

CITATION: *O'Brien v Queensland Building and Construction Commission* [2017] QCAT

PARTIES: Peter O'Brien
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR143-16

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Member Gordon**

DELIVERED ON: 17 March 2017

DELIVERED AT: Brisbane

ORDERS MADE:

1. Peter O'Brien did not breach section 83(1)(a) of the Building Act 1975 when he issued the building development approval dated 24 September 2015.
2. Accordingly Peter O'Brien did not engage in unsatisfactory conduct.

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS – OTHER PROFESSIONS, TRADES AND CALLINGS – private certifier – where certifier gave building development approval before the Council's development permit for operational work – whether a breach of section 83(1)(a) of the Building Act 1975 – whether unsatisfactory conduct

Building Act 1975 (Qld) s 83, s 83(1)(a)
Sustainable Planning Act 2009 (Qld)
Acts Interpretation Act 1954 (Qld) s 14(3), s 14A, s 14D

REPRESENTATION:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act).

Peter O'Brien

- Paul R Smith, Deane Chambers.

Queensland Building and Construction Commission:

- Earl Tan, Principal Lawyer.

REASONS FOR DECISION

- [1] Peter O'Brien a private certifier, was reprimanded by the Queensland Building and Construction Commission. He now applies to the Tribunal for a review of QBCC's decision about this.
- [2] The QBCC's reason for reprimanding Mr O'Brien was that he had issued building development approval for a child care centre prematurely. The QBCC says that he was only permitted to issue the building development approval after all the necessary development permits had been obtained from the Council and this had not happened. Mr O'Brien disputes this, and says that all necessary development permits had been obtained, that he acted legitimately and in accordance with the usual practice.
- [3] The child care centre was to be built at 32-36 King Street, Buderim. The relevant planning scheme for the site was the Sunshine Coast Planning Scheme 2014. Under the planning scheme, the change of use to child care centre was "impact assessable", and in turn, the associated operational works were "code assessable". These two forms of development therefore required development permits from the local government, in this case the Sunshine Coast Regional Council. The reconfiguration of the lot was also assessable development which needed Council approval.
- [4] The development permit for material change of use was the first to be made, and on 15 January 2015 it was amended in a negotiated decision. Section 12 of that decision notice listed the further development permits which were required:-
 - a) Development Permit for Reconfiguration of a Lot.
 - b) Development Permit for Operational Work (Civil works and Landscaping).
 - c) Development Permit for Building Work (relocation of Existing House).
 - d) Development Permit for Building Work (New Buildings).
- [5] Mr O'Brien holds a QBCC Licence for Building Certifier Level 1, and as such may perform the duties of a private certifier class A. Accordingly he could deal with the building development applications in c) and d) above.
- [6] The decision notice of 15 January 2015 imposed detailed conditions for the material change of use in section 5 (under the heading Assessment Manager Conditions) and section 6 (Referral Agency Conditions). A number of the conditions in section 5 specifically required works to be done in accordance with the development permit for operational work, when made.

[7] The actual sequence of permits and approvals was as follows:-

Date	Permit	Issued by	Purpose
21 Oct 2014	Development Permit for Material Change of Use	SCRC	Planning approval for material change of use to child care centre with numerous conditions relating to construction and use
15 Jan 2015	Amended Development Permit for Material Change of Use (negotiated decision)	SCRC	Amendment to the earlier planning approval for material change of use, with an amendment to one condition, the list of approved plans and documents and the deletion of an advisory note
25 Feb 2015	Development Permit	SCRC	Planning approval for the reconfiguration of a lot (1 lot into 2 lots)
10 Aug 2015	Building Development Approval	Mr O'Brien	Building approval for the relocation of existing 1a dwelling
24 Sept 2015	Building Development Approval	Mr O'Brien	Building approval for the construction of the child care centre
16 Dec 2015	Development Permit for Operational Work	SCRC	Planning approval for engineering works, roadworks, landscaping, earthworks, street lighting and vegetation clearing

[8] The issue came before QBCC by way of complaint made by an officer of the Council on 12 January 2016. The complaint was that Mr O'Brien had given building development approval on 24 September 2015 prior to the Council's development permit for operational work given on 16 December

2015. This was said to be a breach of section 83 of the *Building Act* 1975 (Qld).

- [9] On this review of the disciplinary action taken by the QBCC, the Tribunal stands in the shoes of the QBCC and must reach the correct and preferable decision on a rehearing.¹
- [10] There is a statement of agreed facts submitted by the parties. The parties have also agreed the issue to be determined by the Tribunal as follows:-

In the particular circumstances of this case was Mr O'Brien in breach of section 83(1)(a) by him issuing his 24 September 2015 building development permit prior to Council issuing its 16 December 2015 operational works development permit?

- [11] If the answer to this question is "yes" then both sides agree that Mr O'Brien engaged in unsatisfactory conduct as defined in Schedule 2 of the *Building Act* by issuing his building development permit when he did. If the answer to the question is "no" then it is agreed that he did not do so.
- [12] As can be seen from the issue before the Tribunal, the relevant subsection of section 83 of concern is (1)(a). Section 83 reads as follows:-

83 General restrictions on granting building development approval

(1) The private certifier must not grant the building development approval applied for—

- (a) if the building development application includes development other than building work—until, under the Planning Act, all necessary development permits and SPA compliance permits are effective for the other development; and

Example—

A proposal involves building work, a material change of use and reconfiguring a lot, under the Planning Act. The private certifier is engaged to carry out the building assessment work and decide the building development application. The application must not be decided until all necessary development permits and SPA compliance permits are effective for the change of use and reconfiguring of the lot.

- (b) until all necessary preliminary approvals under the Planning Act are effective for other assessable parts of the development; and

Example—

A proposal requires building assessment work against a planning scheme under the Planning Act and the building assessment provisions. The private certifier is engaged to carry out the building assessment work and decide the building development application. The application must not be decided until all necessary preliminary approvals are effective for the assessment of the building work against the planning scheme.

- (c) until the building assessment work for the application has been carried out under the building assessment provisions; and

¹ Sections 19 and 20 of the QCAT Act.

- (d) if, under the Planning Act, a concurrence agency has jurisdiction for a part of building assessment work—
 - (i) that part has been assessed by the concurrence agency, under the building assessment provisions;
 - and
 - (ii) if the concurrence agency is the local government—any security it has required for the carrying out of the building work has been given;
- and
- (e) if proposed works relating to the development include installing or changing on premises an on-site sewerage facility under the *Plumbing and Drainage Act 2002*—until a compliance permit under that Act has been given for the installation or change.

Maximum penalty—165 penalty units.

- (2) If the private certifier receives the application before all other assessments for permits and approvals mentioned in subsection (1) are completed, for timings under IDAS, the application is taken not to have been received until the day all other assessments under IDAS have been completed.
- (3) This section does not limit part 4.

[13] The context of this section is that under the integrated development assessment system (IDAS) responsibility for planning and building approvals is divided between private certifiers and the local government. Section 83 seeks to ensure that private certifier's approvals will be consistent with planning requirements.

[14] Although the submissions from both sides were somewhat more wide ranging, there are two main points made on Mr O'Brien's behalf which are answered by QBCC in its final written submissions and which I now deal with. Both sides provided me with some authorities which have considered section 83 but I did not find any of them helpful in deciding this particular matter.

Submission 1: There was no development other than building work in the building development application

[15] What is said here on Mr O'Brien's behalf is that section 83(1)(a) is not engaged at all, because it only applies "if the building development application includes development other than building work".

[16] "Development" is defined in section 7 of the *Sustainable Planning Act 2009* (Qld) and "building work" is defined in section 10 of that Act. There is also a different definition of building work in section 5 of the *Building Act*. From these definitions it is clear that for the purposes of the planning legislation at least, "building work" and "operational work" are mutually exclusive terms. In other words, for the purposes of planning development, building work would not include operational work and operational work would not include building work.

- [17] In order to deal with this argument about section 83(1)(a) I would need to know whether the building development application included any development other than building work.
- [18] On this question, it is submitted on behalf of Mr O'Brien that the building development application did not include any development other than building work. In its final submissions in reply, the QBCC does not disagree with this contention. However, in its Statement of Reasons for the Decision, the QBCC does contend that the building development application did include development other than building work.² However, apart from saying that a building development application may involve other categories of development, and if so commonly this would be plumbing and drainage work, operational work and/or material change of use of the premises, the QBCC does not state what was this development work other than building work in this particular case.
- [19] Both the building development approval³ and the development permit for operational work⁴ have been provided to me but they rely upon plans with which I have not been provided.⁵
- [20] On this basis I am unable to conclude that the building development application included any development other than building work. Instead I think I am justified in taking from the latest position of the QBCC as shown by its final submissions on the matter, that it did not do so. I approach the contentions about 83(1)(a) on that basis.
- [21] The submissions of the QBCC about 83(1)(a) assume in fact, that it would be rare for a building development application to include any development other than building work. Therefore the QBCC says, if 83(1)(a) is read literally, it is essentially useless. So it is submitted that it should be read purposively bearing in mind the private certifier's functions⁶ and the laws and documents under which the building work must be assessed.⁷ Therefore, the private certifier must consider other necessary development permits even where the building development application does not include any development covered by those other necessary development permits.
- [22] Both sides refer to the *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Bill 2016* currently before the Queensland Parliament, which as drafted would remove from 83(1)(a) the words "if the building development application includes development other than building work" and make other amendments clarifying this provision. Both sides refer to the explanatory

² Paragraphs 32 to 40 of the Reasons for the Decision.

³ Pages 36 to 42 of the agreed documents.

⁴ Pages 43 to 51 of the agreed documents.

⁵ I have the architectural plans attached to the development permit for the material change of use, and "Cover Sheet and Notes" prepared by Wolter Consulting Group plan LA3052-01.

⁶ As set out in section 48 of the *Building Act*.

⁷ As set out in section 30(1) of the *Building Act*.

notes for the Bill. Those explanatory notes recognise that it is “unclear why a building development application would need to include” any development other than building work.

[23] The question for me however, is whether the subsection as drafted, should be read literally as submitted on Mr O'Brien's behalf or purposively as submitted by the QBCC.

[24] The example in 83(1)(a) is clear. It says:-

Example—

A proposal involves building work, a material change of use and reconfiguring a lot, under the Planning Act. The private certifier is engaged to carry out the building assessment work and decide the building development application. The application must not be decided until all necessary development permits and SPA compliance permits are effective for the change of use and reconfiguring of the lot.

[25] This shows that the legislature intended that the private certifier should consider what development permits are required for the whole of the proposed development (not just the building development application) and that the building development application should not be approved until all necessary development permits for that development are effective. This would indeed accord with the approach the QBCC invites me to take.

[26] The difficulty is that the example in 83(1)(a) is inconsistent with the provision itself. Guidance how to deal with this can be obtained from the *Acts Interpretation Act 1954* (Qld). By section 14(3) an example is part of the Act. But then section 14D provides:-

14D Examples

If an Act includes an example of the operation of a provision—

- (a) the example is not exhaustive; and
- (b) the example does not limit, but may extend, the meaning of the provision; and
- (c) the example and the provision are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails.

[27] So here 14D(c) applies, and the provision prevails over the example.

[28] I am also concerned with section 14A:-

14A Interpretation best achieving Act's purpose

- (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
- (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.
- (3) To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.

Example—

There is judicial authority for a rule of interpretation that taxing legislation is to be interpreted strictly and in a taxpayer's favour (for example, see *Partington v AG* (1869) LR 4 HL 100 at 122). Despite such a possible rule, this section requires a provision imposing taxation to be interpreted in the way that best achieves the Act's purpose, whether or not to do so would be in a taxpayer's favour.

- [29] A breach of section 83 can result in criminal proceedings, with a maximum penalty of 165 penalty points. By section 256, offences would be prosecuted by a local government (or person authorised by a local government) lodging a complaint with the Magistrates for a summary proceeding under the *Justices Act* 1886 (Qld). That procedure was not used here; instead a complaint was made under section 190 to the QBCC. But the possibility of criminal proceedings here means that interpreting a provisions purposively in reliance of section 14A(1) of the *Acts Interpretation Act* is not available because it would result in criminal liability where there was none before. The position at common law is the same.⁸
- [30] In my opinion therefore, section 83(1)(a) must be read literally. It follows that I agree with the submissions made on Mr O'Brien's behalf on this issue that section 83(1)(a) is not engaged because the building development application (which resulted in the approval of 24 September 2015) did not include development other than building work.
- [31] I shall deal with the second main submission in case I am found to be wrong on the first.

Submission 2: whether the operational works approval was “necessary”

- [32] This is a reference to the requirement in section 83(1)(a) that building development approval must not be given until “all necessary development permits .. are effective” for development other than building work. In order to consider this I will need to assume that the development other than building work referred to here is a reference to the operational works for which the Council gave a development permit on 16 December 2015, that is, after Mr O'Brien gave his building development approval.
- [33] It seems to me that whether or not any development permit required to permit the proposed development as a whole to be completed would be “necessary” under 83(1)(a), and should be made before the building development approval, is a question of fact in each case. The example in 83(1)(a) provides statutory guidance as to what is necessary in the case of development comprising building work a material change of use and reconfiguring the lot. In that obvious case, as the example states, the development permit for material change of use and reconfiguring the lot would be necessary before the building development approval is given.
- [34] There will be other cases like this one however, where the Council has already approved the main parts of the proposed development (in this case the material change of use and the reconfiguration of the lot), leaving the

certifier to decide whether any additional permit is necessary before giving building development approval. Regrettably, if the certifier incorrectly decides not to wait this could result in a criminal penalty.

- [35] It follows that I do not agree with the QBCC's submissions that the certifier needs to wait in every case for permits for any outstanding assessable development before giving building development approval. It is suggested that upon the building development approval the work can be started, and this would therefore deprive the Council of its planning powers over necessary works such as the operational works. I disagree with this submission because any assessable development which is commenced without the necessary development permit will be unlawful under section 578 of the *Sustainable Planning Act*. The giving of building development approval cannot change this because such approval is limited to the building work.⁹
- [36] The final question on this submission therefore is whether as a matter of fact in this case the development permit for operational work was necessary before the building development approval was given.
- [37] To reach a conclusion on this requires evidence about what was known or reasonably anticipated at the time of the building development approval about the impact of the development permit for operational works. The only direct evidence about this is in the form of a witness statement from Mr O'Brien dated 27 October 2016. In this he says that the decision on the material change of use showed the design and location of the operational works in detail, including the location of the vehicular entrance and markings of the carparks. He made sure that his building approval was consistent with the decision on the material change of use. The subsequent detailed approval of operational work "would have no effect on the works I was assessing".
- [38] In his response of 1 February 2016 to the original complaint he stated that the civil works and landscaping required to complete the childcare centre "had no effect or implication on the construction of the proposed building" and that "nothing in the operational works approval has any bearing on the building approvals issued".
- [39] In addition to this there is his response to the QBCC of 2 March 2016. In that document he said:-

On 17 December 2015 Council issued a Development Permit for Operational Work (Engineering Works, Roadworks, Landscaping, Earthworks, Street lighting and Vegetation Clearing). None of these items are considered to be a necessary development permit pursuant to section 83(1)(a) of the BA. This is because the further works which

⁹ A building development application is an application for development approval under the Planning Act to the extent it is for building work: section 6 of the *Building Act*.

require an Operational Works approval will have no impact on the approval of the building work for the child care centre.

The layout of the site, including the design and siting of the building, vehicular access, and landscaping were approved by the Development Permit for Material Change of Use. The further approval required for Operations Work involved detailed design and specification of roads, parking areas, stormwater and landscaping. None of these approvals will impact on the proposed building work.

- [40] This is also the effect of submissions made on Mr O'Brien's behalf. It is said that in this case, in accordance with the requirements of the *Sustainable Planning Act*, the Council made all important operational works decisions at the material change of use stage and imposed the necessary conditions to that approval. Only detailed engineering and minor matters were involved in the subsequent operational works permit. The building could be constructed without impacting on the approval of, and construction of, the operational works.¹⁰
- [41] What Mr O'Brien says about this is not directly challenged by QBCC in its submissions, but I am left with the impression from what is said in those submissions and in other material submitted that there is no agreement on these factual issues. Also this is not covered in the statement of agreed facts.
- [42] In its submissions the QBCC says that operational works can significantly impact the site, including the form and placement of the building.¹¹ In the QBCC's internal appeal decision¹² some more information about this can be found, as provided by the Council:-
- SCRC advised that 32-36 King Street, Buderim is not a minor development and it takes its access from a designated main road. There are many conditions of the Development Approval that are needed to be worked through as the development is part of a staged approval involving drainage problem issues through the lands to which it drains to the south of the site.
- [43] Just above this passage in the internal appeal decision there are examples provided by the Council about how operational works can impact upon the building including then knowing the width of the driveways (as opposed to their placement), the location of on-street pits and drainage, street lighting poles or other critical needs, such as on-site detention of stormwater prior to leaving site.
- [44] The difficulty with the evidence from the QBCC on this issue is that it is describing what could happen in some cases, instead of what actually did happen in this case.

¹⁰ Paragraphs 26 to 30 of Mr O'Brien's submissions.

¹¹ Paragraph 45 of the submissions.

¹² Page 139 of the documents attached to the statement of agreed facts.

- [45] I can see from the detail in the permit for the material change of use that Mr O'Brien is probably right when he says that he was able to approve the building works with confidence that the development permit for operational work was not going to impact upon the building work that he was approving.
- [46] In the circumstances I accept Mr O'Brien's evidence about this. My conclusion therefore is that at the time Mr O'Brien gave the building development approval, he was right to conclude that the development permit for operational work was not going to impact upon the building work that he was approving. Hence at that time, the development permit for operational work was not "necessary" within section 83(1)(a) of the *Building Act 1975*.

Conclusion

- [47] Mr O'Brien did not breach section 83(1)(a) of the Building Act 1975 and did not engage in unsatisfactory conduct.