



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	24 - 15
Applicant:	Roche Projects Pty Ltd
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	Unit 12, 7 Roche Avenue, Bowen Hills and described as Lot 12 on SP 239805 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) in relation to an Enforcement Notice issued by the Brisbane City Council on the grounds that a person must not contravene a development approval, including any condition in the approval pursuant to section 580 of SPA.

Date and time of hearing:	Thursday 14 January 2016 at 10.00am
Place of hearing:	Conference Room, Level 16 Mineral House, 41 George Street, Brisbane
Committee:	Ain Kuru – Chair
Present:	Darryl Vaughan, Director, Roche Projects Pty Ltd – Applicant Glenn Davidson, Principal Officer – Council representative I Glenn Reimer, Supervisor Built Environment – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA, dismisses the appeal on the grounds that it does not have the jurisdiction to decide on an appeal about an Enforcement Notice issued in respect of a person contravening a development approval pursuant to section 580 of SPA, as it does not relate to a building, plumbing and drainage matter under section 526 of SPA.

Background

In 2010 the Applicant received a Development Permit for a Material Change of Use and Preliminary Approval to carry out Building Work from the Council for a Multi-Unit Dwelling on the subject site (Council reference A002875586) in accordance with the *Brisbane City Plan 2000*. The development comprised 12 units over three storeys and a basement carpark. The building was subsequently built and completed in 2012. However, Unit 12 on the third floor was difficult to sell due to noise and air quality issues caused by traffic on nearby Breakfast Creek Road. A prospective buyer suggested partly enclosing the balcony would improve the internal amenity of the unit. The Applicant subsequently undertook work to install ten panel bi-fold doors on the balcony. The doors partly enclosed the existing

balcony separating the living area of the unit from the outside and the negative environmental effects of traffic on the nearby road. The bi-fold doors when closed create a new room on the balcony. As a result, approximately one third of the balcony could now be enclosed.

On the 23rd June 2015, the Council issued a Show Cause Notice to the Applicant, which in short states that:

- An inspection of the premises finds that the balcony is partly enclosed;
- Condition 4 of the Development Permit states that work must be carried out generally in accordance with the approved plans;
- Condition 13 of the Development Permit states that all balconies shown on the approved plans are to remain unenclosed with no shutters, glazing, louvres or similar permanent fixtures etc:

13) Balconies and Terraces to Remain Unenclosed

All balconies and terraces shown on the approved drawings and documents, are to remain unenclosed with no shutters, glazing, louvres or similar permanent fixtures other than those consistent with the relevant "Brisbane City Plan 2000 - Residential Code" and clearly depicted on the approved drawings.

- Enclosing the balcony is assessable work under City Plan 2000 that requires development approval; and
- As approval has not been obtained, a development offence has been committed.

On the 23rd June 2015 the Applicant responded to Council's Show Cause Notice in writing advising:

- The balcony is not fully enclosed and only part of the balcony is enclosed;
- The purpose of the bi-fold doors is to provide acoustic screening from traffic noise on Breakfast Creek Road;
- The bi-fold doors are not fixed and can be left in an open position; and
- The space created by the doors is not habitable as it is not waterproof.

On the 17th July 2015, the Council issued an Enforcement Notice to the Applicant, restating the grounds listed in the Show Cause Notice, and directing that the doors be removed.

On the 7th August 2015, the Council received an Application to change the Development Permit pursuant to section 369 of SPA. The purpose of the Application was to enclose part of the balcony with bi-fold doors.

On the 14th August 2015 an Application for Appeal about the Enforcement Notice was received by the Committee's Registrar on the grounds that:

- The description of the balcony as "partly fully enclosed" uses conflicting terminology;
- Reference to "Fully enclosing part of the balcony of unit 12" is incorrect, as it is only partly enclosed;
- The intent of condition 13 of the development approval is to prevent full enclosure of the balcony so as to maintain the external appearance of the building;
- A subsequent application has been made to Council since the Enforcement Notice was issued; and
- If the above arguments are not acceptable to the Committee, the Enforcement Notice be amended to provide for an application to be made to Council for the bi-fold doors.

The appeal hearing was initially postponed by the Committee pending a decision by Council in respect of the application for a change to the Development Permit. However the Committee decided to convene a hearing on the 14th January 2016 after it became evident a decision on the application by Council was delayed.

At the hearing the Applicant advised that Unit 12 was difficult to sell due to traffic noise from Breakfast Creek Road, and subsequently bi-fold doors were installed to partly enclose the balcony to improve the amenity of the unit. His interpretation of condition 13 of the development approval is that it relates to the enclosure of the whole balcony, as the intent is to maintain the approved appearance of the building from the surrounding area.

He also advised that the Enforcement Notice should have also directed that an application be made for the works, and that the ownership of Unit 12 had changed since the Notice was issued.

The Council representative responded by advising that part of the balcony is fully enclosed and that this is inconsistent with the intent of the condition, which states that all balconies as shown on the approved drawings are to remain unenclosed. He also advised that directing lodgement of an application in the Enforcement Notice was not considered an option, and was not suggested by the Applicant in the response to the Show Cause Notice.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 14 August 2015.
2. Decision Notice for Development Permit for a Material Change of Use and Preliminary Approval to carry out Building Work for a Multi-Unit Dwelling issued by Brisbane City Council (reference A002875586) dated 15 October 2010.
3. Show Cause Notice issued pursuant to section 588 of SPA by the Brisbane City Council dated 23rd June 2015.
4. Application for a Permissible Change to a development approval pursuant to section 369 SPA lodged with Brisbane City Council (reference A004190747) received by Council on 7th August 2015.
5. Enforcement Notice issued pursuant to section 590 SPA by the Brisbane City Council dated 14th August 2015.
6. *Sustainable Planning Act 2009* (SPA);
7. *Sustainable Planning Regulation 2009* (SPR);
8. *Building Act 1975* (BA);
9. Brisbane City Council (2016). 7 Roche Avenue, Bowen Hills. *PD Online Property Enquiry* Retrieved from <https://pdonline.brisbane.qld.gov.au/MasterPlan/Default.aspx>; and
10. Building Newsflash 453 - *Classifying Domestic Patios, Verandahs, Shade Structures, Decks and Similar Structures* issued on 16 November 2010 (Growth Management Queensland).

Findings of Fact

After listening to verbal submissions, the Committee asked the parties to consider whether it had jurisdiction to hear an appeal against the Enforcement Notice. Section 533 of SPA, which provides for appeals against enforcement notices, is contained in Chapter 7, Part 2, Division 6. This Division relates only to building, plumbing and drainage matters, with section 526 stating:

An appeal to a building and development committee under this division may only be about—

- (a) a matter under this Act that relates to the Building Act, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission, or the Plumbing and Drainage Act 2002; or*
- (b) a matter that under another Act may be appealed to a building and development committee; or*
- (c) a matter prescribed under a regulation.*

Section 25 of the Sustainable Planning Regulation 2009 (SPR) only prescribes appeals where the local government is the Concurrence Agency, which is not the case in this appeal.

The Council representative agreed that the Enforcement Notice incorrectly states that a person who is given a Notice may appeal to the Committee. He also agreed that the Notice had misdirected the Applicant to appeal to the Committee and as a result natural justice was not provided to them. As a result, he advised that Council would not act on the Enforcement Notice.

Finally the Committee would like to note that enclosing a balcony may require approval pursuant to the BA. For further guidance on this matter, the Applicant may like refer to *Building Newsflash - 453 Classifying Domestic Patios, Verandahs, Shade Structures, Decks and Similar Structures* issued on 16 November 2010 by the Queensland Government.

Reasons for the Decision

The Committee does not have jurisdiction to decide the appeal as it does not relate to a building, plumbing and drainage matter under section 526 of SPA.

Ain Kuru
Building and Development Committee Chair
Date: 2 February 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
Telephone (07) 1800 804 833 Facsimile (07) 3237 1248