



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	29- 14
Applicant:	Mr Ronald Donaldson
Assessment Manager:	Mackay Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	3034 Bruce Highway, Kuttabul and described as Lot 22 on SP105837 (the subject site)

Appeal

Appeal under section 533 of *Sustainable Planning Act 2009* (SPA) against an Enforcement Notice (Ref: CRS No. 417074-417065-417077) dated 17th July 2014, issued by Mackay Regional Council (Council) under section 590 of the SPA for carrying out assessable development without a permit at the subject site.

Date and time of hearing:	Friday 12 th September 2014 at 12.01pm
Place of hearing:	The subject site
Committee:	Mr Gordon Heelan – Chair Mr Ian Mac Donald - Referee
Present:	Mr Bob Donaldson – Applicant and property owner Mr John Viklund - Applicant representative (Town Planner) Mr Andrew Cridland - Council representative Mr Steven Gatt - Council representative Mr Robert Maher - Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(c) of the SPA **sets aside** the decision of Council to issue the Enforcement Notice dated 17 July 2014. The Committee makes the following amendments to the relevant sections of the Enforcement Notice and directs the Council, under section 564(1) to re-issue the Enforcement Notice to the Applicant.

1. On pages three and four under the section titled '*Particulars*'
 - amend 'Permit previously issued' to read *building permit number 91/0198 issued on xx date* (Council to provide the date and completed building permit details for all relevant buildings - approximately six (6))
 - amend the Show Cause Notice to read '*Show Cause Notice, number XXXXXX* (Council to provide the Show Cause Notice number)'

- amend the Enforcement Notice to read '*Enforcement Notice, number XXXXXX (Council to provide the Enforcement Notice number)*'
 - advise the Applicant what conditions have not been met with regard to the Council letter dated 26 August 1994.
- 2 On page four under Section 4 titled '*Details of Required action*' remove points iv to ix and replace with the following:
- *Within 40 business days upon receipt of the Committee Decision engage a Private Building Certifier to apply for and gain, a building approval to enable finalisation of the Six (6) Cabins and the unapproved carport. The Applicant is required to complete all work associated with the building approval within 18 months. (From commencement of work or commencement of building approval). This will also include the existing plumbing permits that were issued conjointly with the original building approval.*
- 3 On page five under Section 5 titled '*Compliance Date*' change to '*Close of Business 50 business days from the date of the Committee decision*'.
- 4 On page five under the Section 6 titled '*Authorisation*' change the date of issue from 17 July 2014 to the date of the Committee decision.

Background

Council issued an Enforcement Notice dated 17 July 2014 under section 590 of the *Sustainable Planning Act 2009* for carrying out assessable development without a permit at the subject site.

The Applicant lodged an appeal against the Enforcement Notice with the Committee Registrar on 20 August 2014 stating he had received the Enforcement Notice on 12 August 2014. The Applicant provided a Statutory Declaration dated 20 August 2014 declaring he had been away from Mackay at the time the Enforcement Notice was issued assisting his family members with the administration of his deceased brother's estate.

A hearing was held on site on 12 September 2014 at 12.01pm.

The subject site is lot 22 on SP 105837. The site is a large rural lot that contains a hotel building and variety of other buildings. The buildings that are the subject of this appeal have a history that dates back to between 1991 and 2000.

In November 2012 Council issued Show Cause Notices to the Applicant for building work and subsequently issued Enforcement Notices for the building work associated with these buildings in January 2013.

On 12 June 2014 Council withdrew all the Show Cause and Enforcement Notices related to the subject site and advised the Applicant that Council intended to further pursue the matter. Council advised the Committee at the hearing that the reason for Council withdrawing all Notices was based on legal advice to Council that precedence could be set from another similar case currently before the Courts.

Upon withdrawing all previous Notices, Council reissued a Show Cause Notice which required a written response by 15 July 2014 in relation to the following:

- i. Shipping containers
- ii. Transportable/Portable Building (Toilet Block)
- iii. Old Hamilton Island Transportable/Portable Building
- iv. Re-site House/Cabin - low set weather board clad;
- v. Re-site House/Cabin - low set weather board clad;

- vi. Re-site House/Cabin - low set weather board clad;
- vii. Re-site House/Cabin - low set weather board clad;
- viii. Re-site House/Cabin - high set fibro clad;
- ix. Re-site House/Cabin - low set weather board clad;

Council states in the Enforcement Notice dated 17 July 2014, the subject of this appeal, that a search of Councils records on 16 July indicated that a development application had not been submitted to Council or a development permit given by Council in respect of the regulated building work. As a consequence, Council issued an Enforcement Notice to the Applicant on 17 July 2014 for non-compliance with Show Cause Notice issued on 12 June 2014.

Pages Two to Four of the Enforcement Notice

The Enforcement Notice states the following under the section titled '*Particulars*':

Under 'Further Particulars':

- v. low set re-site house/cabin - first (1st) in line on the eastern side of the Bruce Highway adjacent to the East Coast QR Rail line....*
- vi. low set re-site house /cabin - second (2nd) in line on the eastern side of the Bruce Highway adjacent to the East Coast QR Rail line....*
- vii. low set re-site house/cabin - third (3rd) in line on the eastern side of the Bruce Highway adjacent to the East Coast QR Rail line.....*
- viii. low set re-site house/cabin - fourth (4th) in line on the eastern side of the Bruce Highway adjacent to the East Coast QR Rail line.....*
- ix. High set re-site house/cabin - fifth (5th) in line on the eastern side of the Bruce Highway adjacent to the East Coast QR Rail line....*
- x. low set re-site house/cabin - sixth (6th) in line on the eastern side of the Bruce Highway adjacent to the East Coast QR Rail line....*

In each of the above, Council has stated these buildings are in a "*dilapidated condition – originally moved onto the site with approval - Development (building) Permit previously issued - neither building work or inspections were finalised*".

With respect to the above, Council did not include in the Enforcement Notice or as an attachment, details about when and what building permits were issued for the relevant buildings.

During the on-site hearing the Council advised that the building approval **91/0198** for the 6 cabins have now lapsed. A copy of the extract of the *Building Act 1975* (1984 version) was provided as justification.

Also during the hearing, Council provided a copy of the following documents;

- a) A letter from 'Pioneer Shire Council' dated 26th February 1991 regarding the Six (6) Cabins, advising that it is proposed to issue a building approval subject to conditions including the lodgement of a septic application.

There is a condition in the letter to the effect that the dwellings are not to be occupied until the buildings are certified as structurally adequate on completion.

The Committee noted that most of the buildings subject of this appeal are occupied or in use.

- b) Pioneer Shire Council – A one (1) page Building Surveyors Report for the 6 Cabins dated 26.2.91 with (Building) six (6) conditions are provided on the back of the report.
- c) A one (1) page building approval **91/0198** issued by Pioneer Shire Council for 6 relocate cabins issued on (Date not provided). Two (2) conditions are noted at the bottom of the page.

The Committee noted that approved plans are not referenced in the one page approval.

- d) A letter from 'Pioneer Shire Council' dated 26th August 1994 regarding the Six (6) Cabins, advising that Council cannot issue a final certificate for the re-site dwellings until all conditions of the building approval have been met.

The Committee noted that the letter and Council records do not state what conditions/items had not been met.

- e) An extract of the *Building Act 1975* (1984 version) was provided by Council as evidence. In particular:

Section 8.6 Approval or Disapproval of building work.

Clause (3) Maximum Period for Commencement of Building Work. The approval of any building work shall become void if-

(b) the building work is not substantially completed within the following periods from the date on which the approval was given:- .

(ii) If no period for completion is stipulated in the approval, a period of eighteen months.

- f) Building & Plumbing Approval - **99/1448** for a Resite Dwelling issued by Mackay City Council Business Unit 'Complete Approval Service' on 31st March 2000. This consisted of a 4 page Decision Notice.

The Committee noted that Council had not provided the property owner with a site plan or dwelling plans that were stamped, endorsed or referenced by Council as is required to accurately identify the correct building for this building approval.

A building approval requires 5 inspections to be completed. One of the inspections is for block work, including bond beams, prior to core filling. This inspection is a requirement for concrete block wall construction, and is used for a slab on ground building. The description of building work is a Resite Dwelling – Class 1a. The inspection would be considered an error in the inspection requirements.

It is not possible for Council or the Committee to determine which building this particular approval applies to because available Council records for the Building & Plumbing Approval are inconclusive.

Council has formed the opinion the building approval for the Six (6) Cabins has lapsed in accordance with the *Building Act 1975* (1984 version) as a successful final inspection was not completed as noted in the Council letter to the Applicant on 26th August 1994. Council advised the Committee that their records show the Applicant has not applied for a new building approval to continue the building work for the Six (6) Cabins.

Council did not provide the relevant Show Cause Notice number in the Enforcement Notice to enable the Applicant to identify which Show Cause Notice was being referenced.

The Committee has reviewed the previous Show Cause Notice issued on 6th November 2012 to the property owner for the re-site house/cabin. The Show Cause Notice provides the following information in the section titled **Particulars**;

A search of Council records indicates a development permit given in respect of the use - building work - dwelling house under construction has lapsed. (CRS 295069 - No 17 - Building)

The above statement indicates Council should have been able to provide the property owner with the permit number; date permit was issued; date permit lapsed; and any other details (e.g. approved plans, etc) on their records. However it appears Council did not provide such details to the property owner as part of the Show Cause Notice or the Enforcement Notice to enable the property owner to provide a response.

As noted above, Council provided a copy of the building approval Decision Notice (excluding approved stamped plans, etc) at the on-site hearing. Council provide a copy of the house plans as soon as practicable after the hearing however the plans are not endorsed (approved stamped plans) by Council.

At the hearing, the Applicant provided a copy of the Council endorsed plumbing and building plans (approved stamped plans) for the Six (6) Cabins (the building approval (Permit No: 91/0198) dated 27.02.1991). Council appears not to have these plans however the endorsed plans need to be used from this point forward for the purpose of the Committee decision with respect to the reissue of the Enforcement Notices.

The plumbing permits associated with the Six (6) Cabins will be addressed in the Committee decision for appeal number 31-14.

Page 4 of the Enforcement Notice

The Enforcement Notice provides the following information in **Section 4 - Details of required action**;

You are required to immediately refrain from committing the offence by:

*Completely remove the **structures** from the site and return Lot 22 on SP105837 to the condition it was in prior to the illegal development commencing;*

NOTE: 'structures' is used as a general term for the purposes of this decision and refers to the **specific** description of each structure noted in the Enforcement Notice (e.g.; shipping containers, low set re-site house/cabin, etc)

Council has instructed the property owner to completely remove each structure including the Six (6) Cabins that had a building approval and a final inspection but did not comply with all of the building approval conditions as noted above. The Committee has formed the view that:

- Council has not provided evidence to support their direction to the property owner about why the Six (6) Cabins that had a building approval are to be completely removed from the site. (e.g. the buildings are structurally unsafe, etc)
- Council has not provided the property owner with an opportunity to demonstrate if the Six (6) Cabins can/may comply with the conditions imposed as part of the building approval 91/0198.

During the hearing:

- Council advised that the property owner had not responded to any correspondence from Council.
- Council and the Applicant agreed the (i) Shipping containers; (ii) Transportable/Portable Building (Toilet Block) and (iii) Old Hamilton Island Transportable/Portable Building will be completely removed from the site.
- The Applicant advised they believe the Building Approvals for the Six (6) Cabins are still current and the buildings are substantially completed and only require a final inspection. The Committee notes that the Council letter dated 26th August 1994 confirms a final inspection was carried out on 25th August 1994, however not all of the conditions of the building approval have been met. The letter also does not stipulate what conditions have not been met however it should be possible for Council to determine what conditions had not been met. The letter dated 26th February 1991 includes 5 conditions. The conditions include, but are not limited to, '*Compliance with the Town Planning conditions as outlined in Council correspondence of 23rd September 1985 - septic and sillage disposal clearance, sealed access, driveways and parking....., etc*'.

- All parties agreed to the following:
 1. The building approval time frames have lapsed in accordance with *Building Act 1975* (1984 version), Section 8.6, and
 2. If the Building Approvals for the Six (6) Cabins have lapsed, the Applicant agrees to engage a Private Building Certifier with the view to apply for and gain a building approval to enable finalisation of the Six (6) Cabins. It is noted that the Town Planning conditions that formed part of the original building approval may still be applicable – an issue on which Council needs to provide advice to the Applicant.

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 Registrar on 20th August 2014.
2. The Enforcement Notice dated 17th July 2014.
3. Verbal representations by the parties at the hearing
4. Additional information provided by the Council at the hearing:
 - a. A letter from 'Pioneer Shire Council' dated 26th February 1991 regarding the Six (6) Cabins, advising that it is proposed to issue a building approval subject to conditions including the lodgement of septic application.
 - b. Pioneer Shire Council – A one (1) page Building Surveyors Report for the 6 Cabins dated 26.2.91.
 - c. A one (1) page building approval **91/0198** issued by Pioneer Shire Council for 6 relocate cabins.
 - d. A letter from 'Pioneer Shire Council' dated 26th August 1994 regarding the Six (6) Cabins,
 - e. An extract of the Building Act 1975 (1984 version), Section 8.6 Approval or Disapproval of Building Work.
 - f. Building & Plumbing Approval - 99/1448 for a Resite Dwelling issued by Mackay City Council Business Unit 'Complete Approval Service' on 31st March 2000. (Consisting of a 4 page Decision Notice).
 - g. Exhibit – Extract from the Standard Building Regulation 1993 - Reprint 2A. Clause 30 – When demolition, removal and rebuilding starts and finishes.
5. Information provided by the Applicant at the hearing:
 - a. Copy of Council approved **91/0198** dated 27.02.1991 and stamped plumbing and building plans for the Six (6) Cabins.
6. The *Sustainable Planning Act 2009* (SPA)
7. The *Building Act 1975* (BA) current version and 1984 version.
8. Standard Building Regulation 1993 (SBR)
9. The Sustainable Planning Regulation 2009 (SPR)
10. Observations made during site inspection

Findings of Fact

The Committee makes the following findings of fact:

- Council has not provided evidence to support their direction to the property owner in the Enforcement Notice as to why the Six (6) Cabins that had a building approval are to be completely removed from the site. (e.g. the buildings are structurally unsafe, etc)
- Council has not advised the Applicant what building approval conditions have not been met however it is possible for Council to determine the conditions that have not been met.
- Council has not provided the Applicant with the opportunity to demonstrate if the Six (6) Cabins can/may comply with the conditions imposed as part of the building approval 91/0198.
- Building Approval (91/0198) does not specify when the building approval will lapse. However the *Building Act 1975* (1984 version) Section 8.6 Approval or Disapproval of Building Work does specify when building work will lapse. It states: *If the building work is not substantially completed within eighteen (18) months from the date of the approval. The building work had not been completed and the building approval had lapsed.*
- The Applicant agrees if the Building Approvals for the Six (6) Cabins have lapsed, to engage a Private Building Certifier with the view to apply for and gain a building approval to enable finalisation of the Six (6) Cabins. It is noted that the Town Planning conditions that formed part of the original building approval may still be applicable, an issue on which Council needs to provide advice to the Applicant.
- Council and the Applicant agreed the (i) Shipping containers; (ii) Transportable/Portable Building (Toilet Block) and the (iii) Old Hamilton Island Transportable/Portable Building as documented in the Enforcement Notice will be completely removed from the site.
- The Committee is not satisfied that the previous plumbing compliance permits for the buildings (issued in association with the building approvals) have lapsed as a plumbing approval does not have a specific completion date with in the plumbing legislation.

Reasons for the Decision

- The Committee decision has been based on the material provided by the Applicant and Council. It is worthy of note that the Council documentation was inconclusive for many issues identified in the Enforcement Notice and this may be due in part to the chronology of time involved dating back to a period between 1991 and 2000.
- During the hearing Council and the Applicant agreed the (i) Shipping containers; (ii) Transportable/Portable Building (Toilet Block) and the (iii) Old Hamilton Island Transportable/Portable Building will be completely removed from the site.
- The Applicant agrees, if the Building Approvals for the Six (6) Cabins have lapsed, to engage a Private Building Certifier with the view to apply for and gain a building approval to enable finalisation of the Six (6) Cabins. It is noted that the Town Planning conditions that formed part of the original building approval may still be applicable – an issue on which Council needs to provide advice to the Applicant. The plumbing permits associated with the Six (6) Cabins will be addressed during appeal 31-14.

Gordon Heelan
Building and Development Committee Chair
Date: 17th October 2014

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) 3237 0403 Facsimile (07) 3237 1248