



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	13 - 12
Applicant:	A.R.A. Refurbishment & Trade Consultants Pty Ltd
Assessment Manager:	GMA Certification Group Pty Ltd
Concurrence Agency: (if applicable)	Gold Coast City Council (Council)
Site Address:	14 O'Grady Drive, Paradise Point and described as Lot 87 on RP141486 — the subject site

Appeal

Appeal under section 532 of the *Sustainable Planning Act 2009* (SPA) against the decision of the GMA Certification Group Pty Ltd to refuse a development application for building work, namely alterations to an existing car park and the construction of a number of new building structures (boat shed, deck, gatehouse, Bali hut and patio). The refusal was purportedly based on advice from the Council as the concurrence agency.

Date of hearing:	Wednesday 6 June 2012, at 11am
Place of hearing:	The subject site
Committee:	Samantha Johnson – Chair Danyelle Kelson - Member
Present:	Marek Pulik – Applicant/Builder Peter Krook – Council representative Tanya Smith - GMA Certification Group Pty Ltd Jim Kendrovski - Owner

Decision

The Committee, in accordance with section 564 of the *Sustainable Planning Act 2009* (SPA), sets aside the decision of the assessment manager, the GMA Certification Group Pty Ltd, and finds that the application lapsed at the end of 5 January 2012, after the applicant failed to provide a response to the Council's information request within the response period provided in section 279 (Lapsing of application if no response to information request) of the SPA.

Background

The subject site is a single storey dwelling located in an established traditional residential area, backing onto a canal in Paradise Point at the Gold Coast.

On 19 April 2011, the applicant lodged an application with the GMA Certification Group Pty Ltd for relaxations with respect to the road and side boundary setbacks for an “as constructed” carport, gatehouse and deck at the subject site.

On 23 June 2011, the applicant lodged a referral agency assessment application with the Council with respect to the proposal.

On 6 July 2011, the Council issued an information request pursuant to section 276 of the SPA. The Council’s information request sought amended, dimensioned and to scale site plans and elevations which indicated all existing and proposed buildings or structures drawn to a minimum scale of 1:200. The Council specifically required identification on further plans of a number of “as constructed” structures that were not the subject of the current application, including a covered area to the south-eastern side of the dwelling, an “as constructed” covered gatehouse, an “as constructed” storage room at the southern corner of the dwelling and an “as constructed” Bali hut adjacent to the waterfront.

On 12 January 2012, the GMA Certification Group Pty Ltd, on behalf of the applicant, lodged a response to the Council’s information request, providing an amended referral agency assessment application form and amended drawings.

On 16 January 2012, the Council by letter to the applicant sent care of the GMA Certification Group Pty Ltd, advised that as the application was the result of a Show Cause Notice, the applicant had only 3 months to provide a response to the information request and that the applicant’s response was provided outside of that timeframe and accordingly the application had lapsed. The Council suggested that if the applicant were to submit a further referral agency response application, the applicant should address the matters contained in the Council’s information request.

On 2 February 2012, an email sent by Tanya Smith of the GMA Certification Group Pty Ltd to Peter Krook of Council identified that the applicant was not aware of a Show Cause Notice having been issued and that the applicant contacted the Council and was told that no Show Cause Notice had been issued. The email identified that the information response period ended on 6 January 2012 and that as the information response was given to the Council on 12 January 2012, it was requested that the Council review the lapsing of the application, given that the delay was only 4 business days and occurred over the Christmas-New Year break.

On 8 February 2012, the Council by letter to the applicant sent care of the GMA Certification Group Pty Ltd, confirmed the Council’s view that the application had lapsed and went on to discuss the manner in which the response to the Council’s information request was deficient in respect of not providing a response to specific matters queried by the Council. In this letter, the Council expressed an opinion that the:

“as constructed’ open carport/gatehouse and associated façade is detrimental to the amenity of the streetscape due to its height and bulk and, accordingly, would not be supported in terms of a positive Referral Agency Response. Similarly, the ‘as constructed’ bali hut with sub floor storage adjacent to the canal would be considered detrimental to the amenity of the waterway due to its height, bulk and proximity to that waterway and also not be supported.”

On 21 March 2012, the GMA Certification Group Pty Ltd refused the application, issuing a decision notice citing as the reason for refusal, “Refusal from Gold Coast City Council for referral application - BLD201105771.”

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal, plans, referral agency (concurrence agency) information request, assessment manager's decision notice and correspondence accompanying the appeal lodged with the Registrar on 26 March 2012.
2. Decision notice from the assessment manager (GMA Certification Group Pty Ltd) dated 21 March 2012.
3. Letter to the applicant from the Council dated 8 February 2012.
4. Email from T Smith of the GMA Certification Group Pty Ltd to P Crook of the Council dated 2 February 2012.
5. Letter to the applicant from the Council dated 16 January 2012.
6. Response to the Council's information request lodged with the Council by the GMA Certification Group Pty Ltd on 12 January 2012.
7. Concurrence agency information request from the Council to the applicant dated 6 July 2011.
8. Verbal submissions made by the parties at the hearing.
9. Written submission provided by the Council by letter to the Registrar dated 5 June 2012.
10. Written submissions made by the GMA Certification Group Pty Ltd by email to the Committee dated 6 June 2012.
11. Written submissions provided by the Council by email to the Registrar dated 22 June 2012.

Findings of Fact

The Committee makes the following findings of fact:

1. Section 276 (Information Request to Applicant) of the SPA, when read in conjunction with Section 33 of the *Building Act 1975*, enables the Council to make an information request to the applicant in its capacity as a concurrence agency.
2. Section 276(5)(a) (Information Request to Applicant) of the SPA, provides that:

“...
(5) *If a concurrence agency makes the request—*
(a) *the request must be made within 10 business days after the agency's referral day*
*(also the **Information Request Period**)...*”
3. The “agency's referral day” is further defined in Schedule 3 of the SPA as the day the referral agency receives the referral agency material.
4. The Referral Agency Assessment Application is dated 23 June 2011. In the written submission made by GMA Certification Group by email dated 6 June 2012, it is stated that the “Relaxation [was] lodged to the council” (which the Committee understands to be the Referral Agency Assessment Application) on 23 June 2011. From this information, the Committee accepts that the Council's referral day was the same day as the Referral Agency Assessment Application is dated, being 23 June 2011.

5. On this basis, the Council's information request would need to have been made on or before 6 July 2011, to be within the information request period prescribed by the SPA.
6. In the written submission made by GMA Certification Group by email dated 6 June 2012, it is stated that the "RFI" (information request) was received from the Council on the date that it was dated, that is, 6 July 2011. From this information, the Committee accepts that the Council's information request was received by the GMA Certification Group on 6 July 2011.
7. From the material before the Committee it appears that no Show Cause Notice was issued prior to the Decision Notice being issued by the GMA Certification Group Pty Ltd on 21 March 2012. The Committee notes that a later show cause notice was issued by the Council to the owner of the subject site dated 19 April 2012. This show cause notice has no relevance to the appeal.
8. Pursuant to section 279 (Lapsing of application if no response to information request) of the SPA, if the application was not made in response to a show cause notice or an enforcement notice, the information response must be provided 6 months after receiving the information request, otherwise the application lapses.
9. "Month" is not defined in the SPA. Section 36 (Meaning of commonly used words and expressions) of the *Acts Interpretation Act 1954*, defines a calendar month as:

"...a period starting at the beginning of any day of 1 of the 12 named months and ending—
(a) immediately before the beginning of the corresponding day of the next named month..."
10. Given the Committee has found that the information request was made on 6 July 2011, the information response period would have ended immediately before the beginning of 6 January 2012.
11. Accordingly, the response to the information request should have been provided to the Council on or before 5 January 2012.
12. The documentation provided to the Committee indicates that the response to the information request was hand delivered to the Council on 12 January 2012. This was 7 days after the end of the information response period. Accordingly, the application lapsed, pursuant to section 279 (Lapsing of application if no response to information request) of SPA.
13. Pursuant to section 280(1) of the SPA (When application taken not to have lapsed) an application which would otherwise have lapsed can be revived if the applicant gives to the assessment manager and the concurrence agency that made the information request, within 5 business days of the lapsing of the application, a written notice that the applicant seeks to revive the application. In this appeal, the applicant would have had to provide that written request on or before 12 January 2012.
14. There is no evidence before the Committee to suggest that the applicant provided such written notice and the response to the information request, which was hand delivered to the Council on 12 January 2012, does not purport to exercise this power.

Reasons for the Decision

1. The Council's information request was made on 6 July 2011. As no show cause notice had been issued by the Council prior to the Decision Notice being issued by the GMA Certification Group Pty Ltd, the applicant's response to the Council's information request had to be provided 6 months after receiving the information request, otherwise, the application would lapse. The information response period expired on 5 January 2012.

2. Given that the GMA Certification Group Pty Ltd hand delivered the response to the Council's information request to the Council on 12 January 2012, 7 days after the end of the information response period, the application lapsed at the end of 5 January 2012.
3. The applicant did not, within 5 business days of the end of 5 January 2012, provide written notice to the Council and to GMA Certification Group Pty Ltd seeking to revive the application. Accordingly, the application was not revived by the applicant.
4. The Planning and Environment Court has broad powers to deal with matters of non-compliance under section 440 (How court may deal with matters involving noncompliance) of the SPA, including a specific power to deal with an application that has lapsed or was not a properly made application.
5. The powers of the Committee are specified in Chapter 7, Part 2 of the SPA. The SPA does not provide the Committee with an equivalent power to that given to the Court in section 440 (How court may deal with matters involving noncompliance) of the SPA. The closest power given to the Committee, is the power to allow an extension of time to take a specified action under section 557 (Committee may allow a longer period to take an action) of the SPA. However, this power is limited to actions specified in Chapter 7, part 2 of the SPA and does not extend to the provision of responses to information requests.
6. Without an express statutory power to excuse non-compliance or otherwise deal with an application that has lapsed, the Committee has no power in this appeal to excuse the non-compliance with the response period for the provision of the response to the Council's information request by the applicant. Accordingly, the Committee has no power to revive the lapsed application.

Samantha Johnson
Chairperson
Building and Development Committee Chair
Date: 25 July 2012

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
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CITY EAST QLD 4002
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