Building and Development
Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	**39 – 13**
Applicant:	Dat Van Vu
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	11 Darra Station Road Darra,19 Darra Station Road Darra, 2765 Ipswich Road Darra, 2767 Ipswich Road Darra, 2773 Ipswich Road Darra and described as Lot 1 on RP 72757, Lot 2 on SP 245814, Lots 6 on SP 245814, Lot 7 on SP 245814 – the subject site

Appeal

Appeal under section 250 of the *Building Act 1975* (BA) against the giving of an Enforcement Notice under section 248(2) of the BA, The Enforcement Notice relates to the occupation of the premise without a Certificate of Classification.

Date of hearing:	7th January 2014 at 2pm
Place of hearing:	Building Codes Queensland Meeting Room 1 Level 16, 41 George St Brisbane 4001
Committee:	Geoffrey Mitchell – Chair Danyelle Kelson – Member
Present:	Dat Van Vu – Applicant Mark Higgin – Council representative Richard Thorn – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the *Sustainable Planning Act 2009* (SPA) ***sets aside*** the Enforcement Notice.

Background

The land, subject to this appeal is located at 11 Darra Station Road, 19 Darra Station Road, 2765 Ipswich Road, 2767 Ipswich Road, 2773 Ipswich Road, Darra. From the plans provided in documents to the Committee it appears the premises erected on the land comprise of a Supermarket with Gross Floor Area of 1350 m^2 and a Restaurant.

The land has been the subject of previous actions by the Council and is still subject to an Order of the Court No 123 of 2012 requiring the obtaining of a Form 11 Certificate of Classification no earlier than 30 November 2013.
The development is currently under the control of a private certifier engaged to provide the Building

Development Approval.

The Council has formed the belief that the building is dangerous and dispensed with the issue of a show cause notice under section 249(4) of the BA.

The Applicant was dissatisfied with the Council's enforcement action and disputes amongst other things that the building is dangerous.

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 16th December 2013.
2. The *Building Act 1975* (BA)
3. The *Sustainable Planning Act 2009 (*SPA)
4. The Building Regulation 2006 (BR)
5. The Building Code of Australia (BCA)
6. Brisbane City Plan 2000 (City Plan)
7. Queensland building work enforcement guidelines 2002 (guidelines)
8. Additional correspondence, submissions and statutory declarations of witnesses received from the Applicant at the hearing
9. Additional material supplied by the Council at the hearing
10. Verbal representation by the parties at the hearing

Findings of Fact

The Committee makes the following findings of fact:

- The building subject to the appeal is the subject of a current Planning and Environment Order 123 of 2012 made 26 August 2013. The order required that the appellant engage a private certifier, obtain a building approval for certain works by 31 October 2013 and obtain the issue of a Certificate of Classification within one month of obtaining the building approval but no earlier than 30 November 2013.
- The building is currently under the control of a private certifier, Mr Nicolas Davidson Licence No A508033.
- A building approval for the relevant works was issued on 31 October 2013.
- At the time of the appeal and the issue of the Enforcement Notice, the building had not been issued with a Form 11 Certificate of Classification.
- At the time of the giving of the Enforcement Notice the building certifier had identified a number of issues that prevented him from giving the Form 11 Certificate of Classification. One of the issues was advice from the Queensland Fire and Rescue Service (QFRS) that the hydrant pressures for the external hydrants did not comply with AS2419.1 -1994.
- The Enforcement Notice was given by Council on the 10th December 2013 and was received by the Applicant on the 14th December 2013.
- The Council dispensed with the giving of a show cause notice as it had formed the belief that the building was dangerous.
- An 'Application for appeal /declaration – Form 10' was lodged with the Committee Registry on the 16th December 2013.

Reasons for the Decision

1. Section 248 (5) of the BA states that an Enforcement Notice under the BA is taken to be an Enforcement Notice under section 590 of the SPA.

   Section 590(4) of the SPA provides that;

   "If a private certifier is engaged for an aspect of a development, the assessing authority must not give an enforcement notice in relation to the aspect until the assessing authority has consulted with the private certifier about the giving of the notice"

   The Council did request information from the private certifier about outstanding issues required before the Form 11 Certificate of Classification could be issued. At the hearing the Council advised that this was the only contact it had with the certifier. The request was prompted by Council's examination of its records on 4 December 2013 which disclosed that there was no record of a Certificate of Classification being issued for the building.

   The certifier, in a statutory declaration presented to the Committee, stated that he considered the information requested by the Council was an "informal update" of matters. The certifier also states that;

   "I was not provided with an opportunity to explain the context of the email; The email does not contain critical information, such as when I last inspected the land or when I last had the ability to review other matters with respect to the allegations made in detail."

   The Committee is of the opinion that this does not constitute *"consulted with the private certifier about the giving of the notice"* as required by section 590(4) of the SPA.

2. The Council dispensed with the giving of a Show Cause Notice under s248(4) BA and proceeded straight to the Enforcement Notice as it had formed the view the building was dangerous. The Council believe the premises are not compliant with the relevant legislative requirements pertaining to fire safety based on the email from the certifier dated 6 December 2013 which listed the following outstanding items;

   1. Install 850 wide exit doors and Form 16
   2. Install additional row emergency lights and exit sign above new exit door Darra Station Road side of the building and provide Form 16
   3. Clear all paths of travel to exit doors and outside of the exit doors to be 1m clear
   4. Door sills of exit doors to be no higher than 5mm above surrounding floor surfaces for disability access
   5. Complete disability car parks, accessible paths and signage
   6. Complete disability WC room and fixture rails, paper holder, mirror, shelf, with 850mm wide door and lift off hinges with Braille signage
   7. QFRS final clearance
   8. Provide fire hose reel test and tag certificate
   9. Provide fire extinguishers installation certificate.

   In forming its view, Council also relied on the following items the QFRS identified as non-compliant in an email forwarded to the Council on 6 December 2013:

   1. Fire Hydrants (Spring and/or pillar hydrants) achievement of specified performance.
   2. Fire Hydrants (Spring and/or pillar hydrants) location and suitability of internal and roof hydrants and external hydrants including fire separation form adjacent building.
   3. Provision of hard standing for fire appliances.
   4. The nominated Street Hydrant shown on the submitted drawing WD01 was not able to supply the required Feed Hydrant flow and pressure of 10lps @ 200kPa as per AS2419.1-1994.

There is no evidence that the Council inspected the premises itself to form the view that the premises were dangerous or considered the context or actual importance of the correspondence from either the certifier or the QFRS. At the hearing, the Council representatives stated that Council regarded non-compliances related to fire safety as a serious matter and therefore formed the view that the premises were dangerous.

Section 249(1)(b) of the BA provides that a local government may give an Enforcement Notice to the owner of a building if it reasonably believes the building is dangerous. Generally a local government is required to give a show cause notice before issuing the Enforcement Notice (section 248(3)) to permit the owner an opportunity to show cause why the Notice should not be issued. However section 248(4) of the BA allows the local government to proceed straight to the issue of an Enforcement Notice in the cases where the issue is of a dangerous or minor nature,

"Dangerous" is not defined in the BA or the SPA. When a section of an act uses plain words with well-known or understood meanings, there is no need to depart from those plain ordinary meanings. Having regard to the Macquarie Dictionary, "dangerous" means "full of danger or risk; causing danger; perilous; hazardous; unsafe".

Guidance on when a show cause is not required is provided in the "Queensland building work enforcement guidelines" (2002) available on the Department of Housing and Public Works website (http://www.hpw.qld.gov.au/SiteCollectionDocuments/qld-building-work-enforcement-guidelines.pdf). The guidelines provide guidance to local governments on their powers and duties for the investigation and enforcement of offences under the BA and IPA (as far as is material, the provisions under the former IPA and current SPA are analogous).

Section 4.2.2 of the guidelines at page 11 states:

> "What constitutes a 'matter of a dangerous or minor nature' is not defined, nor has it been tested in court. However it is reasonable to assume dangerous is intended to refer to some circumstance where a building or structure is structurally unsound and could collapse or presents another immediate hazard.
>
> A building or structure that was lawfully constructed and remains structurally sound or intact cannot be considered dangerous because it does not meet current safety standards"

There is no suggestion that the building is structurally unsound or that there is any immediate peril or hazard making the building unsafe. The sole basis for the Council's belief the building is "dangerous" is the view it has formed regarding the building's non-compliance with fire safety standards based on the emails from the private certifier and the QFRS.

Of the private certifier items only items 2,3,7,8,& 9 have any relevance to fire safety, and of those items 8 and 9 are purely administrative issues not affecting life safety in the building.

In relation to Items 2 and 3 the private certifier, in his written submission, advises that these items had been rectified when inspected on the 6th January 2014. It is unknown whether those items were outstanding at the time the Enforcement Notice was issued and the Council has not provided information that it conducted an inspection to verify or otherwise their existence. In any case if it is considered that the existence of these defects may render the building unsafe it does not necessarily follow that the building is dangerous as contemplated by the BA

In relation to the private certifier's item 7 and the QFRS items, the inspection advice from the QFRS in fact lists only one issue that is non complaint. The format of the report is somewhat confusing as it lists all the elements that the QFRS inspects. The comments area contains the outstanding matters which in this case relate to the insufficient pressures and flow of the street hydrant.

The provision of fire hydrants for buildings is identified in the BCA and in particular Volume 1 EP1.3

> "*A fire hydrant system must be provided to the degree necessary to facilitate the need of the fire brigade appropriate to –*

(a) fire-fighting operations; and
(b) the floor area of the building; and
(c) the fire hazard

The Deemed to Satisfy (Dts)provisions in the BCA Volume 1 E1.3 gives;

(a) A fire hydrant system must be provided to serve a building –
(i) having a total floor area od 500 m^2; and
(ii) where a fire brigade is available to attend a building fire.

It can be seen from the above that it may not be necessary to install fire hydrants at all, however the location and size of the building in this appeal indicates hydrant protection is required.

Fire hydrant systems are not installed or designed to be used by the occupants of the building, but are installed for use by the fire brigade. The first response fire fighting is provided by fire hose reels and portable fire extinguishers which have been shown to have been provided in the subject building.

The absence of a fire hydrant system does not diminish the initial level of safety of occupants as there are other facilities and equipment that have effect to enable safe evacuation before the fire brigade arrive. The absence of an effective hydrant system may hinder the fire brigade in conducting search and rescue and containment of a fire, and prevention of spread of fire to adjoining properties but again it does not necessarily follow the building is dangerous as contemplated by the BA

In issuing an Enforcement Notice, the Council must have formed the view that the building is "dangerous" based on a reasonable belief. It has been accepted that a challenge to the exercise of a discretion which is required to be exercised reasonably must demonstrate the high hurdle established in the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (**the Wednesbury test**)* that the exercise of the discretion must have been so unreasonable, no reasonable authority could have come to it.

In the recent High Court decision *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 the majority (Hayne J, Kiefel J and Bell J) held that the legal standard of reasonableness is not confined to the Wednesbury test but errors in decision making such as taking irrelevant considerations into account or failing to consider reasonable considerations or giving disproportionate weight to some factor may be seen as unreasonable.

In the present appeal the following factors lead the Committee to conclude that the Council's belief the building was sufficiently dangerous as to justify the issue of the Enforcement Notice was not reasonable in the circumstances and that the Enforcement Notice should accordingly be set aside:

1. The Council did not undertake its own inspection of the premises before the issue of the Enforcement Notice to determine whether the building was perilous, unsafe or presented an immediate hazard to users, occupants and members of the public;
2. Council relied on items listed in the emails of the private certifier and the QFRS without applying critical independent assessment of them to determine their true importance or consequences, including whether those items in fact presented any danger to users, occupants and members of the public in the building
3. Council did not seek important information from the private certifier such as when he had last inspected the building or the context in which his email to them was made;
4. The email exchange between the Council and the private certifier was (when considered against the background of the Planning and Environment Court order of 26 August 2013) in the nature of an informal exchange of information; it was not, nor could it reasonably be considered, to constitute the consultation with the private certifier required before the issue of the notice by section 590(4) of the SPA;
5. It is clear that the real purpose of the Enforcement Notice was to require the Applicant to

obtain a Certificate of Classification for the premises. This very requirement was the subject of the Planning and Environment Court order of 26 August 2013. It is clear from the communications between the private certifier and Council that at the relevant time, the Applicant was working to that end. If the Council had the view that there was a breach of the Planning and Environment Court order because the Certificate of Classification had not been obtained within the agreed timeframe, then action should have been taken to enforce that order.

Geoffrey Mitchell
Building and Development Committee Chair
Date: 17 February 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