



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	02-12
<b>Applicant:</b>	Mr Bhaskara Nand & Ms Anjila Devi
<b>Assessment Manager:</b>	N/A
<b>Concurrence Agency:</b>	Brisbane City Council (Council)
<b>Site Address:</b>	31 Hutton Road Aspley, and described as Lot 117 on PR89501 (the subject site).

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### **Appeal**

Appeal against an Enforcement Notice given under the *Building Act 1975* (BA) and taken to be an Enforcement Notice given under section 590 of the *Sustainable Planning Act 2009* (SPA) issued by Council, who reasonably believes that the erection of a carport awning has been carried out without an effective Development Permit.

<b>Date of hearing:</b>	10:00am – Thursday 2 February 2012
<b>Place of hearing:</b>	The subject site - Aspley - Brisbane
<b>Committee:</b>	Mr Leo Blumkie - Chairperson
<b>Present:</b>	Mr Bhaskara Nand - Applicant Mr Aaron Smith – Council representative Mr Matt Wighton - Council representative Mr Suresh Chandra – Building Approvals and Inspection Consultants Mr Albert Dean – Observer

The Building Development and Dispute Resolution Committee (Committee), in accordance with Section 564 of the SPA :-

- A. **confirms** the decision of the Council to issue an Enforcement Notice, however in doing so, changes the date of the Enforcement Notice from 28 November 2011 to the date of this decision and

B. **confirms** the decision of the Council as Concurrence Agency dated 24 March 2011 including conditions to:-

- (1) refuse the siting variation for a carport awning structure 17.40 metres long within the 6 metre setback of the Hutton Road boundary;
- (2) grant a relaxation if the existing shade cloth carport is reduced to 9m in length along the Hutton road boundary and has a clearance of 1.5m to the side boundary; and
- (3) the structure is modified to comply with Council requirements as set out in the decision dated 24 March 2011.

C. **directs** Building Approvals & Inspection Consultants, the Assessment Manager to convey the decision of the Concurrence Agency, in writing dated 24 March 2011, to the Applicant as required by the SPA.

### **Background**

The site is a 601 square metre rectangular shaped corner allotment fronting Hutton Road and Stebbing Street, Aspley, Brisbane.

The site is developed with a two storey Class 1a dwelling, and a 17.4 metre long x 7.2 metre wide shade cloth structure within 0.20 metre of the Hutton Road Boundary and approximately 0.2 metre from the side boundary.

The site has about 1 metre fall towards the Hutton Road boundary.

The owner has been living at the property for approximately the last 11 years.

The adjoining property in Hutton Road is developed with a class 1 dwelling with an approximate 8 metre setback to Hutton Road.

On the 29 October 2009, application was made to Council for a siting variation for an extension to the dwelling on the subject property.

In response to this application, at a site inspection, the Council officer established that unlawful building work had been carried out in the form of a shade cloth structure/carport.

Some time before October 2009, the Applicant (himself a registered builder) advised at the hearing that he had, at that time, engaged a specialist subcontractor to erect a shade cloth carport.

He understood the subcontractor would have prepared all the necessary documentation including the engineering component, and obtained all the necessary relaxations and approvals.

Upon questioning he advised that he did not sign any applications nor sight any approvals for the structure and did not seem to understand that the owner under building law was ultimately responsible for all building work on the property.

After being advised of the unlawful structure, he engaged the Assessment Manager to make application for a siting variation for the existing structure. Application was made to Council as the Concurrence Agency dated 18 December 2009.

On the 31 December 2009, the Council as Concurrence Agency advised the Assessment Manager that it was Council policy to only permit a 6 metre wide open carport abutting the front alignment.

After further submissions and verbal discussion, Council as Concurrence Agency on 24 March 2011 refused the 17.4 metre proposal however, agreed to grant a siting variation to allow the

structure if it was reduced to be a maximum of 9 metre in length.

The Assessment Manager (as required by SPA) **never advised the owner in writing** that the siting variation application had been refused (due to the Concurrence Agency not agreeing to the variation as requested).

On the 27 April 2011, an appeal was lodged with the Registrar regarding the Concurrence Agency not agreeing to the variation application as requested.

On the 27 April 2011, the Registrar correctly advised the applicant that an appeal was not possible as the development application had not been refused.

On the 14 August 2011, the Council issued a Show Cause Notice in relation to the development not having an effective Development Permit.

Numerous discussions were held with Council officers, however it appears that no official show cause meeting was held.

On the 27 September 2011, the Registrar received correspondence of 19 September 2011 from the Applicant requesting to reactivate the appeal lodged on 27 April 2011.

On the 27 September 2011, the Registrar correctly advised the Applicant that it was again not possible to appeal against the issue of a Show Cause Notice and that if the show cause meeting was unsuccessful and an Enforcement Notice was subsequently issued, then an appeal could be lodged.

On 21 October 2011, Council extended the time until 4 November 2011 for the Applicant to show cause as to why an Enforcement Notice should not be issued.

Up to 20 Nov 2011, no further submissions were received in relation to the Show Cause notice and there was no formal attempt to show cause.

On the 28 November 2011, the Council issued the Enforcement Notice.

On the 23 December 2011, a copy of the Enforcement Notice and correspondence of 15 December 2011 from the Applicant was lodged with the Registrar requesting to re-activate the appeal.

On 4 January 2012, the Registrar received a Form 10 – Notice of Appeal application to support the information received on 23 December 2011.

## **Material Considered**

The material considered in arriving at this decision comprises:-

1. Form 10 – Notice of Appeal, drawings, extracts and correspondence (Council's refusal) accompanying the appeal lodged with the Registrar on 24 April 2011 and re activated on 15 December 2011.
2. Verbal submissions from the Applicant at the hearing.
3. Verbal submissions from the Council representative at the hearing.
4. Verbal submissions from the Assessment Manager at the hearing.
5. QDC MP 1.2 Design and Siting Standard for single detached housing - on lots 450m2 and over.

6. The structure and its siting.
7. Other development in the neighbourhood.
8. *Building Act 1975* (BA).
9. *Building Regulation 2006* (BR).
10. SPA.
11. Building Code of Australia (BCA).

## **Findings of Fact**

The Committee makes the following findings of fact:-

- The allotment is approximately 601 square metre in area.
- The allotment is a rectangular shaped corner block fronting Hutton Road and Stebbing Street, Aspley Brisbane.
- The site is developed with a highset class 1 dwelling and an unauthorised 17.4 metre long x 7.2 metre wide shade cloth carport/structure within 0.20 metre of the Hutton Road Boundary and approximately 0.20 mm from the side boundary.
- No development permit has been obtained for the existing shade cloth carport structure.
- The site has approximately 1.0 metre fall towards Hutton Road.
- The neighbouring allotment in Hutton Road has approximately, an 8 metre setback from the Street frontage.
- In correspondence dated 24 March 2011, Council agreed to grant a siting variation to allow the structure to be a maximum of 9 metre in length facing Hutton Road.
- The Applicant currently has at least 4 vehicles and work trailer, all of which he would like to store under cover.
- The Assessment Manager should have refused the siting variation application, in writing to the Applicant after receiving the decision from Council as Concurrence Agency dated 24 March 2011.
- The Registrar was correct in advising the applicant that it was not possible to process the appeal, as the application had not been refused.
- The Registrar was also correct in advising the applicant that it is not possible to appeal Show Cause notices.

## **Reasons for the Decision**

Had the Assessment Manager refused the siting variation application in writing, upon receiving advice from the Concurrence Agency, the Applicant could have appealed that refusal.

Also, as it is not possible to appeal a Show Cause Notice, the Applicant until now, has not been able to appeal the siting variation application refusal.

As the issue of the Enforcement Notice is a direct result of the refusal of the siting variation application, it is now both logical and the opinion of the Committee, that the appeal should also consider the original variation application refusal.

Hence the appeal is about :-

- Refusal by the Concurrence Agency of the siting variation application, and
- Issue of the Enforcement Notice by the Council.

### **A Assessment under MP 1.2 of the QDC**

The Council has refused the application based on the belief that the proposal does not comply with the QDC performance criteria for the following reasons:-

*P1 The location of a building or structure facilitates an acceptable streetscape appropriate for-*

- (a) The bulk of the building or structure; and*
- (b) The road boundary setbacks of neighbouring buildings or structures; and*
- (c) The outlook and views of neighbouring residents; and*
- (d) Nuisance and safety to the public.*

*P6 The location of a building or structure facilitates normal building maintenance.*

The Committee is of the opinion that the above items are not reasons, they are merely a repeat of the criteria listed in the performance criteria of the QDC for consideration. There is no detail on how the structure does not satisfy these criteria.

The Council advice dated 24 March 2011 does not contain such detail.

The Committee assesses the siting variation application under the QDC as follows:-

#### **P1 (a) The bulk of the building or structure**

An inspection of the immediate neighbourhood did not reveal any relaxations in the street boundary setback structures greater than 8m in width. The majority were 6m or less.

Council policy was to allow 6 metre width as a general rule.

The proposal as a curved shade cloth structure (17.4 metre long and 7.2 metre wide) with a 0.20 metre setback and approximately 3.5 metre high, was not in character with the design/aesthetics of the house nor was it in character with the existing streetscape.

The Committee accepts the decision of Council to allow a 9 metre long structure in a modified form, however also believes it should not receive a relaxation for the side boundary setback.

The Applicant's request to allow an 11 metre long structure because this would assist in modifying the existing structure is a fact, however it is not seen as a reason to extend the length of the agreed 9 metre relaxation.

#### **P1 (b) The road boundary setbacks of neighbouring buildings or structures**

The neighbouring property in Hutton Road has a setback of approximately 8 metre. The low profile of the existing structure, provided it is a minimum 1.5 metre from the side boundary and remains unenclosed would facilitate an acceptable streetscape.

#### **P1 (c) The outlook and views of neighbouring residents**

The original would have some effect on the outlook and views of neighbouring residents. The amended proposal, provided it remains unenclosed and is a minimum 1.5 metre from the side

boundary, would not unduly affect the outlook and views of neighbouring residents.

*P1 (d) Nuisance and safety to the public*

The Applicant's submission that people with disabilities and school children use the footpath, has no basis in supporting a relaxation for a boundary setback. The Applicant's vehicles can be parked in the 6 metre setback without the need for a shade structure/carport.

The original and amended proposal does not create a nuisance nor a safety concern for the public, apart from the possibility of roof water cascading onto the foot path. This can be addressed in the modified design.

*P2 (a); (b); (c) Daylight, ventilation, amenity and privacy of residents*

The amended proposal allows adequate daylight and ventilation to habitable rooms on the subject block and also to buildings on adjoining lots and does not adversely impact on the amenity of residents on adjoining lots.

*P3 Adequate open space is provided for recreation, service facilities and landscaping*

The original proposal and hence the agreed relaxation allows for adequate open space for recreation, service facilities and landscaping.

*P4 The height does not unduly overshadow adjoining houses, obstruct the outlook from adjoining lots*

The amended proposal as set out in the agreed relaxation would not unduly overshadow adjoining houses or obstruct the outlook look from adjoining lots.

*P5 Buildings are sited and designed to provide adequate visual privacy for neighbours*

The original proposal being only 0.20 metre from the side boundary would not allow adequate visual privacy for neighbours. The amended proposal provided it is 1.5 metre from the side boundary provides adequate visual privacy.

*P6 The location of a structure facilitates normal building maintenance*

The Council representatives were unable to give reasons as to why the original proposal does not facilitate normal building maintenance. The committee is of the opinion all maintenance could be carried out from within the subject property or from the footpath with applicable Workplace Health and Safety requirements in place.

The amended proposal makes it easier to carry out maintenance.

*P7 The size and location on corner sites provide for adequate sight lines*

The original and amended proposal has a 10m setback from the corner, hence both have limited impact on site lines.

**B Appeal of the Enforcement Notice**

The Applicant did not dispute any of the matters stated within the grounds, facts & circumstances of the Enforcement Notice. The Committee believes the items stated within the requirements of the Enforcement Notice are appropriate and necessary under the circumstances.

As a result of the appeal, the Committee changes the date of the Enforcement Notice 28 November 2011 to the date the decision on the appeal is issued.

## **Conclusion**

The Committee after taking into account the following:-

- the existing structure;
- circumstances leading up to the issue of the Enforcement Notice;
- dimensions, existing development and levels of the block;
- existing streetscape of Hutton Road and neighbouring streets;
- inspection of properties in the neighbourhood which appear to have been granted variations by Council for setbacks for 6 to 8 m wide carports;
- existing setbacks of neighbouring properties;
- submissions from Council and its hearing representatives; and
- submissions from the Applicant and Assessment Manager.

believe the setback variation offered by Council in their correspondence dated 24 March 2011 is generous and acceptable provided it has a minimum 1.5m setback from the side boundary, and with the conditions set out in the decision, is acceptable after taking into account the performance criteria of the QDC.

The proposal is also required to satisfy all other requirements contained within the BA, BR, BCA and SPA.

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**Leo Blumkie**  
**Building and Development Committee Chair**  
**Date: 15 February 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 Local Government and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**