



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 11/2011

Applicant: Kristine Ceraolo

Assessment Manager: Brisbane City Council

Concurrence Agency: Not Applicable
(if applicable)

Site Address: Unit B3/41 Gotha Street (131 Wickham Street) Fortitude Valley
and described as Lot 3 on BUP 106905 — the subject site

Appeal

Appeal under section s533 of the *Sustainable Planning Act 2009 (SPA)* against the issuing of an enforcement notice by Brisbane City Council. The notice relates to an alleged development offence pursuant to section s578 of SPA (carrying out assessable development without a permit) and s580 of SPA (non compliance of a development approval, including any condition in the approval)

Date of hearing: 11.30am on 11 April 2011

Place of hearing: The subject site

Committee: Debbie Johnson – Chair

Present: Kristine Ceraolo – Applicant
Adele Pashen – Observer
Sam King – Observer
Mark Higgin – Council Representative
Greg Jones – Council Representative

Decision:

The Committee, in accordance with section 564 of the SPA **confirms** the decision of the Brisbane City Council to issue the enforcement notice as contained in their written notice dated 11 March 2011.

Background

The applicant's property is a single level dwelling unit located within a large inner city mixed use complex. The construction of the development was staged, after it was approved in 1998.

The floor level of the unit is set down approximately 750mm below the adjoining external ground surface which is a landscaped garden bed in a common area. The living area of the unit opens onto a private balcony which is for the exclusive use of that unit. The balcony is bordered by a half height masonry wall that in part retains the landscaped garden bed in the adjacent common area. The garden bed is heavily landscaped and therefore provides some privacy screening for the balcony area. However, the pathway past this garden is used frequently and the landscaping does not address the acoustic impacts associated with people passing the unit, nor does it offer any security or protection from intruders.

It is primarily due to the security concerns that the applicant decided to enclose this balcony area with aluminium framed sliding glass windows. The applicant made various enquiries with the Council and also with the committee of the body corporate (of which she was the Chair) to determine what the requirements were in relation to having this work undertaken. On 8 April 2010 at an informal meeting of the committee for the body corporate, it was determined that the body corporate could allow the enclosure of a balcony. However the minutes of this meeting, recorded that other approvals may be required.

The applicant, then believing that she could proceed with the work, had the balcony enclosed using a combination of aluminium louvers and sliding glass windows.

After carrying out inspections on the subject site Council issued a show cause notice and subsequently on 24 January 2011 an enforcement notice to the applicant. The applicant appealed against the enforcement notice to the Dispute Resolution Committees on 25 January 2011. The Council subsequently withdrew the enforcement notice and reissued another on 11 March 2011.

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 25 January 2011.
2. Council's two Enforcement Notices, dated 24 January and 11 March 2011.
3. Council's letter withdrawing the Enforcement Notice dated 24 January 2011.
4. Written representations by the applicant.
5. Photographs of the subject.
6. Oral submissions by the applicant and the council representatives at the hearing.
7. Minutes from the Committee for the Body Corporate 8 April 2010.
8. The development approval and associated conditions for the mixed use development on the subject site.
9. Property details, through Council's website.

Findings of Fact

The Committee makes the following findings of fact:

The subject site was developed in accordance with a conditioned approval issued by council in 1998.

Condition 13 of this approval states:

- 'Ensure that each proposed balcony area within the subject site remains unenclosed at all times. This condition is imposed to protect and enhance the appearance of development with the Fortitude Valley area. The requirement will also ensure that the proposal does not exceed the maximum Gross Floor Area limitations applicable to the site.'

The decision notice also provides advice that the conditions of the development approval are attached to the land and are therefore binding on the successors of title for the site in accordance with the *Integrated Planning Act 1997* (being the relevant legislation at that time.)

Further the notice advises that:

- Any amendment to the development as contained in the development approval, including changes to the approved plans, documents or conditions will require an application for modification to be submitted. Similarly, a new application may be required.

Reasons for the Decision

The conditions of the planning approval issued in 1998, are applicable and legally binding to each of the lots created by virtue of that approval. Condition 13 of the approval clearly states that all balcony areas must remain unenclosed.

Unless the parent approval is modified or a new application is approved, the enclosed balcony contravenes the existing development approval. The enclosure of the patio requires a development approval for building works. In this instance, a building permit cannot be granted as the work does not comply with the existing higher order approval.

Building and Development Committee Chair

Date: 11 July 2011

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 Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248