



## Building and Development Dispute Resolution Committees—Decision

---

### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	52 - 12
<b>Applicant:</b>	Lastelle Investments Pty Ltd
<b>Assessment Manager:</b>	Gold Coast City Council (Council)
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	29 William Banks Drive, Burleigh Heads; and described as Lot 11 on RP230033 - the subject site.

---

### **Appeal**

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the Enforcement Notice issued by Gold Coast City Council to vacate the premises unless certain works are carried out to the adjacent land batter, as Council reasonably believes that the batter constitutes a hazard which may result in serious damage to the building and/or occupants of the building.

---

<b>Date of hearing:</b>	11:00am – Friday 23 November 2012
<b>Place of hearing:</b>	The subject site – 29 William Banks Drive, Burleigh Heads
<b>Committee:</b>	Mr Bryan Payne – Chair
<b>Present:</b>	Ms Danyelle Kelson – Committee Member Mr Ray Lastelle – Applicant (Sole Proprietor Lastelle Investments P/L) Mr Mehran Sadegh-Vaziri – GCCC Supervisor Development Compliance Mr Aidin Sheykhpour – GCCC Engineer Development Compliance Mr Martin Roberts – GCCC Senior Development Compliance Officer

### **Decision:**

It was agreed during the hearing by both parties that discussion for purposes of the appeal would only be about the matters relating to the content of the Enforcement Notice and would not encompass matters for which Supreme Court proceedings have been taken by the Applicant. This was considered possible due to the physical location of the matters in each case being separate.

After taking into account the above agreement, the Building and Development Dispute Resolution Committee, (Committee) in accordance with Section 564 of the SPA, **sets aside** the Enforcement Notice of the Gold Coast City Council on the following grounds:-

#### The Enforcement Notice:

- is made under Section 248(1) of the BA; and
- is considered to relate to matters, namely the land slope in question, outside the scope for issue of an Enforcement Notice as delimited in Section 248(1) of the BA.

The Committee does however wish to record its concern over the possible instability of the land slope in question and urges the parties involved to reach a speedy agreement on any actions necessary to minimise the risk of future failure of this land slope.

## **Background**

The site is an irregularly shaped allotment of area 3368m<sup>2</sup> with frontage to William Banks Drive and has a common boundary along its eastern side with a public road reserve containing Rudman Parade, which forms the access to an adjacent quarry site to the south of the allotment.

The site is developed with a single storey Class 8 steel framed and clad building described as a warehouse/factory occupying the bulk of the site area adjoining the eastern boundary.

A steep batter exists along the majority of the eastern boundary of the allotment. This batter includes a small (800mm height) concrete masonry retaining wall at its toe and irregularly shaped and sloped shotcrete batter protection above this wall. The shotcrete does not extend to the full height of the batter. The face of the retaining wall is of the order of 1.5 metres from the eastern wall of the building.

An Enforcement Notice was issued by Gold Coast City Council on 16 October 2012 to vacate the premises unless certain works are carried out to the adjacent land batter, as Council had formed the view that the building was unfit for use or occupation because the batter constitutes a hazard which may result in serious damage to the building and/or occupants of the building.

An appeal was lodged by Lastelle Investments Pty Ltd, the owner, with the Building and Development Committee Registry on 26 October 2012.

The Registrar advised Council on 31 October 2012 that an appeal had been lodged in relation to the Enforcement Notice and subsequently advised all parties of the date, time and place for the hearing.

## **Material Considered**

The material considered in arriving at this decision comprises:-

1. Form 10 – Notice of Appeal, drawings, photographs, extracts and correspondence (including Council's Enforcement Notice) accompanying the appeal, lodged with the Registrar on 26 October 2012.
2. Various other items of documentation relating to the development history of the allotment and building in question, subsequently supplied by Council.
3. Site survey contours and survey cross-sections dated 14 May 2008.
4. Verbal submissions from the Applicant at the hearing.
5. Verbal submissions from Council representatives at the hearing.
6. *Building Act 1975* (BA).
7. Building Regulation 2006 (BR).
8. *Sustainable Planning Act 2009* (SPA).
9. Building Code of Australia (BCA).

Documents relating to the Supreme Court action were excluded from the considerations of the Committee.

## **Findings of Fact**

The Committee makes the following findings of fact:-

- The site is an irregularly shaped allotment of area 3368m<sup>2</sup> with frontage to William Banks Drive, Burleigh Heads and has a common boundary along its eastern side with a public road reserve containing Rudman Parade, which forms the access to an adjacent quarry site to the south of the allotment.

- The site is developed with a single storey Class 8 steel framed and clad building described as a warehouse/factory occupying the bulk of the site area adjoining the eastern boundary.
- A steep batter exists along the majority of the eastern boundary of the allotment. This batter includes a small (800mm height) concrete masonry retaining wall at its toe and irregularly shaped and sloped shotcrete batter protection above this wall. The shotcrete does not extend to the full height of the batter.
- The batter in its general form was in existence for some time prior to an application for Building Approval for the Class 8 warehouse/factory was submitted (16 September 1996).
- A separate proposal to undertake works on the batter received Council approval, subject to minor amendment, on 2 June 1995. It is unclear what works, if any, occurred at the time.
- There is anecdotal evidence that the small retaining wall was constructed in conjunction with the building.

## Reasons for the Decision

### A. Reasons for Enforcement Notice

In the opinion of the Committee, for a valid Enforcement Notice to be issued because premises are considered unfit for use or occupation, the concern must relate to the structural sufficiency of the building itself and not to compliance or otherwise with any other approval process, past or present.

Section 248(1) of the BA provides for the issue of a notice if the local government reasonably believes the building, structure or building work—

- was built before the commencement of the section without, or not in accordance with, the approval of the local government; or
- is dangerous; or
- is in a dilapidated condition; or
- is unfit for use or occupation**; or
- is filthy, infected with disease or infested with vermin.

The terms “building”, “structure” and “building work” are all defined in the BA as follows:

Building: (Schedule 2 Dictionary)

*building* -

1. A *building* is a fixed structure that is wholly or partly enclosed by walls or is roofed.
2. The term includes a floating building and any part of a building.

Structure: (Schedule 2 Dictionary)

*structure* includes a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure.

Building work: (Section 5 of the Act)

*Building work* is –

- building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or
- excavating or filling –
  - (i) for, or incidental to, the activities mentioned in paragraph (a); or
  - (ii) that may adversely affect the stability of a building or other structure, whether on the land on which the building or other structure is situated or on adjoining land; or
- supporting, whether vertically or laterally, land for activities mentioned in paragraph (a); or
- other work regulated under the building assessment provisions, other than IDAS.

Council has chosen to issue the Enforcement Notice because it “*reasonably believes the building on the premises is unfit for use or occupation because the adjacent over steepened batters are dangerous*”. Council believes that the action required to cure the apparent problem is to “*ensure the building is vacated and not occupied until the over steepened batters are stabilised and achieve a RPEQ specialising in*

*geotechnical engineering certified factor of safety against failure of 1.5.”*

Up to amendments in 1998, which essentially introduced the present form of the enforcement notice provisions within the Act, the provision relating to the issue of enforcement notices to owners of buildings “unfit for use or occupation” (then section 53(2)) provided:

- “(2) If in the opinion of a local government formed on reasonable grounds any building or other structure or any part of a building or other structure is a ruin or so far dilapidated as to be unfit for use or occupation or is, from neglect or other cause, in a structural condition prejudicial to the inhabitants of or to property in the neighbourhood, the local government may, subject to section 54, by notice in writing, require the owner of the building or structure to do any one or more of the following —
- (a) demolish the building or structure or part;
  - (b) repair the building or structure or part;
  - (c) remove the building or structure or part;
  - (d) fence the land on which the building or structure or part stands;
  - (e) repair any fence that encloses or is on that land;
  - (f) secure the building or structure or part;
- within the time specified in the notice.”

In that iteration of the provision, it was clear that the “unfitness” for occupation related to the structural condition of the building itself, rather than any external factor or influence.

The change which introduced the form of the section essentially as it now is, was the *Building and Integrated Planning Amendment Act 1998 (No 13/98)*, which was the legislation to implement the *Integrated Planning Act 1997 (IPA)* and introduce private certification. The Explanatory Notes to the Bill which became Act No. 13/98 provided that the enforcement notices in the BA were intended to deal with non-compliances which were not development offences under IPA:

*“Enforcement notices outlined in the Integrated Planning Act deal with situations involving development offences committed under that Act. However building enforcement notices are required to deal with existing buildings”.*

There were some words within the Explanatory Notes that suggested the enforcement notice provisions had been “rewritten for clarity”, but beyond that, there is no suggestion that the intention of changing the provision was in any way to alter, widen or expand the applicability of the provision. The Committee believes the intention remained that “unfitness” was intended to relate to the structural condition of the building or structure itself.

The next change of note to the enforcement notice provisions of the BA was when the words “building works” were introduced by the *Local Government and Other Legislation Amendment Act 2000 (No 4/2000)*. The Explanatory Notes for that Act indicated that the words were introduced to cover the carrying out of building works such as site works associated with the construction of buildings and structures.

## B. Structural Sufficiency

The building itself is clearly structurally adequate. It is instead the batters which are of concern to Council as they are stated to be *“highly susceptible to erosion and under adverse weather conditions (long term persistent rainfall) they could undergo a major deep seated failure resulting in serious damage to the building and/or occupants of the building”*.

The masonry retaining wall appears generally stable as does the shotcrete, although construction of the latter appears less than ideal.

Despite the landowner’s view that the “landslide and hazards are in GCCC land”, the Treasure & Associates site survey presented as evidence in this appeal suggests that the batter lies largely within the allotment and that the part within the allotment acts as support for the land above. It does not appear that the shotcrete batter protection extends to the allotment boundary. So while loose saturated soil and associated vegetation may indeed originate from the unprotected batter within the Rudman Parade road reserve and

slide down the batter, there is the risk that similar material from within the allotment may also do so.

### C. Relevance of the Enforcement Notice

Some degree of site and retaining works can be considered a part of building work. In this instance, anecdotal evidence is that the extent of such work undertaken at the time of building construction in the vicinity of the batter and directly related to the building construction itself may have been restricted to construction of a small retaining wall at the base of an existing cut slope. This slope was noted in Council's planning report of 25 November 1996 as "a steep batter which limits the development potential of the site", however no conditions relating to the batter appear to have been imposed at the time.

It is the opinion of the Committee that site works associated with and necessary for construction of the building, that is, those works defined as "building work" under the Act, have not exacerbated what was a pre-existing condition. The Committee therefore considers that the substance of the Enforcement Notice issued by Council under Section 248(1) of the BA is outside the scope of matters permitted for issue of such a Notice.

### **Conclusion**

The Committee understands Council's concern and appreciates that it has a duty to ensure that public health and safety is protected both from the perspective of the occupants of the building and the users of the road on the top side of the batter. The Committee believes the owner of the building should also be concerned about risk to the property as the potential for further landslide or catastrophic failure of the batter which Council fears is definitely present.

However in this instance, the Committee has concluded that those works defined as "building work" under the Act, that is, site works associated with and necessary for construction of the building have not exacerbated what was a pre-existing condition and therefore the substance of the Enforcement Notice issued by Council under Section 248(1) of the BA is outside the scope of matters permitted for issue of such a Notice.

The Committee wishes to congratulate all parties for the positive discussion put forward during the hearing process and co-operative manner in which they conducted themselves.

---

**Bryan Payne**  
**Building and Development Dispute Resolution Committee Chair**  
**Date: 14 March 2013**

## **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  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**