



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	29-10
Applicant:	Peter McKinlay for and on behalf of Eric Rinaldi
Assessment Manager:	Gold Coast City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	7 Matilda Rd, Gaven and described as Lot 59 on RP95754 – the subject site

Appeal

Appeal about an enforcement notice issued by Council on 12 April 2010 for operational works (filling) being undertaken without a development approval.

Date of hearing:	Thursday 5 August 2010	
Place of hearing:	Gold Coast City Council – Nerang Office	
Tribunal:	John Panaretos	– Chair
	Michael Walton	– General Referee
Present:	Peter McKinlay	– Agent for Mr Rinaldi
	Michelle Hughes-Smith	– Observer
	Lisa Watson	– Gold Coast City Council
	Michael Doyle	– Gold Coast City Council

Decision:

The Committee orders that the appeal be dismissed on the basis that the Committee does not have jurisdiction to hear an appeal against an enforcement notice relating to alleged offences involving operational works.

Background

On 12 April 2010 Council issued an enforcement notice to Eric Americo Rinaldi (the appellant) under section 590 of the *Sustainable Planning Act 2009* (SPA).

The enforcement notice alleged that the appellant has committed a development offence contrary to section 578 of SPA, by carrying out assessable development, namely operational work (filling) at the subject site without an effective development permit.

The enforcement notice required that the premises be returned *“to the state that prevailed prior to the commencement of the operational work.”*

It is alleged by Council that:

- certain operational works (filling) were carried out on the appellant’s land which land is located in the Park Living Domain under the Council’s planning scheme;
- the operational works are assessable development under the Table of Development for the Park Living Domain and there is no effective development permit for these works.

In this case the appellant made an application for operational works but it was refused on 10 August 2009.

The enforcement notice states that section 473 of SPA provides a right of appeal to the Planning and Environment Court against giving of the notice. In this case, the appellant has chosen to appeal to the Committees.

Council argued that it is beyond the Committee’s jurisdiction to decide this appeal.

The appellant argued that the work done on site does not constitute operational work and Council was not empowered to issue the enforcement notice.

The Committee received written submissions from the parties and conducted a hearing which was followed by a further submission from the appellant. Prior to considering the merits of the case, the Committee was required to determine its jurisdictional ability to hear the appeal.

Material Considered

The material considered in arriving at this decision comprises:

1. ‘Form 10 – Notice for Appeal/Declaration’, including a statement of grounds for appeal lodged with the Registrar on 13 May 2010;
2. Enforcement notice issued to Eric Americo Rinaldi by Council dated 12 April 2010;
3. Written submissions from Peter McKinlay to the registrar via emails dated 22 July and 26 July 2010;
4. Written submission from Peter McKinlay received by the Registrar on 30 July 2010;
5. Written submission from McCullough Robertson, providing legal advice to Council, received by the Registrar on 4 August 2010;
6. Verbal submissions from both parties at the hearing;
7. Written submission from Peter McKinlay, received by the Registrar on 9 August 2010, responding to Council’s submission;
8. Written submission from Peter McKinlay by email received by the Registrar on 26 August 2010;
9. The SPA.

Findings of Fact

The Committee makes the following findings of fact:

- The appeal is against an enforcement notice relating to an alleged development offence for operational work (filling).
- The appellant’s agent did not dispute that material had been imported to the subject site, but disputed the nature of that work and whether it constituted operational work.

- Notwithstanding the fact that the appellant disputes that the work in question constitutes operational work, the appeal is against an Enforcement Notice for operational work (filling).
- The filling alleged in the enforcement notice is not associated with any development work involving a building or application for building work, but appears to centre on the appellant's concerns with stormwater drainage discharging onto his property from Council land.

Reasons for the Decision

- The jurisdiction of Building and Development Committees is limited to the matters specified in section 508 of SPA.
- Section 508 of SPA provides four separate heads of power for an appeal to the Committees, namely:
 - Division 4 of Part 2 Chapter 7 of SPA – this division deals with an appeal if the application is only for a material change of use of premises that involves the use of certain prescribed buildings – this division does not apply in this case;
 - Division 5, Part 2, Chapter 7 of SPA – this division deals with appeals about compliance assessment – this head of power does not apply in this instance;
 - Division 6, Part 2 of Chapter 7 of SPA – this division deals with appeals about building, plumbing, drainage and certain other prescribed matters. This division 6 will be considered in more detail as it appears to be the basis for the appellant's contention that the Committee has jurisdiction;
 - Division 7, Part 2, Chapter 7 of SPA – this division deals with appeals about charges for infrastructure – this head of power does not apply in this instance;
- Section 526 of SPA provides that an appeal under division 6 may only be about:
 - (a) A matter under SPA that relates to the *Building Act* (other than certain exceptions that are not relevant here);
 - (b) A matter that under another Act may be appealed to a Building and Development Committee;
 - (c) A matter prescribed under a regulation.
- Sections 526(b) and (c) are not relevant here. The remaining question is whether section 526(a) is relevant and this depends on whether the appeal is about “*a matter under SPA that relates to the Building Act...*”
- Within division 6 is found section 533 which provides that “*a person who is given an enforcement notice may appeal to a Building and Development Committee against the giving of the notice*”. One can understand why the appellant may have considered that section 533 provided the Committee with jurisdiction in this case
- However, the Committee's jurisdiction under section 533 is limited by section 526 of SPA. This appeal does not relate to any of the matters identified in section 526 and in particular is not an appeal about “*a matter under this Act that relates to the Building Act...*” (Section 526(a));
- The Committee does not have jurisdiction to hear this appeal and for this reason the appeal to the Committee should be dismissed

John Panaretos
Building and Development Committee Chair
Date: 1 September 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
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