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*Sustainable Planning Act 2009*

**Appeal Number:** 22 - 17

**Applicant:** Wesley William Freeman

**Local Authority:** Livingstone Shire Council (Council)

**Concurrence Agency:** N/A  
(if applicable)

**Site Address:** 23 Sleeman Street, Emu Park Qld 4710  
Lot 5 + 6 on RP604022, Parish of Hewittville

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### Appeal

Appeal lodged under Section 559 of *Sustainable Planning Act 2009 (SPA)* against an Enforcement Notice issued by Livingstone Shire Council on 9 May 2017 (under Section 248 of *Building Act 1975 (BA)*). This required the Applicant/Owner to remedy alleged illegal/unapproved building works previously constructed some time between June 1992 and June 2010.

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**Date and time of hearing:** 15 August 2017 at 10.00am

**Place of hearing:** Livingstone Shire Council Offices, Yeppoon

**Committee:** Mr. John Bright - Chair  
Mr. Russell Schuler - Member

**Present:** Mr Wesley Freeman - Applicant & Property Owner  
Mr David Battese - Council Representative  
Mr Craig Newsome - Council Representative  
Mr Bradley Crook - Council Representative

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### Decision

The Building and Development Dispute Resolution Committee (Committee), in accordance with Section 559 of the SPA **sets aside** the Enforcement Notice issued by the Council under Section 248 of the BA, on the following grounds: -

- because of the time lapsed (7 to 25 years) between occurrence of the alleged unlawful/unapproved building works and Council initiating proceedings, in this instance the Committee is of the view that the burden of proof as to the existence or otherwise of documentation of building development approvals, should rest with the Council, and any benefit of doubt should accrue to the Applicant/Owner.
- in the absence of any Council building records for the subject site, the Committee is of the view that the allegation that said building works are unlawful/unapproved is not proved beyond reasonable doubt.

## Background

It is apparent that Livingstone Shire Council first became involved with matters at 23 Sleeman Street Emu Park, in response to a complaint by an adjoining owner (25 Sleeman St) relating to the common boundary fencing. During a site inspection on 26 October 2015, Council's officer(s) then became aware of certain building anomalies at the subject site.

On 16 March 2016, Council issued the Applicant/Owner with correspondence alleging unlawful building works at the property. From a comparison of two (2) aerial photographs (dated 8 June 1992 and June/July 2010 respectively) Council ascertained that seven (7) additional buildings/structures had been constructed some time during the intervening 18 years. These contentious buildings/structures were outlined as an overlay on the 2010 aerial photograph and designated 'A' to 'G'. Council's correspondence required the Applicant/Owner to undertake nominated remedial works by 15 April 2016 and by 15 June 2016 respectively.

On 7 December 2016, Council issued to the Applicant/Owner a Show Cause Notice (in accordance with Section 588 of SPA). This also confirmed that contentious buildings/structures 'A' and 'G' had been removed by the Applicant/Owner prior to Council's inspection on 18 July 2016. The Applicant/Owner had previously advised Council (email, 2 December 2016), that he was - *'...both unable to and unwilling to comply any further with councils demands'*.

On 9 May 2017, Council issued to the Applicant/Owner an Enforcement Notice (in accordance with Section 248 of the BA). This detailed matters requiring attendance by the Applicant/Owner by close of business on 13 June 2017.

On 29 May 2017, an Application for Appeal (Form10) was received, from the Applicant/Owner, by the Committee's Registrar.

The Appeal Hearing was held on 15 August 2017, and was adjourned to firstly provide an opportunity for the Applicant to submit their intentions in relation to lodgement or otherwise of relevant building development applications, and secondly for advice to be provided to the Committee on the existence or otherwise of building records and building record searches.

## Material Considered

The Committee considered the following materials in reaching its decision -

1. Email advices from the Applicant/Owner (18 Sept 2017) and the Council (19 Sept 2017) in response to emailed requests for specific additional information from the Committee's Registrar (12 Sept 2017)
2. Verbal submissions to the Appeal Hearing from the respective attending parties and additional printed material, as follows -
  - Sales History for the subject property (CoreLogic RP Data, dated 16 April 2016) provided by the Applicant/Owner
  - Coloured aerial photograph of the subject property (dated June/July 2010) provided by the Local Authority (previously issued as Enforcement Notice, pg 5 of 6/Show Cause Notice - Attachment 1)
3. Building and Development Dispute Resolution Committee Application of Appeal (Form 10) lodged by the Applicant/Owner and received by the Committee's Registrar on 29 May 2017
4. Livingstone Shire Council Enforcement Notice (dated 9 May 2017) issued to the Applicant/Owner under Section 248 of Building Act 1975
5. Applicant/Owner correspondence to the Local Authority (undated, but stamped 'received' - 19 January 2017) in response to Council's Show Cause Notice
6. Livingstone Shire Council Show Cause Notice (dated 7 December 2016) issued to the Applicant/Owner under Section 588 of SPA 2009
7. Cam Schroder Lawyers correspondence to Livingstone Shire Council on behalf of the Applicant/Owner (dated 1 April 2016) in response to Council's initial allegations of unlawful building work at the subject site
8. Livingstone Shire Council correspondence to the Applicant/Owner (dated 16 March 2016) referencing its inspection of the subject site on 26 October 2015, and alleging unlawful building work

9. *Sustainable Planning Act 2009*

10. *Building Act 1975*

## **Findings of Fact**

The Committee makes the following findings of fact -

1. The subject site is a double lot with total area of 810sqm. The address is 23 Sleeman Street Emu Park. Access to the property (and 3 adjacent sites) is via an unnamed roadway parallel to, but separated from, Sleeman Street by a 60 metre wide (approx) landscaped open drainage buffer.
2. No records of any building works on the subject site, other than sewer drainage details, have been found.
3. Records are not available as to when the original dwelling was constructed on the subject site. However, from mid-1996 to the present time, the property has been transferred to new owners on six (6) occasions. The Applicant became the current owner on 26 June 2015, the property having been listed 'for sale' for the previous seven (7) months.
4. Council officer(s) inspected the subject site on 26 October 2015 (4 months after transfer of ownership to the Applicant/Owner). This was in response to a complaint received from an adjoining owner regarding fencing to the common boundary. During this inspection certain building anomalies relating to the existing dwelling were also identified.
5. Council initiated investigations into building works existing on the subject site. Historical aerial photographs were obtained, as follows -
  - Photo 1, dated 8 June 1992
  - Photo 2, dated June/July 2010

A comparison of these established that various additional building works had occurred on the property during the intervening period (some time between 7 and 25 years ago).

6. Council's correspondence to the Applicant/Owner (dated 16 March 2016), alleged that unlawful building works had occurred at the subject site. This allegation was based as follows -
  - Comparison of the 1992 aerial site photograph with that of 2010 revealed that additional building works (overlayed on the latter photo as A, B, C, D, E, F and G) had occurred in the intervening period
  - A search of Council records found no evidence to confirm building development approval had been granted for the above mentioned buildings/structures

It was also noted that roof structure 'A' (attached to the northern side of the original dwelling) was '*poorly constructed and unlikely to meet current building requirements*'.

The Applicant/Owner was required, before 15 April 2016, to -

- 1) *Provide Council with documentation confirming that the requisite approval (building development approvals) was granted for the construction of the above mentioned lean-to (sic) roof structure identified on the attached photograph as (A); or*
- 2) *Remove the structure from the property and contact Council to arrange an inspection of the property to confirm that the structure has been removed;*

and before 15 June 2016, to -

- 3) *Provide Council with documentation confirming that the requisite approvals (building development approvals) were granted for the construction of the above mentioned buildings/structures identified on the attached photograph as (B - G); or*
- 4) *Provide Council with documentation confirming that a properly made building development application has been lodged, with a suitably licenced building certifier, for the building work for the construction of the above mentioned buildings/structures; and*
- 5) *Take all necessary and reasonable steps to enable the development application to be decided as quickly as possible; or*

- 6) *Remove the buildings/structures from the property and contact Council to arrange an inspection of the property to confirm that they have been removed.*
7. Certain remedial works were undertaken by the Applicant/Owner prior to a subsequent Council inspection on 18 July 2016. These included -
    - Removal of roof structure 'A'
    - Removal of free-standing shed structure 'G'
  8. On 2 December 2016, the Applicant/Owner advised Council (by email) that he was '*...unable to and unwilling to comply any further with councils demands...*'
  9. On 7 December 2016, Council issued to the Applicant/Owner a Show Cause Notice.
  10. On (or about) 19 January 2017, the Applicant/Owner responded.
  11. On 9 May 2017, Council issued to the Applicant/Owner an Enforcement Notice.
  12. On 29 May 2017, an Application to appeal (Form 10) was received from the Applicant/Owner by the Committee's Registrar.
  13. Council's inspecting officer (Mr Eric Pabis - Development Compliance Officer) was on leave and unavailable to attend the Appeal Hearing on 15 August 2017. Council's attending officers, in their verbal submission to the Hearing -
    - Re-stated the circumstances of how the matter initially arose and then escalated
    - Confirmed that Council's involvement in such matters was 'reactive' not 'proactive'. Initial involvement in this instance had been solely in response to a complaint received from an adjoining neighbour
    - Confirmed that no building records were held for the subject site
    - Advised that certain structural elements of the remaining contentious buildings/structures were considered unlikely to meet current standards
    - Advised a willingness to allow the Applicant/Owner a further opportunity to resolve outstanding matters, conditional on lodgement of an appropriate Building Development Application
  14. The Applicant/Owner, in his verbal submission to the Appeal Hearing -
    - Re-stated his contention that Council's requirements of him in this matter were unjust/unfair, because
      - He considered that Council's inspecting officer had not dealt impartially in matters involving the adjoining neighbour
      - The property had been owned by others when the alleged unlawful building work had occurred
      - There had been no means by which it could have been ascertained, prior to purchase, that the property contained the alleged unlawful building works
      - Removal of the contentious buildings/structures 'A' and 'G' demonstrated his willingness, within limited means, to resolve the matter
    - Advised that the original dwelling and additions had withstood the effects of severe tropical 'Cyclone Marcia' in late February 2015 with little or no damage
    - Confirmed that a Building Records Search had not been requested prior to purchase because of advice that it would be 'a waste of money' as Council held no building records for the property
    - Agreed to consider the opportunity to resolve outstanding matters, conditional on lodgement of an appropriate Building Development Application
  15. The opportunity for outstanding matters to be resolved, pursuant to lodgement of an appropriate Building Development Application, lapsed on 31 August 2017 without further response from the Applicant/Owner.
  16. The Applicant/Owner confirmed by email to the Registrar on 18 September 2017 that a building records search was not requested at the time of purchase of the property, as he had attended the Council office and was advised that Council had no building records for the property except for a plan of a sewer pipe location.

17. On 19 September 2017 the Registrar received an automatic generated response email from Council in answer to a request for a list of all Council building records for the property. No records were included.
18. In the absence of further advices in the regard, the Committee bases its decision on the documentation and verbal representations provided by the parties at the Appeal Hearing.
19. The Enforcement Notice of 9 May 2017, was based on Council's reasonable belief that certain building works at the subject site had been erected without the required development approval(s). This accords with Clause 1(a), Section 248 of the BA, and is one of several matters for consideration for the issue of such a Notice.

The Enforcement Notice did not indicate that any building works currently on site were -

- Dangerous (Clause 1(b), Section 248); or
- In a dilapidated condition (Clause 1(c), Section 248); or
- Unfit for use or occupation (Clause 1(d), Section 248); or
- Filthy, infected with disease or infested with vermin (Clause 1(e), Section 248)

### **Reasons for the Decision**

The Committee advises its decision that the alleged illegality of the contentious building works is not proved. Accordingly, the Enforcement Notice issued by Livingstone Shire Council to Wesley William Freeman is to be **set aside**.

The Committee is of the view that, because of the length of time lapsed between occurrence of the alleged unlawful/unapproved building works and Council's initiating of proceedings (7 - 25 years), in this instance the burden of proof should rest with compliance agency (Council), while any benefit of doubt should accrue to the Applicant/Owner.

On this basis, the Committee considers and accepts Council's contention, that additional building works had occurred on the subject site sometime between June 1992 and June/July 2010, as is evident from comparison of the respective aerial photographs.

In each of its various correspondence and notices issued to the Applicant/Owner, Council advised that - *'A search of Council records found no evidence to confirm that building development approval has been granted for the building works associated with construction of the above mentioned buildings/structures.'*

Although factual, this statement is considered somewhat misleading because, in the absence of any Council building records relating to the subject site, it could equally be contended that - no evidence was found that building development approval has not been granted.

The Committee therefore considers that Council's contention that the said additional building works are unlawful/unapproved is not substantiated beyond reasonable doubt.

Other factors considered by the Committee in making its decision include -

- That on-site building works were not substantially affected by 'Cyclone Marcia', a Category 5 severe tropical cyclone which caused extreme damage to many buildings in the Capricorn Coast area in late February 2015
- That contentious buildings/structures originally identified by Council as *'poorly constructed and unlikely to meet current building requirements'* were removed by the Applicant/Owner prior to receipt of the Show Cause Notice and Enforcement Notice.
- That the buildings/structures which are the subject of the Enforcement Notice had not been identified as being dangerous, in a dilapidated condition, unfit for use or occupation, or filthy, infected with disease or infested with vermin.

**John Bright**  
**Building and Development Disputes Resolution Committee Chair**  
**Date: 10 October 2017**

## **Appeal Rights**

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Committee's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees  
Building Codes Queensland  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001  
**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**