



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	19 - 14
Applicant:	Ms Kate Grant
Local Government:	Moreton Bay Regional Council (the Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	46 Wellington Road, Murrumba Downs and described as Lot 50 on AP 210040 - the subject site

Appeal

The appeal is made pursuant to section 533 of the *Sustainable Planning Act 2009* (SPA) against the giving of an Enforcement Notice under section 248 of the *Building Act 1975*. The Enforcement Notice was issued by the Council on the grounds that it reasonably believes the building, which was approved as a class 1 building, was dangerous because the building was being used as a class 2 building without the appropriate fire separation between the units.

Date and time of hearing:	27 June 2014 at 10am
Place of hearing:	The subject site
Committee:	Mr Peter Rourke - Chair
Present:	Mr Denis Grant – Applicant’s representative Mr John Reeve - Applicant’s representative (Building Certifier) Mr Ian Buchanan – Applicant’s representative (Town Planner) Mr Chris Trewin – Council representative Mr Ben Rolf – Council Representative

Decision:

In accordance with section 564(2)(b) of the SPA, the Building and Development Dispute Resolution Committee (Committee) **changes** the Enforcement Notice issued by the Council dated 15 April 2014 as follows:

- Delete item 1 of the Notice, which states: *Arrange for the removal of one of the occupants from the dwelling and provide a copy of a notice to vacate the premises to Council by no later than 4:30pm on Friday 16 May 2014.*
- Item 2 of the notice is amended as follows – *should you wish to use the building as two attached class 1a buildings or for class 2 purposes (as defined here-in) at any time in the future, the building must be constructed to the Building Code of Australia (BCA) requirements applicable to the relevant class of building and a certificate of classification must be obtained from a private certifier prior to re-commencing any of the above uses.*

Background

The subject building is a two-storey building. A private certifier issued a development permit for a detached class 1a building on 25 June 2012. It is assumed that the Development Application (Application) was assessed against the 2012 edition of the BCA.

The lower level consists of 3 bedrooms, living and dining areas, sanitary facilities, a kitchen, laundry and 2 garages. The upper level, which sits above the garages, contains a bedroom, study, living area, bathroom and a kitchen. There is an unenclosed deck opening off the living room. There is no internal connection between the lower level and upper level. Access to the upper level is by an external stairway. The laundry located on the lower level is available for use by occupants of the upper level.

On 10 April 2014, the Council inspected the subject site and formed the opinion that the upper level of the building was tenanted. Because part of the upper level tenancy was located over the garage of the residential portion below it, the Council was of the opinion that the building was being used as a class 2 building in contravention of the original development approval, which was for a detached class 1a building.

Council issued an Enforcement Notice on 15 April 2014 alleging that the premises were dangerous because they were being used as a class 2 building, without appropriate fire separation, in contravention of the development permit which was for the construction of a detached class 1a building.

An appeal against the Enforcement Notice was lodged with the Committee Registrar on 16 May 2014.

A3.2 of the Building Code of Australia (BCA) defines a class 1a building as :

Class 1: one or more buildings, which in association constitute —

(a) *Class 1a — a single dwelling being—*

(i) *a detached house; or*

(ii) *one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit;*

An attached class 1 building must be separated from adjacent class 1 parts by a vertical fire separation wall. A class 1 building cannot be located above or below another dwelling or another class of building other than a private garage. If it is, it must be classified as either a class 2 or a class 3 building.

Construction details accompanying the Application indicated that the wall separating the two garages was to be fire rated and was to extend to the underside of the roof lining above. However, no inspections were carried out on this aspect of the building work by the building certifier so there is no conclusive evidence that the fire separation has been provided or if has, to the correct standards of construction.

The BCA defines a Class 2 building as *a building containing 2 or more sole-occupancy units each being a separate dwelling*. Sole occupancy units in class 2 buildings can be located above or below each other however, they must be fire separated from each other by horizontal and/or vertical fire rated construction.

Council considers the building to be dangerous because it cannot be confirmed conclusively that the fire separation requirements of the BCA relevant to an attached class 1a building or a class 2 building has been provided.

The mandatory IDAS Forms 1 and 2, which must accompany an Application, nominate the proposed use of the building as a two-storey dwelling and associated unit. IDAS Form 2 also nominates the proposed use of the building as a class 2 building for the purposes of the BCA.

The Applicant's representative (Mr Grant) was of the opinion that the house is still a class 1 building even though the upper level had been used by a boarder on the basis the boarder had access to the whole building and services and facilities in the building were shared. Mr Grant also advised that a second power meter was not connected and an application for a second rubbish bin has been cancelled.

Condition 1 of the Enforcement Notice required the Applicant to arrange for the removal of the occupants from the dwelling. Condition 2 of the Notice required the Applicant to obtain a certificate of classification

for a change of use from a class 1 to a class 2 building before any further class 2 arrangements are recommenced.

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 16 May 2014;
2. The Enforcement Notice dated 15 April 2014;
3. Verbal representations by the parties at the hearing;
4. Additional information provided by the Council dated 2 June 2014;
5. Additional correspondence by Mr Denis Grant on behalf of Ms Kate Grant dated 30 June 2014;
6. *Sustainable Planning Act 2009 (SPA)*;
7. *Building Act 1975 (BA)*;
8. Building Code of Australia 2012 - Volumes 1 Volume 2 (BCA).

Findings of Fact

The Committee makes the following findings of fact.

- A development permit was issued for a class 1a building on 25 June 2012.
- Council issued an Enforcement Notice on 15 April 2014 alleging that the premises were dangerous because they were being used as a class 2 building, without appropriate fire separation, in contravention of the development permit which was for the construction of a detached class 1a building.
- An appeal was lodged with the Committee Registrar on 16 May 2014
- The upper level of the building is no longer tenanted.

Reasons for the Decision

- Council indicated at the hearing that it was obvious that the upper level was no longer occupied and that the requirements of item 1 of the Enforcement Notice have therefore been satisfied.
- A3.1 of Volume 2 of the BCA details the principles of the classification of buildings. A3.1 states:
The classification of a building or part of a building is determined by the purpose for which it is designed, constructed or adapted to be used.
- The Committee is of the opinion that the building, at the time of the issuing of the Enforcement Notice, was adapted for use as a class 2 building for the following reasons:
 - There is no internal connection between the lower and upper levels. Access to the upper level is via an external stairway. This is uncommon in fully enclosed 2 storey detached class 1a buildings and is more consistent with an attached class 1a or a class 2 building.
 - Two power meters have been installed and while only one has been connected, it suggests that multiple tenancies were proposed.
 - The mandatory IDAS Form 1 nominates the proposed use of the building as a two-storey dwelling and associated unit.
 - Prior to the issuing of the Enforcement Notice, it was not disputed that the upper level was tenanted suggesting that it was intended to use the building as separate class 1a buildings or a class 2 building.

- The mandatory IDAS Form 2 nominates the proposed building use as a two-storey dwelling and associated unit. It also nominates the building's classification as a class 2 building for the purposes of the BCA.
- The upper level of the building has all of the facilities for a class 2 building and is capable of being used as a separate sole occupancy unit as defined in the BCA subject to the provision of appropriate fire separation between the levels.
- The upper level does not have all of the facilities necessary to satisfy the requirements of the BCA for an attached class 1a dwelling in that it is necessary to share the laundry facilities located on the lower level of the building.
- The plans and elevations forming part of the development permit show partial fire separation between the lower level garages. That separation was proposed to extend to the underside of the roof above. This suggests that there was intent to comply with the separation requirements of the BCA relevant to an attached class 1a building or a class 2 building.
- Regardless of whether the building is two attached class 1a buildings or a class 2 building, fire separation between the levels is required by the BCA. However, because the upper level is located over the garages below, by definition in A3.2 of Volume 2 of the BCA, the building would have to be classified as a class 2 building.

Peter Rourke
Building and Development Committee Chair
Date: 9 July 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