to the enforcement notice. At the time it was the Committee's belief that it did not have the authority to consider the plumbing and drainage appeal aspect of the appeal. The Committee later determined that it did have the authority, as the appeal had been lodged against an information notice that

should have been given by Council. The Committee was re-established and a further hearing was held by written submissions.

At the hearing of 2 July 2010, the applicant's representative raised issues about the validity of the enforcement notice issued by Council. Council also raised issues about the validity of the applicant's appeal. The issues of validity were and the grounds raised in Council's enforcement notice were discussed.

At the hearing the Committee attempted to broker a compromise which would allow the applicant to proceed with part of the proposal. Council was open to the suggestion, however the applicant was unwilling due to a lack of trust in the Council.

It should be noted that the applicant's representative declined to take a copy of the Council's written submission presented at the hearing, despite the Committee's recommendation to do so.

The balance of this background is separated into two parts. Part 1 relates to the enforcement notice issued under SPA and Part 2 relates to the information notice that was able to be given under PDA.

PART 1 - Enforcement Notice

Because of the number of issues raised it is necessary to address each separately and in order of consequence, that is the validity of the appeal to the Committee must be determined first, in order to be able to proceed to determination the validity of the enforcement notice.

a) Validity of Appeal to Committee

At the hearing and in written submissions Council sought to have the appeal to the Committee struck out on the basis that the owner of the subject site, the recipient of the enforcement notice, was not listed as the applicant on the Form 10 – Application for appeal/declaration. Furthermore the form was not signed by the owner. The applicant and signatory indicated on the appeal form was the applicant's representative from Burnett Country Certifiers.

The Council argued that section 533(1) of the SPA clearly restricts the right of appeal against an enforcement notice to the person on whom it was served. The Council acknowledge that SPA provides for an applicant to be represented during the proceedings by a representative, however they argue that only the person served the notice may initiate the appeal.

To support their position Council cited the judgement of his Honour Judge Michael Rackemann in the Planning & Environment (P&E) Court Appeal of *Cooloola Shire Council vs Suncoast Building Approvals* (2007). In summary, Cooloola Shire Council (CSC) initiated an appeal in the P&E Court against a decision of a Building and Development Tribunal (No. 03-07-044). The Tribunal appeal was initiated by Suncoast Building Approvals against a concurrence agency response by CSC. The Tribunal appeal was not against the concurrence agency response, but against the manner in which it was given. The Tribunal found in favour of Suncoast and set aside the CSC response and replaced it with a new decision. In the subsequent P&E Court appeal, Judge Rackemann determined that Suncoast had no right to appeal to the Tribunal as they were not the applicant for the development application as required under section 4.2.11 of the *Integrated Planning Act 1997* (IPA). The Tribunal's decision was consequently dismissed.

Council acknowledges that whilst the P&E appeal was in relation to Division 3 of Part 2, Chapter 4 of IPA regarding appeals against development applications, they argued the Court's decision can be equally applied to Division 4 of Part 2, Chapter 4 of IPA regarding appeals against enforcement notices. They also argue that the reasoning applied in the case, may also be applied to Division 6, Subdivision 3 of Part 2, Chapter 7 of SPA as these provisions mirror those found under IPA.

In their written submission of 13 July 2010, the applicant's representative acknowledges that they

made an error in completing and lodging the appeal notice, however they argue this is not enough to conclude the appeal is invalid and that a common sense approach must be used. The applicant's representative argued that:

a) whilst their name appeared on the appeal notice, a signed authority from the applicant giving permission for them to act on the applicant's behalf was submitted with the appeal notice.

b) the applicant personally attended the hearing.

Because of these two points, it is argued that it is not possible to state that the applicant was not supportive of the appeal to the Committee. It was also argued that the applicant's representative's name on the appeal notice does not result in a situation that hurts either party's position in the appeal.

The applicant's representative also argued that the Committee, via the Registrar, sent him a letter acknowledging the lodgement of the appeal and that letter recognised that they were acting as the representative of the applicant, and therefore the Registrar accepted the legislative requirements had been met. The applicant's representative indicated that as the Council made a submission prior to the hearing regarding the validity of the appeal, had the Committee at that stage determined the appeal notice was incorrect, the hearing would not have proceeded in the way it did, or the application could have been corrected to show the applicant's details.

In response to the P&E Court case cited by Council, the applicant's representative advised in his written submission of 13 July 2010 that they had contacted Suncoast and their client Ausmar Homes, both of whom confirmed that Suncoast initiated the appeal to the Tribunal without support or participation from Ausmar. Nor did Ausmar Homes participate in the P&E Court hearings. The applicant's representative indicated that the judge had explained to the parties that had Ausmar participated in the hearing the matter would have proceeded.

The applicant's representative also noted that the Committee members at the hearing recognised that the owner was the person who would be affected by any decision of the Committee, and that whilst the owner didn't make any written submissions the Committee in questioning the owner directly recognised that the owner through his actions wanted to appeal the enforcement notice.

b) Validity of Enforcement Notice

The applicant's representative by way of verbal and written submissions sought to have the Council's enforcement notice dismissed on the following grounds:

a) That if the Council officers did not have powers of entry under the *Local Government Act 1993* (LGA) to enter the applicant's to serve the enforcement note, the notice should be dismissed. Furthermore the officer did not produce identification when serving the notice, which is also grounds for dismissal.

b) That if it could not be shown that the Chief Executive Officer (CEO) of Council had delegated authority under the LGA to sign the enforcement notice, the document is invalid.

c) That under sections 248(3) and 248(4) of the BA the Council was required to issue a show cause notice prior to the issuing of an enforcement notice.

d) That under section 590(4) of SPA, the Council was required to consult with the private certifier, being Burnett Country Certifiers, prior to issuing the enforcement notice.

At the time the enforcement notice was issued the now repealed LGA, specifically Part 5, Chapter 15, stipulated the powers of entry for local authority officers and the need to present identification.

In their written submission and supporting documentation of 9 July 2010 the Council indicated the enforcement notice was handed to the owner of the subject site on the footpath outside his residential address. The submission from Council includes a statement from the Council officer who

served the notice, and a corroborating statement from another officer who witnessed the serving of the notice.

The Council argued that as the notice was served in person on public property being the footpath outside the applicant's residence, and not private property, the power of entry provisions of the LGA have no relevance in this case. The Council also referenced s39(1)(a)(i) of the *Acts Interpretation Act 1954* (AIA) regarding the service of documents, in which they noted the AIA provides for numerous methods of delivery, including the personal delivery of a document.

Other than by way of raising the issue, the applicant nor their representative have made written or verbal representations contradicting the Council's statements regarding the way the enforcement notice was served. In the representative's submission of 13 July 2010, they indicated they would supply an email from the applicant regarding the location of service, however no further material was submitted.

At the time the enforcement notice was issued the now repealed LGA and Local Government Regulation 2005 (LGR) stipulated the requirements with respect to the delegation of local authority powers, specifically section 472 of the LGA and section 26 of the LGR.

In its written submission of 9 July 2010 the Council indicated its CEO had delegated authority to sign enforcement notices as per the requirements of the LGA. Extracts from Council's 'Register of Delegations' were provided indicating the CEO had the delegated authority by virtue of Council resolutions on 10 December 2008 and 21 December 2009 to issue enforcement notices under section 248 of the BA and section 590 of SPA.

Neither the applicant nor his representative have made written representations questioning the validity of the CEO's delegated authority following receipt of the additional information from Council.

At the hearing and in their written correspondence of 5 July 2010, the applicant's representative indicated that it was unclear whether the enforcement notice had been issued under the BA or SPA. At the hearing the Council advised that the notice had been issued under section 590 of SPA. This matter impacts upon when a show cause notice is required to be issued prior to an enforcement notice.

The applicant's representative argued that under sections 248(3) and 248(4) of the BA the Council was required to issue a show cause notice prior to the issuing of an enforcement notice because according to the provisions of the BA a show cause notice must be issued where the building works are of not of a minor nature. The representative indicated that the Council themselves had stated in point 28 of the enforcement notice "that the building works are not of a minor nature".

At the hearing the Council advised that it did not consider it appropriate to issue a show cause notice because the works were not minor in nature as indicated in the enforcement notice. They also stated that it was not appropriate to issue a show cause as building work had already commenced and a show cause notice would not stop building work from continuing. Council did not elaborate in its written submissions or at the hearing why the works are not considered minor. At the hearing Council indicated they considered it to be in the best interests of the applicant to stop the works because of the risk that Council may require design changes during the assessment of the MCU application. Had building work been allowed to continue the costs of rectifying the design would have been greater for the applicant.

In its written submission of 9 July 2010 the Council state that they did contact the private certifier prior to issuing the enforcement notice and therefore complied with section 590(4) of SPA. In the submission, the Council officer who served the enforcement notice indicated they contacted the building certifier by telephone on 28 May 2010 to discuss Council's concerns and why they intended to issue a notice. Council indicates in it submission and extracts from file notes that the representative responded negatively and indicated they would be contacting the tribunal and media.

Council served the enforcement notice shortly after the phone call.

The applicant's representative in their submission of 13 July 2010 confirms that Council made contact by phone on 28 May 2010 and that they gave the Council officer the "short shrift" and advised the matter would be appealed and the media contacted. The applicant's representative did not consider a single telephone call advising of the intention to issue an enforcement notice to be consultation. The representative also questioned whether Council ever intended to consult given the enforcement notice was issued about 15 minutes after their telephone call. The applicant's representative also provided a dictionary definition of the word "consult".

The applicant's representative considered that Council had sufficient time, being eight weeks from the time the building approval was lodged, to contact the applicant or their representative by letter to explain their concerns and arrange a meeting to discuss the matter.

c) Grounds of Enforcement Notice - Total Use Area

According to the Scheme the 'total use area':

> "means total area in square metres used for a purpose and includes all storeys of buildings, display areas, storage, outdoor dining areas, and entrances, but excludes car parking areas, access driveways and landscaped areas."

In their submission of 9 July 2010, Council indicates that they calculated the total use area to be 281.488 m^2. Their calculations are based on the dimensions provided on the approved plans and included the entire:

- outdoor area, excluding a 0.955 m x 5.233 m strip on either side
- enclosed floor space measured from outside the external walls
- partially enclosed rear ramp/services area measured from outside the external walls

Other than visually depict the area calculated and quote the definition of 'total use area' contained in the Scheme, Council provided no additional reasons why areas where included or excluded, or provided insight into interpreting the definition.

In the written material lodged with the appeal notice, the applicant's representative expressed the opinion that Council had confused the Scheme definition of 'floor area' with 'total use area'. The applicant's representative believes the definition can be interpreted in two ways, that the use area is the total land area used for the purpose or the use area is only the area of the building used for the purpose. As the Council did not have a town planner available to provide advice, the applicant's representative made the best determination they could with help from the draftsman and advice from the Department of Infrastructure and Planning. That determination was that only those parts of the building essential to the functioning of the intended use of the restaurant are included.

In determining the use area the representative only included the:

- entrances (less travel paths required by the Building Code of Australia for fire safety)
- inside dining area
- outside dining area (excluding landscape areas)
- reception/bar area
- kitchen
- storage area
- one disabled toilet

According to the approved floor plan (Drawing No. GD0109-01 Rev. F) submitted to Council the

calculated use area was 184.4 m^2, which excludes internal and external wall thicknesses. The plan also does not include the one disabled toilet in the calculated area which is in the order of 5.4 m^2 excluding any travel path through the airlock. The plan indicates that the total enclosed area of the restaurant plus the outdoor dining area is 246.5 m^2.

The applicant's representative advised that the area of the airlock and second toilet were not included because the Building Code of Australia only required one shared toilet for this size of restaurant. The second toilet and airlock were merely additions at the request of the applicant's partner. As they weren't essential they weren't included in the calculation.

The applicant explained that the office was not for the restaurant, but to be used mainly by their children as a study/play area. A telephone would be available behind the bar, with a fax and other office needs at their residence.

The applicant also explained that the rear change room and bathroom were for use by their parents who have a camper and travel regularly. The area was a facility was for the parents convenience when they stopover and not for use by restaurant patrons or staff.

The applicant's representative advised that should the Committee determine the proposal exceeded 200 m^2 they would remove the outdoor dining area which would allow the use to proceed, and apply later for a MCU to include the outdoor dining area.

d) Other Issues

In their submissions of 1 July and 9 July 2010, Council raised additional issues in regard to:

(a) the validity of the certifier's decision notice because the correct lot description of the property had not been used.

(b) an operational works approval for the car parking area appears necessary before the building permit can be issued, which indicates another breach of s83 of the BA.

The applicant's representative advised that the incorrect lot description was merely a typographical error and that it does not cause a problem as the street address is correct. The applicant's representative was also satisfied that they had assessed the proposal against all the relevant codes, including the Development Standards Code which is used for car parking, and was satisfied the self assessable requirements of the Scheme had been met.

PART 2 - Information Notice

In written submissions the applicant's representative has argued that both plumbing and drainage information requests issued by the Council are invalid under the PDA for the following reasons:

a) Council's first information request was issued after the 10 business day period allowed for under section 85 of the PDA. The compliance request was lodged with Council on 15 March 2010 and the first information request was dated 12 April 2010 which is beyond the date it should have been issued.

b) The PDA only allows for one information request to be issued, therefore the second request issued by Council dated 27 May 2010 is invalid. Furthermore the second request was well beyond the decision period allowed for under the PDA and raised issues beyond plumbing and drainage, being the requirement for a planning application.

The applicant's representative argued that as the first information request was invalid, the 20 day decision period started on 16 March 2010 and the deemed refusal date was effectively 15 April 2010. Despite this the owner submitted additional information in response to the first request on 6 May 2010. The applicant's representative noted that the second request raised three issues, other than the planning matter, that may have been conditioned as part of a compliance permit.

Given sufficient information has been provided and it is possible to condition the other matters raised in the second (invalid) request, the applicant's representative requested the Council be directed to issue a compliance permit.

In its written submission dated 1 July 2010, the Council indicated that it was in the best interests of the owner not to issue the compliance permit on the grounds the required planning approval may result in changes to the design. Had the under-slab plumbing been completed it may have been costly to rectify had design alterations been required. In its submission Council indicated that it had the right under the PDA to issue more than one information request where the applicant had not demonstrated compliance, however the specific provision of the PSA which granted these rights was not highlighted. The Council provided no argument in relation to the timing of the information requests.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Application for appeal/declaration – form 10' and grounds of appeal, letter of authorisation, extracts and correspondence from Council accompanying the appeal lodged with the Registrar on 9 June 2010;
2. Enforcement notice issued under *Sustainable Planning Act 2009* by Council dated 28 May 2010;
3. Information requests issued by Council under *Plumbing and Drainage Act 2002* dated 12 April 2010 and 27 May 2010;
4. Letters sent to the applicant and applicant's representative by Council, both dated 30 June 2010, regarding validity of appeal;
5. Site inspection carried out by the Committee prior to the hearing;
6. Verbal submissions from Council representatives at the hearing;
7. Verbal submissions from the applicant and applicant's representative at the hearing;
8. Written submission from Council dated 1 July 2010, presented at the hearing;
9. Written submission by applicant's representative (post - hearing) dated 5 July 2010 regarding validity of enforcement notice and Committee's powers to consider plumbing issue;
10. Written submission from Council (post hearing) dated 9 July 2010 regarding the validity of the appeal, powers of entry and delegated authority;
11. Written submission by the applicant's representative (post hearing) dated 13 July 2010 regarding the validity of the appeal and the enforcement notice;
12. Written submission from the applicant's representative dated 13 August 2010 regarding the validity of information notices issued under the PDA;
13. Site plan, floor plan and construction details for the development;
14. Planning & Environment Court Judgement - *Cooloola Shire Council v Suncoast Building Approvals* (2008) QEPC 36;
15. Building & Development Tribunal Decision (File No. 03-07-044);
16. Guide to completing an Application for Appeal/Declaration Building and Dispute Resolution Committees;
17. The AIA
18. The BA

19. The LGA
20. The LGR
21. The PDA
22. The SPA
23. The Scheme.

Findings of Fact

The Committee makes the following findings of fact:

- The proposal is defined as a 'food premises' under the Scheme.
- The subject site is located in the 'Town Zone' and 'Commercial Precinct' under the Scheme.
- A 'food premises' in the 'Town Zone' and the 'Commercial Precinct' is self assessable where the 'total use area' is no greater than 200 m^2. A food premises larger than 200 m^2 in total use area requires a MCU application and is Code assessable.
- On 15 March 2010 a compliance request was lodged with Council for plumbing and drainage compliance approval.
- On 31 March 2010 Burnett Country Certifiers issued a decision notice granting a development permit (carry out building work) for a food premises at the subject site.
- On 31 March 2010 the certifier lodged a copy of the decision notice with Council for archival purposes.
- On 12 April 2010, Council issued an information request under section 85 of the PDA seeking additional information.
- On 6 May 2010, the owner lodged additional plumbing and drainage information in response to the first information request issued under the PDA.
- On 27 May 2010, Council issued an information request under section 85 of the PDA. The request indicated that the proposed restaurant appeared to exceed the 200 m^2 'total use area' and that under the Scheme a town planning approval would be required.
- On 28 May 2010, Council contacted the assessment manager to discuss their intention to issue an enforcement notice regarding works being carried out on the subject site.
- On 28 May 2010, Council issued an enforcement notice under section 248 of the BA and section 590 of the SPA.
- The first information request issued by the Council, was issued beyond the ten (10) business days provided for under section 85(4) of the PDA.
- Section 85 of the PDA only provides for one information request to be issued by a local authority.
- The PDA contains no provisions preventing the issuing of a compliance permit where a development permit for planning or building approval hasn't been issued.
- The PDA contains no provisions allowing for the planning related matters to be raised as part of an information request under section 85.

Reasons for the Decision

This section is separated into two parts. Part 1 relates to the enforcement notice and Part 2 relates to the information notice.

PART 1 - Enforcement Notice

Because of the number of issues raised it is necessary to address each separately and in order of consequence, that is the validity of the appeal to the Committee must be determined first, in order to be able to proceed to determination the validity of the enforcement notice.

a) Validity of Appeal to Committee

The Committee is satisfied that the appeal lodged on 9 June 2010 should not be dismissed on the basis that the applicant's representative completed the appeal form instead of the applicant themselves.

It is agreed that the principles applied in the *Cooloola Shire Council v Suncoast Building Approvals* court case can be applied to appeals against enforcement notices under SPA. However the Committee does not agree that the Court's decision is applicable in this case. It is apparent from reviewing the Court judgement and the associated decision from the Tribunal that applicant Aushomes did not actively participate in either the P&E or Tribunal appeals. It is clear that the Court dismissed Suncoast's appeal as they were not the applicant "in whom the benefit of the application vests" as defined in SPA. Suncoast were only the assessment managers with no vested interest in the relaxation application, other than the wish to air a grievance regarding the manner in which the approval was granted.

The matter before the Committee is different from the cited Court case in two ways. Firstly, the appeal notice was lodged with a letter from the applicant/owner authorising his representative to act on his behalf in all matters relating to the appeal. Secondly, the applicant actively participated in the hearing. Clearly the "person" with a vested interest in the matter intended for the appeal to be lodged and played an active part in the process. The applicant's representative was not acting independently as was the situation in the Cooloola case.

The applicant's representative in their submission of 13 July 2010 admits their error and notes that had they been informed by the Registry they would have corrected the appeal form. As the enforcement notice was issued on 28 May 2010, the applicant had until 25 June 2010 to lodge an appeal. The appeal was lodged with the Registry on 9 June 2010, allowing for 12 days to correct the error had it been brought to the applicant's representative's attention. As it stood the applicant's representative had no reason to suspect an error given they received an acknowledgement letter from the Registry.

Furthermore, the applicant's representative had no reason to suspect that as an authorised agent of the applicant that they could not complete the appeal forms, as:

- Application for appeal/declaration – form 10 does not clearly state who must complete the form as applicant or prohibit agents from completing the form.
- The "Guide to completing an Application for Appeal/Declaration Building and Dispute Resolution Committees" referred to in form 10 does not clearly state who must complete the form as applicant or prohibit agents from completing the form for this type of appeal.
- Whilst section 533(1) of SPA states "a person who is given an enforcement notice may appeal to a building and development committee against the giving of the notice", there appears to be no section of SPA that prohibits the "person" from initiating the appeal via an agent. The definitions under SPA and applicable sections of the AIA do not provide any additional clarity.

The Committee does not consider it fair or reasonable for the applicant's appeal to be dismissed for what is essentially an administrative error. Furthermore the Committee does not consider that by allowing the appeal it has prejudiced the Council's position in the appeal.

b) Validity of Enforcement Notice

The Committee is satisfied that despite some confusing drafting, the enforcement notice issued by Council on 28 May 2010 is valid and should not be dismissed for reasons of incorrect service, lack of delegated authority, failure to issue a show cause notice or failure to consult with the building certifier.

Statements have been provided from two Council officers advising the notice was handed to the applicant on the public road reserve outside his residential address. Neither the applicant, nor his representative made submissions contradicting these statements. As the notice was served on public property and not private property, there is no issue of whether the Council officer who served the notice had the appropriate "powers of entry" under the LGA. The Council officer was not exercising a power on someone else's behalf which required them to produce identification in accordance with section 1088 of the LGA. The officer was merely serving a notice, which under section 39 of the AIA may be served in a variety of forms including post or personal delivery. The AIA does not require the server of the notice to provide identification.

Council has provided extracts from its Register of Delegations indicating that Council's CEO had, by Council resolution, the delegated authority to sign the notice. Neither the applicant, nor his representative made submissions questioning the validity of the material provided by Council. Based on the material provided it would appear that the CEO had the appropriate delegated authority under the LGA to sign the enforcement notice.

According to the subheadings on the first page of the notice it refers to section 248 of the BA and notes that it has been issued under section 590 of SPA. Section 248 of the BA provides for the issuing of enforcement notices by local authorities. Subsection (1) is not applicable to this matter as the section obviously relates to structural or health and safety matters. Subsection (2) allows for the issuing of a notice "to a person who does not comply with a particular matter in this Act". Subsection (5) states that a notice issued under this section of the BA is taken to be issued under section 590 of SPA.

The representative's confusion regarding the whether the enforcement notice was issued under the BA or SPA is understandable as the notice is somewhat vague and contradictory in a number of points. The notice itself indicates that the notice relates to section 248 of the BA and was issued under section 590 of SPA, in accordance with section 248(5) of the BA. Unfortunately, the notice does not indicate upfront which particular matter under the BA had not been complied with as required by section 248(2) in order to issue a notice under the BA. It is not until point 14 that it becomes somewhat clear that section 83 of the BA has not been complied with, in that the certifier was not allowed to issue the building approval until the other necessary development permits were in place. Point 26 of the notice then states a development offence has occurred under section 578(1) of SPA. Whilst these are relevant grounds to issue an enforcement notice under SPA, they are not an issue of non-compliance with a particular matter of the BA to which this notice applies. The Council may wish to issue a further enforcement notice for non-compliance with section 578(1) of SPA, in which case any appeal against the notice would be restricted to the P&E Court.

Point 28 of the notice causes further confusion as the statement provides reasons why a show cause notice should not be issued under section 248(4) of the BA and section 588(3) of SPA. Whilst the sections of the Act are not quoted, the reasons given clearly relate to both provisions. Section 588(3) is not applicable as the section 248(5) of the BA bypasses it for section 590 of SPA. Section 588 would only apply if the notice was issued solely for non-compliance with a provision of SPA.

Point 32 of the notice indicates the applicable appeal rights against the issuing of the enforcement notice, however it only indicates the appeal rights to the P&E Court (section 473 of the SPA) and not the additional appeal rights to the Committee (section 532 and 533 of the SPA), despite the fact the notice indicates it relates to a notice under the BA.

If it were not for the references to section 248 and section 83 of the BA and Council's verbal and written submissions confirming the notice related to non-compliance with the BA, the enforcement notice could be mistaken as being issued under SPA due to a development offence under section 578(1) of the SPA. The Committee does not consider it appropriate to dismiss the enforcement notice on the grounds some sections are confusing, as it is clear from the applicant's representative's verbal and written submissions they understood why the notice was being issued. They merely needed to know which Act the notice was issued in order to determine when a show cause notice was necessary.

As it is accepted that the enforcement notice was issued under section 248 of the BA, it must comply with subsections (3) and (4) regarding the giving of a show cause notice. Under subsection (3) Council must issue a show cause notice before issuing an enforcement notice except where not required by subsection (4). When the unnecessary wording is removed from subsection (4) it reads: 'Subsection (3) applies only if the matter is not of a minor nature'. Which means that if the works are of a minor nature a show cause notice does not need to be issued. The drafting of this subsection is particularly confusing and the Committee questions whether this was the actual intent of the drafters, however the Committee must apply the Act as drafted.

Council in point 28 of its enforcement notice states "that the building works are not of a minor nature", which would mean by their own admission a show cause notice should have been issued, however the Committee suspects the Council may have also been confused by the drafting of the Act. Despite this the Committee does not agree that the works are not of a minor nature. A site inspection carried out by the Committee and the photographic evidence submitted by Council reveals the only work carried out to date is some filling, which appears to be less than one metre in depth. No structures or services of any description appear to have been erected or installed on the property. It appears that the fill is for the purpose of creating a level building pad prior to construction works. Under the BA and SPA, filling or excavation incidental to other building activities is also defined as building work. In the Committee's opinion the extent building works carried out on site to date are of a minor nature and therefore in accordance with Section 248(4) of the BA a show cause notice is not required. Had more extensive construction work occurred on site, the Committee may have formed a different opinion.

As stated previously the provisions of SPA requiring a show cause notice to be issued prior to an enforcement notices do not apply in this instance as s248 of the BA has its own provisions regarding show cause notices and directs you to s590, bypassing s588 of SPA.

The Council indicated in their submission that they contacted the applicant and building certifier on 28 May 2010 to discuss the enforcement notice, with the desire to work through the issues. The representative has confirmed in their written submission of 13 July 2010 that they were contacted by Council. Section 590(4) of SPA indicates that Council must consult with the private certifier, the Act however does not provide any assistance as to how that consultation must be undertaken, for how long or that the parties must be satisfied with the consultation. Nor does the definition provided by the representative or the AIA provide any assistance in determining what is an appropriate level of consultation.

It could be argued that Council may have entered into further discussions had they not received a negative response from the representative to their telephone call on 28 May 2010; or had building work not already commenced perhaps the Council would have contacted the certifier in a different manner. It could also be argued that Council had already prepared the enforcement notice and the telephone call was merely a courtesy rather than consultation, given the fact the notice was issued so quickly after the telephone conversation.

The Committee has insufficient grounds to question Council's methods or intentions regarding consultation. It is a fact that Council contacted the representative, who was also the certifier, by telephone prior to issuing the enforcement notice. The telephone call was a simple form of

consultation and in the Committee's opinion complies with the strict interpretation of section 590(4).

At the hearing the representative was under the impression that once dismissed a new enforcement notice could not be issued, in essence a “double jeopardy” clause. There are no provisions under Chapter 7, Part 3, Division 3 of SPA that prohibit the issuing of multiple notices regarding the same site or offence. Therefore if the notice were dismissed, there would be nothing preventing Council from issuing a new enforcement notice.

c) Grounds of Enforcement Notice - Total Use Area

It is the Committee's opinion that 'total use area' means the total area of the subject site being 624 m^2, minus those areas specifically excluded by the definition and those areas not being used for the purpose of a 'food premises'. Both parties appear to be interpreting the term 'area' as applying only to spaces within the building or undercover. If the area calculation was clearly meant to apply only to the inside of buildings or partially enclosed spaces the definition would read similar to the definition of 'floor area' under the Scheme, and there would be no need to specifically exclude outdoor spaces being car parking areas, access driveways and landscaped areas. There is an understandable tendency to presume that 'total use area' relates only to floor space, given the more commonly used measurement of 'gross floor area' or 'floor area' in many planning schemes.

There is nothing in the wording of the definition that supports the applicant’s representative's opinion that the use area is limited to the spaces that are essential to the proposed use. Even though the airlock and extra toilet may not be essential according to Building Code of Australia, they will be used by restaurant patrons and staff and if they are used for the purpose of a 'food premises', they must be calculated as part of the 'total use area'.

There is nothing in the definition to support the exclusion of travel paths required to meet safety regulations or the space occupied by internal and external walls. If the spaces are used in some way for the purpose and are not specifically excluded, they must be calculated.

Aside from the obvious use areas, the rear ramp and the walkways down the side of the building between the car park and outdoor dining area must also be calculated in the 'total use area'. The definition doesn't exclude these spaces and they are "used" for the purpose. Both areas provide access for patron and staff to the building, and part of the rear ramp incorporates the bin wash down area and grease trap access.

The Committee does not accept the applicant's argument that the office area will not be used for the 'food premises'. The plans indicate it is an office not a play/rumpus room for children. The building approval contains no conditions prohibiting its use for an ancillary office. The office is located between the reception/bar and the kitchen and is directly accessible from the dining area. Given its location, internal access, stated function on the plans and no prohibitions on its use, the area could easily be used as an office and therefore Committee must assume the area will be used as an office or other related use.

On similar grounds, the Committee does not accept the applicant's argument that the rear change room and bathroom office area will not be used for the 'food premises'. The building approval has no conditions prohibiting their use by staff and the areas are accessible from within the premises. Given they can be accessed internally and there are no prohibitions on their use, the area could be used by staff and therefore Committee must assume the areas will be used for 'food premises' purposes.

The applicant’s representative correctly stated that they could not condition the office, change room or bathroom to be used for some purpose other than 'food premises', as the BA limits the type of conditions a certifier may apply to building related conditions, not use or planning conditions. Based on the previous assumptions and the exclusions under the definition, the 'total use area' is calculated as being **309.23 m^2** which was determined as follows:

- Site area = 624 m^2
- Car park, driveway and rear landscape areas = 299.765 m^2 (19.321 m x 15.515 m)
- Landscaping in the outdoor dining area = 15 m^2

Total use area: 624 m^2 - 299.765 m^2 - 15 m^2 = **309.23 m^2**

All the above dimensions and areas were taken from dimensions and areas indicated on the submitted plan GD0109-05 Rev. B (Landscaping & Car parking Plan).

Even if the Committee had taken a much more lenient approach in calculating the 'total use area' by counting only the internal floor area (excluding internal and external walls) and the outdoor dining area (excluding the landscaping) the size of the 'food premises would be 236.78 m^2.

The Committee does not accept the representatives statement that they would merely remove the outdoor dining area to achieve compliance with the 200 m^2 use area limit, as the outdoor dining area only represents 62 m^2 of the 309 m^2 total use area. Given the Committee's interpretation of the definition of 'total use area', unless the entire outdoor dining area was converted into landscaping the space would still count towards the use area.

It is clear from these calculations that the grounds of the enforcement notice are valid as the proposed 'food premises' exceeds the 200m^2 'self assessable' threshold under the Scheme and therefore a development permit for a MCU is required.

Whilst the Committee supports the grounds of the enforcement notice, the requirement to cease building work and rectify the site is unreasonable. As discussed at the hearing the applicant should be given the opportunity to lodge a MCU application to seek planning approval for the design as proposed. Alternatively, the applicant can modify the design, reducing the use area so it complies with the 'self assessable' provisions of the Scheme.

d) Other Issues

The Committee is satisfied that the incorrect lot description indicated on the decision notice issued by the assessment manager is merely a typographical error and not really a matter of concern for the Committee. As the street address is properly identified, the error does not prevent a person from identifying the property. The fact that Council has been able to identify the property is an indication of this. If the Council requires the error to be fixed they can discuss this separately with the assessment manager.

The issue of the need for an operational works approval for the car park has not been investigated by the Committee. It is not appropriate for the Committee to consider other potential breaches beyond those raised in the enforcement notice. If the Council is of the belief that further development permits beyond a MCU are required they should raise the issue as soon as possible with the owner and assessment manager prior to taking any additional enforcement action.

PART 2 - Information Notice

Section 85 is the applicable part of the PDA for compliance assessment for regulated or on-site sewerage work. Council's information requests both indicate the applications were beings assessed under section 85.

The Committee is satisfied that both information requests issued by Council were technically invalid. Section 85(4) of PDA clearly states that the Council had 10 business days to issue an information request following receipt of the application for compliance assessment. This means that Council had until 29 March 2010, to issue an information request. The request dated 12 April 2010 was eight days late. As the first request was technically invalid it cannot be considered to have been issued. Therefore according to section 85(5) of the PDA, Council's 20 day decision

period commenced on the day after lodgement being 16 March 2010 and ended on 14 April 2010.

According to section 85(9) of the PDA, if Council does not decide the application with the timeframe prescribed by section 85(5) the application is taken to have been refused and Council must issue an information notice under section 85(10). Council failed to issue an information request or determine the application within the specified timeframes. Furthermore Council failed to issue an information notice in accordance with section 85(10) of the Act.

It would appear that the applicant was unaware that the necessary timeframes had not been complied with and had the right to appeal as on the 6 May 2010 they lodged additional information in response to the first (invalid) information request.

The second information request issued by Council dated 27 May 2010 is invalid as section 85 of the PDA only provides for one information request. Only section 92 of the PDA in relation to the assessment of on-site treatment plants provides for a second information request. The second request also indentified the need for a development permit, whilst it has been confirmed that a development permit (MCU) is required is required for the current design, the PDA does not contain any provisions similar to the BA that prevents the granting of a compliance permit prior to the issuing of other development permits.

It is not uncommon for Council's to exceed timeframes and information request limits in an effort to resolve an application, rather than refuse the proposal just to ensure strict compliance with the requirements of an Act.

As the requirements of the PDA were not adhered to the Committee would be within its rights to direct the Council to issue a compliance permit subject to conditions. However, the Committee is reluctant to make such orders given the circumstances. It has been confirmed that the proposed development exceeds the minimum 200 m^2 total use area for a self assessable development by over 100 m^2, therefore changes will have to be made to achieve a self assessable design or a development permit (MCU) obtained. There is potential that changes will be made to the design whichever option is adopted, meaning that if a compliance permit was granted based on the current design there is a distinct risk that it would be superseded and a new compliance permit would be required. The Committee is of the opinion that there is nothing to be gained, nor is it in the best interests of the applicant, to order Council to issue a compliance permit where there is doubt regarding the relevance and longevity of that permit.

The Committee recommends the applicant lodge new information with Council for assessment once the final design of the proposed restaurant is approved via a development permit (MCU) under SPA or the design is modified to comply with the self assessable provisions of the Banana Shire Scheme. It is the Committee's opinion that the applicant should not be penalised by new fees when lodging the new information for assessment and that Council should begin its assessment from section 85(3) of the PDA upon receipt of the new information.

Steve Adams
Building and Development Committee
Date: 26 November 2010

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
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248