

GENERAL MANAGER'S REPORTS

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung)**Summary**

In July 2015 Riverside Plaza erected an unauthorised fence at the Riverside Plaza North Carpark which attract significant public attention due to the obstruction it caused to pedestrian traffic. Riverside Plaza has subsequently lodged an Application for a Building Certificate with Council. This report is the assessment of Riverside Plaza's Application for a Building Certificate on the unauthorised 1.8m wire mesh dividing fence at Riverside Plaza North Carpark.

Recommendation

1. That Council advise Riverside Plaza management, that subject to the following works being completed within 3 months, the Building Certificate for the fence will be approved and issued under delegated authority:

Works Required:-

- a. A pedestrian opening consistent with the following specifications shall be installed in the dividing fence between 50 Morisset Street (Riverside Plaza North Carpark) and 30 Morisset Street (Kmart), Queanbeyan
 - i. The opening is located near the Kmart building and shall link with the existing pedestrian path/thoroughfare.
 - ii. The opening and approaches shall comply with disability access standards (AS 1428.1).
 - iii. The opening shall be available for unimpeded pedestrian access during opening hours of Riverside Plaza Shopping Centre.
 - iv. That the opening be installed in accordance with the above within 3 months (by 27 April 2016).
 - b. The fence must be freestanding and not encroach onto adjoining land. This means the attachment to the Kmart building must be removed and any damage to the wall repaired.
2. That in the event that the works required in item 1 are not achieved by 27 April 2016, Council refuse the Application for the Building Certificate for the fence between 50 and 30 Morisset Street and enforcement action commenced. The enforcement action may include either directing the Riverside Plaza Management to make structural changes to achieve item 1 at the Plaza's own cost or demolition of the whole fence at the Plaza's own cost.
3. That Council not seek any development contribution for the single carpark lost in providing the required access.
-

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

Background

Council first received complaints from the public regarding a wire mesh fence erected at the back of the Riverside North Carpark in July 2015 as shown in Figure 1. It attracted numerous complaints from the community. The erection of the fence required approval but no application for development consent had been lodged. As a result an Application for a Building Certificate (the application) was lodged with Council on 27 August 2015 to regularise the unauthorised fence.



Figure 1 Properties bounding the fence (fence shown in red)

The matter was reported to Council on 23 September 2015 where it was resolved:

1. That Novion Property Trust (owner of Riverside Plaza) be requested to consider the installation of a gate in the fence to allow for continued and convenient pedestrian

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

access between 50 Morisset Street (Riverside North Carpark) and 30 Morisset Street / 27 Antill Street (Kmart and Woolworths supermarket sites).

2. Should agreement be reached to install a gate that Council contribute to the costs of installing an accessible ramp(s) where required.
3. That it is noted that a report on the assessment of the application for Building Certificate will be provided to Council for determination.

Council staff have made multiple attempts to negotiate with Novion (now trading as Vicinity Centres) with no success.

Figures 2 and 3 show that part of the fence adjoining the Kmart building has been damaged since early November 2015 resulting in an open section through the fence that allows pedestrian access. It is observed that people have been utilising this gap for pedestrian access between the two parking areas.



Figure 2 Site inspection photo on 6 November 2015



Figure 3 Site inspection photo on 13 January 2016

Implications

Legal

The dividing fence is erected on the boundaries between three private properties and not over any easement or right of ways that benefit Council. Under Clause 2.37 of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (the Codes SEPP), there are some fences that are exempt from approval subject to them meeting specific criteria. Clause 2.37(c) excludes fences that are within flood control lots. This site is a flood control lot and as such the fence is not exempt development and required development consent from Council. Council's records shows that no development consent has been granted for the fence, therefore it is an unauthorised structure. There are several options to deal with unauthorised structures (in the case the fence).

1. Under section 121B of the *Environmental Planning and Assessment Act 1979* (EP&A Act), Council can either issue Order 2 to demolish the unauthorised fence or Order 4

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

to alter the fence because it was erected without prior approval from Council and poses a safety risk to the public.

2. Under section 149A of the EP&A Act a person may lodge an Application for a Building Certificate for Council's consideration and determination.

Riverside Plaza Management has submitted an application that is supported by a survey plan that shows minor encroachment into adjoining properties (0.1m encroachments into the Kmart site and 0.03m into the Woolworths site). This means that enforcement action is suspended until the application is determined.

Under section 149D of the EP&A Act, Council has the following options in making a determination on the Building Certificate Application:

1. Option 1 - *Approve* the Application: Council must approve the Application unless it is intending to issue an Order for the unauthorised fence to be demolished, altered, added to or rebuilt or undertake legal proceedings.
2. Option 2 - *Refuse* the Application: Council can refuse the Application. A reason must be given for the refusal and this can include that Council is intending to issue an Order or undertake legal proceedings.
3. Option 3 - *Defer* the determination of the Application: Council can defer its determination allowing the applicant to address outstanding matters. Once the matters have been resolved, the Building Certificate can be issued without delay.

If the Application is approved, a Building Certificate will then be issued for the dividing fence and Council will not be able to take any action under the EP&A Act or the *Local Government Act 1993* (LG Act), to order or take proceedings for an order to have fence demolished, altered, added to or rebuilt for a period of seven years.

If the Application is refused, the Council will recommence enforcement action. Riverside Plaza Management has the right to appeal any refusal decision in the Courts. On hearing the appeal, the Court may do any one or more of the following:

- a) it may direct the council to issue a building certificate in such terms and on such conditions as the Court thinks fit,
- b) it may revoke, alter or confirm a notice under section 149C,
- c) it may make any other order that it considers appropriate

Policy

Council's *Development Compliance Policy* (the Policy) has been followed in investigating the unauthorised fence. The Policy also provides guidance in deciding what action is appropriate. One of the relevant matters to take into account in deciding on the type of action, is if consent had been sought for the unlawful activity, is it likely that development consent would be granted?

As discussed in the legal section, the dividing fence would require development consent as it is not an exempt development. The *Queanbeyan Local Environment Plan 2012* (QLEP 2012) and the *Queanbeyan Development Control Plan 2012* (QDCP 2012) do not have relevant controls that prevent the erection of the fence. As such, the avenue of requiring a Building Certificate

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

Application, rather than commencing enforcement action was appropriate in this instance. This included attempting to negotiate with Riverside Plaza Management to install a gate.

Other considerations such as environment, sustainability, asset, social/cultural, economic, strategic and public interests are also required for a complete assessment of the application and these are assessed under the appropriate headings below.

Environmental

The fence is located within flood prone land but outside the floodway. While the mesh wired fence may capture debris during a storm or flood event, it is not expected to significantly impact on upstream or down stream flooding, nor significantly alter flood flows. Fencing in this location between open car-parking areas has the potential to obstruct the escape route for pedestrians during flood events. It is considered that an opening in the fence that allows for pedestrian access is appropriate for this area of high pedestrian activity.

The fence is also unlikely to impact on the ecology of the Queanbeyan River.

Sustainability

The fence does not negatively impact on the sustainability of the Queanbeyan community or environs.

Asset

The fence is between private properties and not over any Council easements. Therefore it has no impact on Council assets such as roads, pipes and footpaths.

Social / Cultural

The fence removes the convenient pedestrian access between the upper Crawford Street Precinct, where the Queanbeyan Aquatic Centre, the Post Office, a medical clinic and two supermarkets are located and the Riverside Precinct where the Queanbeyan Bus Interchange and Queen Elizabeth II Park is located. The fence also obstructs a future 'Friendly Town' linkage identified in the Queanbeyan CBD Master Plan Cultural Map.

Pedestrian permeability with is important for promoting walkability, convenience and access to the shopping and commercial activities. The fence should provide pedestrian access to allow for convenient connection. Requiring an opening in the fence is expected to re-establish these connections and linkages.

Economic

While the fence is not expected to have a significant impact on the overall economic impact of the CBD, the creation of an opening in the fence, will re-establish the connection between parking areas of Riverside and Kmart as well as allowing for convenient and multiple shop access options for customers who choose to park in this carpark.

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

It will also allow the continuation of the previous east-west connection with the Queanbeyan Bus Interchange expected to contribute positively to the economic viability of the upper Crawford Street Precinct, which includes Woolworths, Aldi, the Post Office, a medical clinic and other specialist retailers.

Strategic

Whilst the fence does not compromise the recommendations of the CBD Masterplan and the main north-south pedestrian linkage, community feedback on the obstruction suggests that this east-west link through the CBD block is important. Any review of the 2009 CBD Masterplan will need to account for this and the new bus interchange for pedestrian linkages.

Consultation and Public Interest

An explanation from Riverside Plaza Management for the unauthorised fence was requested. The reason provided was that:

The fence has been erected to replace inadequate old fence that was becoming a safety hazard and ensuring all boundary trip risk has been eliminated. The replacement fence ensures safety and maintains convenience for our customers.

A review of Google Streetview photos (Figures 4 and 5) that are dated November 2007 shows medium strip between the carparks are unimpeded for pedestrian movements.



Figure 4 Riverside Plaza North Carpark looking southwest (Google Streetview – Nov 2007)

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)



Figure 5 Riverside Plaza North Carpark looking northwest (Google Streetview – Nov 2007)

Notices of Building Certificate Application were issued to owners and occupiers of adjoining properties on 7 September 2015 to provide an opportunity for them to make comment on the Application. A response has been received and the concerns raised are:

- a. A hindrance for customer traffic between Woolworths supermarket, the medical centre and the bus station.
- b. The safety of high school students is at risk as they are jumping the fence to get to and from the bus station.
- c. The public are using private property to cut through into the Woolworths loading dock, placing themselves at risk due to high volume of semi trailer deliveries, delivery trucks and vans in this area.
- d. The purpose of the fence is unclear.

These concerns are representative also of the 8 complaints Council received from various members of the public since the erection of the unauthorised fence. The matter also featured on the front page of the Queanbeyan Age on 18 August and 2 October 2015 demonstrating the high level of community concerns.

Councillors have also raised concerns about the fence at the Council meeting on 23 September 2015 where it was resolved to negotiate with Novion to install a gate to allow for continued pedestrian access. Despite numerous attempts this negotiation has failed to provide any commitment to install a permanent opening or gate in the fence.

Council's Road Safety Officer has advised that as result of the new fence, school children are climbing it, or walking through nearby properties, including through the Woolworths' back loading dock. These behaviours create public safety concerns as it may result in significant injuries.

Council's Building Surveyor has advised that the 1.8m mesh-wired fence should not be attached to the Kmart building. Subject to the fence not being attached there are no outstanding building

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

issues associated with the mesh fence. As the Building Certificate only applies to the Riverside Plaza property, any encroachment over other privately owned land must be removed. Therefore the fence must be freestanding and the attachment to Kmart building must be removed.

Finding a Solution

The key impact of the dividing fence is it obstructing an informal linkage between the car parks in the immediate area, and connection between the Queanbeyan Bus Interchange and the upper Crawford Street Precinct in the broader context. In addition, the fence has also generated significant public interest and public safety concerns.

The fence is a significant public interest issue. Public safety and the pedestrian connectivity of the car parks is considered to override the reasons put forward by the Riverside Plaza Management for the installation of the fence. It is considered that a suitable compromise to allow the fence to remain is to require the installation of a permanent opening in the fence that maintains pedestrian access.

While an opening is considered the most appropriate solution it will need to comply with disability access requirements. Several locations of the opening have been considered and summarised below:

Location 1: At the crossover near **Woolworths** (red arrow)

This location would allow for disabled access and would be unlikely to result in the loss of any car parking space.

However, this is not considered the best solution as it would direct people close to the Woolworths loading dock, which will create a conflict between pedestrian and vehicles.

Location 2: Near the **substation** (yellow arrow)

This is considered as the least desirable option as it will result with the loss of at least two car parking spaces (one on each side) with no obvious benefits to any party.

Location 3: Near the **Kmart** building (green arrow)

This is considered the most desirable option because it is located near an existing cut of the fence which people use to access both car parks. In addition, the walkway in front of Kmart separate pedestrian and vehicle thus making a safer environment.

However a pram ramp will be required as there is a step down from the Kmart side to the Riverside North Carpark it may result with the loss of one carparking space in Riverside North Carpark to allow for access.



Figure 6 Options for the fence opening

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

Based on the above assessment, Location 3 (that is to locate the opening of the fence near the Kmart building utilising its walkway) is recommended. However, the exact location and its design is recommended to be negotiated with all stakeholders.

It is also proposed that the opening must remain unobstructed during the opening hours of Riverside Plaza. However it may be closed outside these hours, unless in the case of emergency. This is considered a balanced approach that takes account of the need for connectivity by the community and Riverside Plaza exercising their property rights.

Financial

The installation of an opening in the fence that complies with disability access requirements is likely to require physical works for a ramp. Based on Council resolution 361/15 on 23 September 2015, Council can contribute to the cost of making the access comply with disabled access requirements.

As identified above, if an opening is created at Location 3, it is expected there will be loss of a single car parking space in Riverside North Carpark. In normal circumstances, this attracts a development contribution of \$11,000 per space to compensate for the loss. However, given the pedestrian access is being required by Council would need to waive this requirement.

Program Code	Expense Type	Funding source	Amount
325	Land Use Regulations	The Environment	\$ 12,000.00*
			*this includes \$11000 for car park and up to \$1000 for the ramp

Resources (including staff)

If an agreement with Riverside Plaza can be reached on creating an opening to the fence, Council staff and equipment may be involved in the installation of the accessible ramp as part of Council's contribution.

Integrated Plan

Development compliance comes under Program 325 – Land Use Regulations in Theme 6 – The Environment.

Conclusion

The fence has been erected without the required development consent. It impedes pedestrian access between carparks and has resulted in numerous complaints. A Building Certificate has

6.2 Determination of Building Certificate for Riverside North Carpark fence - 50 Morisset Street, Queanbeyan (Ref: C167166; Author: Thompson/Cheung) (Continued)

been lodged and to date the request by Council to Riverside Plaza Management requiring the installation of a gate to allow for pedestrian access has not resulted in any agreement.

Informal pedestrian access of sorts has been 'reinstated' where the fence has been cut next to the Kmart building.

The matter is of public interest and the formal reinstatement of pedestrian access is considered important whilst still allowing for reasonable fencing of private land. Therefore, it is considered that the installation of an opening in the fence that allows for public access is a balanced approach in resolving this conflict between the public interest and Riverside Plaza's interest.

Given there is a solution available, the EP&A Act allows Council to defer the determination of the Building Certificate to provide the opportunity for Riverside Plaza Management to comply. It is considered three months is a reasonable timeframe and if this is not achieved in three months, Council is able to refuse the Application and commence enforcement action on the unauthorised fence under the Policy and EP&A Act.

As such it is recommended that an opening in the dividing fence between 50 (Riverside Plaza North Carpark) and 30 (Kmart) Morisset Street, Queanbeyan be installed and remain accessible during business hours. The opening should be located adjacent to the Kmart building and should comply with disability access requirements.

The fence must not encroach onto adjoining land and this means the attachment to Kmart building must be removed.

This installation is to be achieved by 27 April 2015 (within 3 months) to allow Council staff to approve and issue the Building Certificate for the fence.

If the installation is not achieved by 27 April 2015, Council should refuse the Application of Building Certificate for the fence and commence enforcement action. The enforcement action may either be directing the Riverside Plaza Management to make structural changes to achieve item 1 at Riverside's own cost or demolition of the whole fence at Riverside's own cost.

Attachments

Attachment 1 Survey Report prepared by LANDdata Surveys