Building and Development
Dispute Resolution Committees — Decision

Sustainable Planning Act 2009

Appeal Number:	**36 – 13**
Applicant:	Michael Erlbaum & Erez Erlbaum
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	6 Brook St, South Brisbane and described as Lot 4 on RP 1169-8 — the - subject site

Appeal

Appeal under section 250 of the *Building Act 1975* (BA) against the giving of an Enforcement Notice under section 248(1) of the BA, The Enforcement Notice relates to the use of the premises for a purpose other than for what it was approved.

Date of hearing:	6 January 2014 at 10:30 am – site inspection by Committee 7 January 2014 at 10:30am – off site hearing
Place of hearing:	6 January 2014 -Committee Inspection of the subject site 7 January 2014 –off site hearing; Building Codes Queensland Meeting Room 1; Level 16, 41 George St Brisbane 4001
Committee:	Geoffrey Mitchell – Chair Danyelle Kelson – Member Ken Crase - Member
Present:	6 January 2014 -Allan Erlbaum – Applicant 7 January 2014: Allan Erlbaum - Applicant Trevor Gerhardt – Applicant's representative 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 and instead requires that the Applicant:

1. Within 14 days of the date of this decision makes an application for a Development Approval for Building Works to a Building Certifier to change the BCA classification of the building closest to the Brook Street frontage to Class 2; and
2. The Building Certifier in making its determination is to consider the works on the ground floor as new works and cannot apply the concessions available under the BA for lawful existing works; and
3. The Building Certifier is to ensure that the provisions of Sch 7 of the Sustainable Planning Regulation 2009 (SPR) are considered for alternative solutions relating to any fire safety system as defined.

Background

The subject site is a rectangular block 440m^2 in size. The site is located in the "Low-Medium Residential Area", "Demolition Control Precinct" ,"West End / Woolloongabba District Local Plan: under the Brisbane City Planning Scheme.

A Development Approval for Building Works for alterations and additions to an existing dwelling on the property has been issued by a private certifier.

There has been a Development Approval given by Council for the raising and extending an existing dwelling on the property.

The site is improved with two buildings. The appeal relates only to the building closest to the Brook Street frontage of the site (the subject building). The secondary dwelling to the rear of the site in not subject to this appeal.

The Council has inspected the premises on a number of occasions to determine if the building is being used for other than for which it was approved. Council's visits of 19 September 2012 and 24 January 2013 were the subject of Appeal 14-13 which related to the use of the building under the definitions as described in the Brisbane City Plan 2000 (City Plan).

On 13 November 2013 the Council visited the premises and conducted an invasive inspection of the subject building to ascertain compliance with the BA. That inspection revealed that there were no aspects of fire separation provided which the Council considered to be required for the current use of the subject building which it determined was being used as a Class 2 building as defined in the Building Code of Australia (BCA).

The Council formed the belief that the building is dangerous and dispensed with the issue of a show cause notice under section 248(4) of the BA. Council proceeded to issue an Enforcement Notice dated 28 November 2013.

The Applicant was dissatisfied with the Council's Enforcement Notice and disputes amongst other things that the building is dangerous. The Applicant subsequently lodged an appeal against the Enforcement Notice with the Committees Registrar on 5 December 2013.

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 5th December 2013.
2. The *Building Act 1975* (BA)
3. The *Sustainable Planning Act 2009 (*SPA)
4. The Sustainable Planning Regulation 2009 (SPR)
5. The Building Regulation 2006 (BR)
6. Volume One and Two of the National Construction Code Series - The Building Code of Australia (BCA)
7. The Guide to the Building Code of Australia (Guide)
8. Brisbane City Plan 2000 (City Plan)
9. Queensland building work enforcement guidelines 2002 (guidelines)
10. Additional correspondence and submissions received from the Applicant at the hearing
11. Additional material supplied by the Council at the hearing

12. Additional material requested by the committee to be provided by the Council.
13. Verbal representation by the parties at the hearing.

Findings of Fact

The Committee makes the following findings of fact:

- The subject building was approved by a private certifier in February 2012 as a Class 1a dwelling.
- In October 2012 the Council issued a Development Approval (A003320764) for the subject building permitting it as an existing dwelling to be raised and constructed outside the building envelope.
- The premises are being rented under four separate tenancy agreements, each with separate keys and to the exclusion of other tenants.
- The subject building is a two story building comprising 3 of the 4 tenancies, one on the upper level and two on the lower level of the building. The fourth tenancy is in the secondary dwelling to the rear of the site.
- Under the BCA classification system, the subject building is a Class 2 building and must meet the requirements of the BCA for a building of that classification.
- There is no fire separation between the upper and lower levels of the subject building.
- There is no fire separation between the two living areas on the lower level of the subject building.
- The smoke alarms installed in the subject building are stand-alone smoke alarms i.e. there is no interconnection between the alarms.
- There is no Certificate of Classification for the subject building.

Reasons for the Decision

1. The Council dispensed with the giving of a Show Cause Notice under s248(4) BA and proceeded straight to the issue of an Enforcement Notice as it had formed the view the building was dangerous.
2. In forming its view the Council stated its belief that the premises were not compliant with the relevant legislative requirements pertaining to fire safety based on its inspection of the premises of 20 November 2013 which found;

    1. No fire retardant materials were evident within the wall cavity to prevent the access of fire between unit 2 and unit 3.
    2. An inspection of the floor space between unit 2 and unit 1 revealed that the floor boards of unit 1 were visible and no fire retardant materials were evident.
    3. An inspection of the floor space between unit 3 and unit 1 revealed that the floor boards of unit 1 were visible and no fire retardant materials were evident.
    4. A series of windows are present within the eastern side ground floor of the primary dwelling which forms the property boundary with the adjoining property.

    In oral representations before the Committee, the Council stated that matters relating to fire safety were regarded seriously by the Council given the threat to occupants posed by house fires.

    Section 248(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 instances 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 Integrated Planning Act 1997 (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 it is in danger of collapse. It may be inferred that the building is unsafe due to the absence of any early warning or protection for occupants in the upper level from a fire situation originating in the lower level of the subject building. However the degree of risk does not represent an immediate hazard such as to find a building "dangerous" as that term is commonly understood and the Enforcement Notice should be set aside.

3. However having regard to the use to which the building is being put and the requirements of the BCA for fire safety, the building is non-compliant and for the following reasons, the Committee is satisfied that steps should be taken by the Applicant to ensure compliance with the BCA for a Class 2 building.

4. The subject building has been approved as a Class 1(a) building. The Applicant presented information to support his contention that the use of the subject building complies with the planning definition of a "house" under the City Plan. The uses defined under the City Plan are different to the principals of Classification under the BCA. As this Enforcement Notice has been brought under the BA the Committee will not address the planning related components.

   The principles of classification are stated in the BCA at A3.1 in Volume 1 and 1.3.1 in Volume 2 as follows:

   > "*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".*

   A Class 1 building is defined in the BCA as:

   > *"(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…..*
   > *"*(b) Class 1b —
   > *(i) a boarding house, guest house, hostel or the like—*
   > *(A) with a total area of all floors not exceeding 300 m^2 measured over the enclosing walls of the Class 1b building; and*

(B) in which not more than 12 persons would ordinarily be resident; or

(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation,

which are not located above or below another dwelling or another Class of building other than a private garage"

The BCA defines a Class 2 building as

"Class 2:

a building containing 2 or more sole-occupancy units each being a separate dwelling."

The BCA defines a sole-occupancy unit as:

***"Sole-occupancy unit** means a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes—*

(a) a dwelling; or

(b) a room or suite of rooms in a Class 3 building which includes sleeping facilities…."

The Guide is a non-regulatory companion manual to BCA Volume 1. It is intended as a reference book for people seeking clarification, illustrations, or examples of what are sometimes complex BCA provisions. The Guide provides the following advice in relation to sole-occupancy units (emphasis added by committee);

*"**Sole-occupancy unit***

*A sole-occupancy unit is an area within a building for the exclusive use of the owner or occupier. It is irrelevant if the area is occupied by an individual, a number of people, or by a company. **Exclusivity of use is the key factor in determining whether an area or room is a sole occupancy unit**.*

Example

Examples of sole-occupancy units include individual flats in a block of flats, a self contained unit, a bedroom and associated ensuite, a suite of rooms in a hotel or motel; bedrooms in an aged care building, a shop in a shopping centre; or an office occupied by an individual owner or tenant in an office building. A sole-occupancy unit may also include a single bedroom or different combinations of related rooms associated with a bedroom exclusively used in a Class 3 building used for student accommodation. For example a bedroom with an associated study room and a small storage room exclusively for the use of a student would be considered a sole-occupancy unit.

In residential applications, a sole-occupancy unit will typically consist of sleeping facilities, sanitary facilities and a living area. ……. In situations where the sleeping facilities are the only areas that are for the exclusive use of the owner or occupier the delineation of the sole-occupancy unit will change. In this instance the bedroom becomes the sole-occupancy unit."

The inspection by the Committee revealed that even though there were some shared facilities; each of the 4 separate parts of the premises were fitted with lockable doors such that other users of the building could be excluded from all but their own portion and each occupier of the separate portions had exclusive use of their own portion with no rights of access to or use of the other units. The Committee is satisfied that the degree of exclusivity contemplated in the Guide is present and that as such each portion of the building is a separate dwelling and therefore a sole-occupancy unit as defined.

The Committee is of the opinion that the current use of the subject building does not fit the classification of either Class 1a or Class 1b under the BCA. The sole-occupancy units, as described above, which comprise the subject building, are configured such that the upper floor unit is located above the two units located on the lower floor.

The subject building may have been approved as a Class 1a building; however the Committee is of the opinion that the appropriate classification of the subject building based on the current use is Class 2. A Class 2 building requires consideration of additional provisions to protect the occupiers of the other parts of the building particularly relating to fire safety systems.

Under section 110 of the BA, the owner of a building must ensure that a change to the use for which a building was designed, built, or adapted to be used, that changes the BCA classification, is not made unless a building certifier has approved the change and the building as changed complies with the buildings assessment provisions, which include the BCA and relevant fire safety standards.

Section 248(2) of the BA provides that an Enforcement Notice may be given to a person who does not comply with a particular matter in the BA. Although the evidence gathered by the Council does not establish the subject building is dangerous, the Committee is of the view that it clearly establishes the fire safety systems of the subject building do not comply with the provisions of the BCA relating to fire safety for Class 2 buildings to ensure the on-going safety of the occupants.

The BCA is a performance document and whilst it lists methods which are "deemed to satisfy" the only mandatory compliance requirement is against the performance clauses.

There are a number of options that could be considered to bring the building in line with compliance requirements of the BCA without the necessity of fully complying with prescriptive provisions of providing physical fire separation. These options could be further explored by the development of an alternative solution.

The Committee has also looked at the last item of concern raised by the Council being the existence of unprotected openings along the eastern side ground floor. The committee noted that the approved plans required the installation of screens to achieve the required fire separation. The BCA requires external walls to have a Fire Resistance Level (FRL) of 60/60/60 (60 minutes). Metal screens alone do not provide an FRL. It is common in a fire engineered alternative solution that radiation calculations will show that the installation of screens will provide an a equivalent degree of protection, to and from adjoining properties, depending on the distance the building is from the property boundary. In the Information provided by the Council relating to the Development Approval for Building Works on Councils' records the Committee cannot see where the installation of the screens has been considered as an alternative solution nor any calculations provided to justify their installation.

The Committee considers that the applicant should:

1. Within 14 days of the date of this decision make an application for a Development Approval for Building Works to a Building Certifier to change the BCA classification of the building closest to the Brook Street frontage to Class 2; and
2. The Building Certifier in making its determination is to consider the works on the ground floor as new works and cannot apply the concessions available under the BA for lawful existing works; and
3. The Building Certifier is to ensure that the provisions of Sch 7 of the SPR are considered for alternative solutions relating to any fire safety system as defined.

Geoffrey Mitchell
Building and Development Committee Chair
Date: 4 March 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