



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	46-14
Applicant:	Robert Sean & Michelle Lee Cullen
Assessment Manager:	Rockhampton Building Approvals
Concurrence Agency: (if applicable)	Livingstone Shire Council (Council)
Site Address:	14 Apollo Court, Taroomball and described as Lot 25 on SP 181253 - the subject site

Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the Preliminary Decision Notice issued by Livingstone Shire Council for proposed building works as the Application has not demonstrated compliance with the Queensland Development Code.

Date and time of hearing:	Tuesday 27 th January 2015 at 10:00am Council Representative arrived at 11.10am
Place of hearing:	14 Apollo Court, Taroomball
Committee:	Gordon Heelan - Chair
Present:	Robert Sean & Michelle Lee Cullen - Applicant and property owner Bradley Crook - Council Representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with Section 564 of the *Sustainable Planning Act 2009* (SPA) finds that it does not have jurisdiction under Section 527 of SPA to hear the appeal.

Background

Rockhampton Building Approvals received a Building Development Application (Application) from the property owners (appeal Applicant) to construct a carport (Boatport) to the front of the subject property. The subject site is a residential lot at the end of a cul-de-sac and the intention was for a carport (for the boat) to be positioned in the front yard to allow for the rear of the property to accommodate the proposed inground pool and playing area for children in the future.

The carport is subject to the Queensland Development Code Mandatory Provision 1.2 (QDC MP 1.2)) and in accordance with the requirements of the code, the property owner referred the Application to the Council as Referral Agency for a response. The Council issued a Concurrence Agency referral approval

for the carport on 30 April 2014. Rockhampton Building Approvals issued a building approval on 8/05/2014 for the construction of a shed – Class 10a.

On or about the 21 October 2014, the property owner made an Application to the Council seeking a change to the existing approval to allow the carport to be located 3.6m from the front (road) property boundary.

On 25 November 2014, Council issued a 'Refused Decision Notice' for the reduced setback. The Private Building Certifier from Rockhampton Building Approvals did not issue an amended building approval for the reduced setback in accordance with the Concurrence Agency referral 'Refusal' from Council.

Site inspection prior to the hearing showed the carport appears to have been constructed in accordance with the Building Approval as issued by Rockhampton Building Approvals. It is noted the carport appears to have a setback of approximately 3.800 metres from the front property boundary.

The appeal hearing on the subject site

The hearing date set for the appeal, agreed to by all parties, was Tuesday 27th January 2015 at 10am. The Council representative arrived at 11.10am.

The Committee asked the property owners to table the original documents pertaining to this appeal. The documents were used as part of the supporting material in making the appeal decision. The property owners confirmed that the documents were original and have not been changed or added to in any way,

It is noted the Council representative came to the hearing unprepared and without any documentation to confirm the documents tabled were as per the documents Council had on their file. The Private Building Certifier from Rockhampton Building Approvals did not attend the hearing or provide any written submissions to be considered by the Committee at the hearing.

It was agreed by the Council and the property owners that the documents tabled by the property owners were the original documents. Upon inspection of the documents it could not be confirmed if the documents were complete as there were no pages numbers in the approval document which included the approved plans. For example, the decision notice and approved documents were not numbered to show the page number as 1 of 10, etc.)

The Committee reviewed the documents in establishing the following:

(a) Who is the Assessment Manager for the document being appealed

(i) *The Committee asked Council if they issued the Building Approval.*

Council responded they did not, that the Building Approval for the carport was issued by Rockhampton Building Approvals, certifier Mr Wayne Knobel.

(ii) *If Council did not issue the Building Approval for the carport, then how can Council issue a Decision Notice with Conditions and Appeal Rights for a 'Concurrence Advice' referral?*

Council are of the opinion they were the 'Assessment Manager' for a 'Concurrence Advice' referral and could issue a Decision Notice with conditions as Council were assessing the proposed building work against the relevant QDC.

As per the *Sustainable Planning Act 2009* (SPA) and *Sustainable Planning Regulation 2009* (SPR), the Committee advised Council, if a Council is the Concurrence Agency for an Application, they cannot issue a Decision Notice with conditions, they can only provide Concurrence Agency advice. In this appeal, it would appear the Applicant for the Concurrence Agency Application is the property owner and not the private certifier.

Under the SPA, the private building certifier, Mr Wayne Knobel is required to issue the Building Approval 'Decision Notice' based on the Concurrence Agency 'advice'. It is the Building Approval

The SPR, schedules 6 and 7 specify who the Assessment Manager is and who the Concurrence Agency/Advice Agency is for a development application. Division 6 of the SPA outlines the legislative requirements for appeals to Committees about a building, plumbing and drainage and other matters. Subdivision 2 of Division 6 outlines appeals about development applications and approvals and section 527 of this section specifically details the requirements for 'appeals by applicants'.

Under the legislative and regulatory requirements noted above, it is the 'Decision Notice' with conditions and **not** the 'Concurrence Agency advice', which is the appealable notice. A Concurrence Agency advice is not appealable because it is advice only and not a decision.

(b) What is being appealed

(i) *The Committee asked Council if they knew what was being appealed*

Council responded the 'Concurrence Assessment'. Council is of the opinion, as they issued a Decision Notice for the 'Concurrence Assessment' it could be appealed and as such they included 'Right of Appeal' provisions in their decision.

The Committee advised Council, there are no appeal rights against Concurrence Agency advice therefore information on the notice about appeal rights should not have been included.

Therefore, given the private certifier has **not** issued an amended Building Approval Decision Notice based on the Concurrence Agency advice dated 25th November 2015, the Committee does not have jurisdiction under the SPA to hear the appeal.

Appeal Documentation

The Committee suggested to the appeal parties that they review the appeal documentation lodged for compliance against the SPA because given the Council's responses to the two questions above at the hearing, it appears neither the Council nor Rockhampton Building Approvals understand the respective legislative requirements.

1 Livingstone Shire Council documents

Application Form - Livingstone Shire Council document

In the Council's 'Application Form for Concurrence Assessment' there is provision for the 'Assessment Manager's Name and Details'. The form notes '*the certifier is requested to complete this section*'. This was not completed. It is noted the neighbouring property owners provided written consent and this was included as part of the Application.

Concurrence Decision Notice - (As received by the Building and Development Registrar on 18th December 2014)

- The cover page to the document is titled 'Building Works - Concurrence Decision Notice'. The title of this document is confusing and implies that Council is the Assessment Manager for a Building Application for Building Works. This is inaccurate under the SPA as the Application is for *Concurrence Agency advice* with regards to non-compliance with the acceptable solutions of QDC-MP1.2.
- The cover page provides '*Right of Appeal*' information. Under SPA there are no appeal rights against Concurrence Agency advice. A Private Building Certifier as the Assessment Manager is required, under the SPA, to issue a building approval or refusal based on Concurrence Agency advice. In the case of a refusal, the Applicant has a right of appeal under section 527 of the SPA against the refused building approval. Concurrence Agency advice is not appealable because it is not a Decision and the Council is not the Assessment Manager. The Council is providing advice to the Assessment Manager (private Building Certifier) to enable a Decision Notice to be issued in accordance with the Council advice. Therefore the 'Right of

Appeal' information that has been included at the bottom of page 1 is inaccurate under the SPA.

- In addition, under the 'Right of Appeal' the following is written:

'Whilst most building work appeals will be made in the first instance to a 'Building and Development Tribunal', applicants do have a right of appeal to the Building and Development Dispute Resolution Committee'. However, if the Committee is satisfied that the matter should be dealt with a Building and Development Tribunal the Committee may, under Division 6 of the Sustainable Planning Act 2009, remit an appeal to that Tribunal for decision'.

Building and Development Tribunals and Building and Development Dispute Resolution Committees are one in the same entity – they are not different entities as stated in the notice. The Building & Development Tribunals operated under the *Integrated Planning Act (IPA)* and their name was changed to the Building and Development Dispute Resolution Committees (Committees) when the *Sustainable Planning Act 2009* replaced IPA in 2009.

- The cover page provides a section for 'Description of Work'. In this section Council has provided a written dimension of 300mm from the left boundary side of the property, however is silent of the setback distance from the front (road) property boundary.
- It is suggested that if Council provides a written setback distance, they also include the front boundary setback. Council could also include the following information/advice within their written response;

CONFLICT BETWEEN PLANS AND WRITTEN ADVICE

Where a discrepancy or conflict exists between the written advice(s) of the Concurrence Agency advice and the endorsed plans, the requirements of the written advice(s) will prevail.

- The cover page provides a section for 'Conditions Applicable to the Decision'. This implies Council are issuing a Decision Notice when it is acting as a Concurrence Agency and therefore under the SPA, can only provide advice.
- The next page of the document is titled 'Conditions/Reasons relating to Concurrence Decision'. This page implies that Council is issuing an Approval for building work as it states the '**Decision – Approved with Conditions**'.
- The site plan has been stamped 'Preliminary Approval only not for construction' -reference R/317-2014.

The site plan has the following information;

- a. The carport has a length of 8.000 metres and a width of 3.800 metres.
- b. The house has a setback 10.600 metres from the front (road) property boundary.
- c. The fence (yard fence) between the side property boundary and the western side of the house is setback 12.650 metres from the front (road) property boundary. The fence is to create a front yard and a rear yard for the family dog.
- d. The proposed carport is 0.700 metres from the house.
- e. The proposed carport left hand corner will be 0.300 from the side property boundary closest to the front (road) property boundary.
- f. The carport has three distance noted from the front (road) property boundary
 - i. 6.000 metres,
 - ii. 3.800 metres,
 - iii. the distance of 3.600 metres has been crossed out.

The proposed carport is to be located between the yard fence and the front (road) property boundary. This area is 12.650 metres in length. The carport is 8.00 metres in length, leaving 4.650 metres. The setback distance of 6.00 metres cannot be achieved without relocating the yard fence. It is assumed the distance of 3.800 metres was to allow the carport to be located without moving the yard fence.

Given the above, the site plan is not clear with respect to the setback dimension Council has approved as they have not provided a written dimension for the front (road) property boundary setback as they did for the side property boundary setback of 300mm.

- The advice section at the bottom of the Conditions (page 1 of 2) refers to the Building and Development Tribunals Appeal, however the appeal rights from the SPA on page 2 of 2 refers to the appeal rights for the Planning and Environment Court.

2 Rockhampton Building Approvals documents

Building Approval and associated documents from Rockhampton Building Approvals (the private building certifier) received by the Building and Development Committee Registrar on 18th December 2014)

- The cover page (page 1 of 3) provides a section for '*Development Description*'. In this section the certifier has described the work as a '*Shed*' however the plans approved are for a Carport.
- The cover page (page 1 of 3) provides a section called '*Referral Agencies*'. In this section it states '*Concurrence Agencies, Livingstone Shire Council*'.
- The Decision Notice does not make reference to the '*Concurrence Agency advice*' as issued by Livingstone Shire Council on 30 April 2014. It is unknown if the Building Certifier has viewed the Concurrence Agency approval.
- In the Decision Notice, Advisory Note on page 2 or 3 the following is noted - *All conditions placed on the Reduced Alignment or Amenity & Aesthetics Approval are to be complied with and form part of this approval.*
- The certifier does not provide a list of approved documents (plans, etc.) for clarification with respect to what has been approved as required under section 335(3) of the SPA. As the documents are not listed in the Decision Notice and the approved documents do not have a unique reference number placed on them, it is unknown if the documents attached are a complete set of approved documents. Example of reference on the approved documents, 'BA276/2014 - 1 of 14'.

In the Decision Notice (for example)

List of Approved Plans / Documents (Form 15 etc)

Plan No: **BA276/2014 - 1 of 14**

Description: **Site Plan**

Plan No: **BA276/2014 - 2 of 14**

Description: **Floor Plan**

The reader of the building approval will know the approval number and the number of documents and if there are any pages missing.

- The site plan has been stamped 'Approval' with the reference 276/2014.

The site plan has the following information;

- a. The carport has the same dimensions as noted in the Concurrence Decision approval except for.
- b. The approved site plan does **NOT** provide the distance from the **front** (road) property boundary.

It is unknown how a Building Certifier or competent person will know the carport is in the correct location from the front (road) property boundary when a prescribed setback has not been provided on the approved documents. Therefore how can the Building Certifier or competent person inspect and approve the carport as per the approved plans when the prescribed setback is not stated.

It is unknown if the Building Certifier has viewed the Concurrence Agency approval as the approved site plans are not consistent with the site plan in the Concurrence Agency referral approval for the carport on 30 April 2014.

If the Building Certifier has viewed/assessed the Concurrence Agency approved site plan showing the 2 setback dimensions, it would be assumed the Building Certifier would have contacted Council to clarify the approved front (road) property boundary setback dimension.

Summary conclusions following the appeal hearing review of the appeal documentation

Council documents

Council acknowledged it did not follow their procedure correctly by ensuring the '*application form for the Concurrence Assessment*' was completed correctly including obtaining the Assessment Managers details.

Council also acknowledged that their Concurrence Agency advice and accompanying documents are confusing and do not comply with the legislative requirements of the SPA. For example, the title of the Councils' Concurrence Agency advice notice '*Building Works - Concurrence Decision Notice*' is contradictory under the legislation.

Rockhampton Building Approvals documents

During the hearing, it was agreed the Private Building Certifier Building Approval and associated approved documents appear to be incomplete. The Certifier did **not** provide a prescribed distance from the **front** (road) property boundary nor was the Concurrence Agency approval and approved plan referenced. It could not be confirmed if the Certifier reviewed Council's Concurrence Agency advice.

The Applicants were not aware of the meaning of 'Concurrence Agencies, Livingstone Shire Council' as written in the section titled 'Referral Agencies', to them, it was just a collection of words on a document.

The Applicants stated to the Committee and Council that they had received very little help from the Private Building Certifier and suggested that both the Council and the Certifier be provided with training and examples on how to write a Decision Notice and reference the approved documents so it is clear what has actually been approved in both circumstances.

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 18 December 2014.
2. The Building Works - Concurrence Decision Notice (317-2014-B-PA) issued by Livingstone Shire Council on 30 April 2014.
3. Decision Notice Approval 201400276 – issued by Rockhampton Building Approvals on 8/05/2014
4. Application For Concurrence Assessment for to Livingstone Shire Council - dated 9 November 2014
5. 'Request to Change Existing Concurrence Approval' acknowledgement letter from Livingstone Shire Council - dated 21 October 2014.
6. Livingstone Shire Council – Concurrence Application Assessment Report – dated 13 November 2014.

7. Concurrence Application – Refused Decision Notice (317-2014-B-PA) issued by Livingstone Shire Council on 25 November 2014.
8. Written submissions provided by the Applicants
9. Written submissions provided by Council
10. The *Sustainable Planning Act 2009* (SPA)
11. The Sustainable Planning Regulation 2009 (SPR)
12. The Queensland Development Code Mandatory Part 1.2 (QDC MP 1.2)
13. Verbal submission from the Applicants
14. Verbal submissions from Council representatives at the hearing
15. Observations made during the site inspection

Findings of Fact

The Committee makes the following findings of fact:

1. The Private Building Certifier as the Assessment Manager had not issued an amended Decision Notice to incorporate the Council's Refusal of the Application as Concurrence Agency at the time the appeal was lodged with the Building and Development Committee Registrar on 18 December 2014.
2. The issue of a Decision Notice is a requirement under section 334(1) of the SPA and the Decision Notice is appealable to the Building and Development Dispute Resolution Committees under section 527 of the SPA.

Reasons for the Decision

1. The Committee's jurisdiction is set out under section 508 of the SPA.
2. The appeal was not validly lodged under section 527 of the SPA therefore the Committee does not have jurisdiction to decide the appeal.
3. Even though the Committee does not have jurisdiction to decide the appeal, the Applicant and Council benefitted from the meaningful discussion at the hearing during which Council agreed to consider changes to their documentation and process.
4. The Committee would like to take this opportunity to express to the Council and the Certifier the importance of ensuring any application and approved documents must be assessed and accurately documented in accordance with the legislative requirements.

Gordon Heelan
Building and Development Committee Chair
Date: 4 March 2015

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