

APPEAL

Integrated Planning Act 1997

File No. 3-01-044

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council

Site Address: 370 Mons Road, Forest Glen

Nature of Appeal

Appeal under Section 4.2.13 of the Integrated Planning Act 1997 against the decision of the Maroochy Shire Council to issue an enforcement notice in respect of the unlawful use of an unlawfully occupied building on land described as Lot 8 RP 810748, Property No.85784, situated at 370 Mons Road, Forest Glen.

Date and Place of Hearing: 10.00 am on 26 September 2001
at Maroochy Shire Council Chambers, Currie Street, Nambour.

Tribunal: G S Cornish

Present:
G S Cornish - Tribunal Referee
R N Lawson - As agent for owners
W Baldwin - Maroochy Shire Council
G Banfield - Maroochy Shire Council

Decision

I determine that requirement 3 of Enforcement Notice No. 01E0172 dated 14 August 2001 be confirmed.

Under the Integrated Planning Act (IPA), Section 4.2.7, this Tribunal has jurisdiction to decide an appeal about a matter relating to the Building Act 1975 or a matter prescribed under a regulation. It can, therefore, only consider requirement 3 of the Notice in respect of a Certificate of Classification required under Section 98 of the Standard Building Regulation 1993.

Requirements 1 and 2 are "material change of use" issues and cannot be determined by this Tribunal.

Material Considered

1. Show Cause Notice No. 01S2373 and accompanying advisory letter, both dated 28 May 2001 and addressed to owners, setting out the areas of non-compliance of the building.
2. Show Cause Notice No. 01S2372 and accompanying advisory letter, both dated 28 May 2001 and addressed to Consolidated Transport Industries, setting out the areas of non-compliance of the building.
3. Enforcement Notice No. 01E0172 and advisory letter, both dated 14 August 2001 and addressed to the owners, requiring the shed not be used for commercial purposes and that a Certificate of Classification be obtained.
4. Enforcement Notice No. 01E0171 and advisory letter, both dated 14 August 2001 and addressed to Consolidated Transport Industries, requiring the shed not be used for commercial purposes and that a Certificate of Classification be obtained.
5. Applicant's appeal letter and form dated 12 September 2001, as an agent for the owners, appealing the Council's decision to issue an Enforcement Notice to his clients.
6. Fascimile from Mr R Lawson to Building Codes Queensland, dated 17 September 2001, confirming that he is acting for the owners in this matter.
7. Verbal submission of Mr R Lawson on 26 September 2001, as the agent of the owners, supporting his application and expanding on the reasons why the application should be granted.
8. Verbal submissions by Mr W Baldwin and Mr G Banfield of Maroochy Shire Council on 26 September 2001 setting out reasons why the notices were issued and any further extensions of time should not be granted.
9. Copy of a letter from the owner to Maroochy Shire Council dated 26 September 1995 stating that the shed would be used solely for private and not for commercial purposes.
10. The Standard Building Regulation.
11. The Integrated Planning Act.

Findings of Fact

I made the following findings of fact:

1. Issues 1 & 2 in the enforcement notice relate to "material change of use" matters while 3 relates to "building work" matters as defined under the Integrated Planning Act. To enable these matters to be considered separately in the appropriate jurisdictions, it may have been better had two separate notices been issued, one for issues 1 and 2 together and another for issue 3 on its own. The Council, however, determined that these matters were integrally connected and should therefore be contained within the one notice.

2. This Tribunal, however, has jurisdiction to address the “building work” matters only and make a determination in respect of those. The continued occupation of the building by a commercial entity, Consolidated Transport Industries, is a “material change of use” matter. This Tribunal has no jurisdiction to make orders in respect of such matters. The “material change of use” matters would require to be considered separately by the Planning and Environment Court.
3. The “building work” and “material change of use” matters have been separated for the purposes of this determination, although they were both discussed in detail at the hearing due to their interrelationship.
4. Consolidated Transport Industries, the current occupiers of the building, are not a party to this appeal. While they may be “*a person having standing in the matter who may be adversely affected by the decision*” they have not made any written submission to the Tribunal identifying their concerns.
5. The building was approved for construction in 1995, under Building Permit No. 95/2541, as a Class 7 building having regard to the size and likely contents of the building. Certain fire safety requirements were specified as a consequence of the approval.
6. The building has never been finalised and no Certificate of Classification has been issued. Whether or not the necessary fire safety provisions are in place has not been identified.
7. The building has been occupied without a Certificate of Classification being issued. This is not in accordance with the requirements of Clause 95 of the Standard Building Regulation.
8. Additions or modifications to the building have been carried out without approval. Whether or not these changes require further safety provisions to be installed in the building has not been identified.
9. As the building was intended for private use, “material change of use” matters were not considered at the time of approval.
10. The building has been unlawfully occupied consistently since approximately 1997 in direct contravention of the requirements of the Standard Building Regulation. No attempt has been made to rectify the matter by seeking the issuing of a Certificate of Classification. If the building had been constructed in accordance with the approval given, the issue of a Certificate would have been a simple matter at any time in the past. However unapproved alterations or additions have since been carried out and these will need a further approval before a Certificate can be issued.
11. Since occupation, Council officers have notified the owners of complaints being made regarding the use of building.
12. The Council allowed the owners additional time to rectify the matters when health issues affected the family.
13. The Council allowed the owners additional time to rectify the matters when health issues affected the owner’s design consultant.

14. No serious attempt has been made to rectify the “building work” issues within a reasonable period of time.
15. The only justification presented to the Tribunal for the continued occupation of the building was that the current occupiers cannot obtain alternative accommodation until January 2002.
16. Mr Lawson advises that the owners are of the view that they have an arrangement with the occupiers and that they believe they should be able to allow the occupiers to stay until that time. This does not address the issue of whether the building is suitable for occupancy from a safety and classification point of view or why the building should not be brought into compliance.
17. This building is not the only building on the property that has been the subject of Council action in respect of outstanding “building work” or “material change of use” matters. Some other buildings have been subject to unauthorised occupation, or have been erected without approval, or have been built without the necessary siting provisions having been met. This building therefore apparently falls within a consistent framework of non-complying building work constructed over a period of years on this property. Retrospective approvals have had to be obtained or are being obtained for these buildings, but only after Council action.
18. Mr Lawson is preparing documentation for submission to Council to obtain approval for the alterations/ additions made to this building and for the issue of a Certificate of Classification. The documents, however, do not relate solely to the present building and its usage, but rather to a group of this and two other buildings to be utilised in conjunction for a different purpose. This submission may not receive approval and in the meantime the subject building remains unlawfully occupied and may also be unsafe.
19. Council’s representatives submitted that Council had afforded the owners adequate time both over past years and during 2001 to rectify the problems, but that nothing substantial had been done. Council was not prepared to allow this unlawful building work and unlawful occupancy to continue.

Reasons for the Decision

An assessment of the facts and the requirements of Section 95 of the Standard Building Regulation leads me to the conclusion that the Council has given the owners ample time over a number of years to comply with their legal obligations. The problems with this building fall within a consistent non-compliant building regime on the property built up over a number of years.

The occupancy of the building without a Certificate of Classification could result in an unsafe situation which could implicate the Council under a “duty of care” if a problem such as a fire were to occur. This is because Council knows that unlawful occupancy is occurring and has not been able to ensure that the building either complies or is vacated until compliance is achieved. The issuing of the Enforcement Notice is aimed at bringing the building into conformity with the approved use.

A Certificate of Classification under Section 95 of the Standard Building Regulation must be issued before a person may lawfully occupy or use a building, irrespective of whether it is for private or commercial purposes. In view of the considerable lapse of time since this matter was initially brought to the attention of the owners, the apparent reluctance on the part of the owners to meet their obligations, the minimal extent of work that should have been necessary to achieve compliance and

the issue of a certificate if the building work had been properly completed in the past, and the fact that further unapproved building work has been undertaken on the building, I am of the view that no further time should be allowed. Compliance with the building standards is necessary to maintain adequate safety provisions for the users. Accordingly, the building should be vacated and remain unoccupied until such time as a Certificate of Classification has been issued. This remains the case irrespective of whether the current occupier has an alternative storage venue or current contractual arrangements with the owners may be broken.

Whether the occupier has a contractual arrangement with the owner to occupy the building without the necessary "material change of use" permission from Council is not relevant to this decision. The current occupier cannot continue occupation without Council approval for a "material change of use" even after a Certificate of Classification has been issued. The Certificate would ensure that, at the date of issue, the building was safe for occupancy for the purpose for which it was approved and/or adapted.

This Tribunal has no jurisdiction to make a decision on the continued commercial occupation of a building not in accordance with the provisions of the Maroochy Shire Council planning scheme or the requirements of the Integrated Planning Act relating to "material change of use", which may be dealt with separately.

I am of the view that the applicant has not provided any justification for the continued occupation of the building without having the necessary Certificate of Classification required under Section 95 of the Standard Building Regulation.

G S Cornish
Building and Development
Tribunal Referee
Date: 28 September 2001

Appeal Rights

Section 4.1.37. of the Integrated Planning Act 1997 provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

Enquiries

All correspondence should be addressed to:

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