



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	71-11
<b>Applicant:</b>	Hwee Jean Koh and Khing Sing Yii
<b>Assessment Manager:</b>	Brisbane City Council
<b>Concurrence Agency:</b> (if applicable)	Not Applicable
<b>Site Address:</b>	3 Holmewood Street Runcorn, described as Lot 3 on RP 226887 (the subject site)

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### **Appeal**

Appeal under section s533 of the *Sustainable Planning Act 2009 (SPA)* against the issuing of an Enforcement Notice by the Assessment Manager. The Council reasonably believes that an offence has been committed under the *Building Act 1975* (the 'Act'). Namely, a change to the use for which the building was originally designed, without approval from a Building Certifier, to the extent that the new use would fall within a different classification.

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<b>Date of hearing:</b>	10:30am on 26 September 2011
<b>Place of hearing:</b>	Level 5, 63 George Street Brisbane, being the Offices of Building Codes Queensland.
<b>Committee:</b>	Debbie Johnson - Chair Patrick Atkinson - Referee
<b>Present:</b>	Hwee Jean Koh and Khing Sing Yii - The Applicants Marc Joyce – Consultant for the Applicants Jamie Cook, Glenn Davidson and Peter McCallum - Brisbane City Council representatives

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### **Decision:**

The Building and Development Dispute Resolution Committee (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 25 August 2011.

## **Background**

The applicant's property is a suburban residential allotment in an established urban area. The site is conveniently located within walking distance of the railway station and a major road where other public transport options are available.

The site was developed approximately 35 years ago to provide a two storey brick home. Currently, the building features six bedrooms and each is fitted with an individual lock. Similarly there are two kitchen areas, two toilets, an ensuite, two showers, a single laundry and a double garage.

Until recently, the home has accommodated more than five unrelated persons who have individually rented rooms from the applicants. As the applicants do not reside at the property and there is no caretaker or property manager residing on this site, the tenants manage their own day to day sharing of the amenities that the house offers.

Following a complaint being made, officers from Council and the Queensland Fire and Rescue Services (QFRS) undertook an inspection of the property on 16 August 2011. Following the property inspection and discussions with the applicants, Council subsequently issued an Enforcement Notice on 25 August 2011, which in the first part required the applicants to reduce the number of occupants to no more than five.

As requested, the applicant's immediately ensured that the number of occupants was reduced to no more than five. Similarly, they have also ensured the number is maintained by reducing the number of beds available to five.

In addition to the first part, the Enforcement Notice also stipulated the applicants were to:

Engage a building certifier with the view to obtaining a building development approval to

1. Change the building's classification under the Building Code of Australia from a 1a to a 1b; and
2. Obtain a building development approval for a Class 1b building; and
3. Carry out all building work identified by and in accordance with the building development approval; and
4. Obtain a Certificate of Classification for a Class 1b with a restriction that the building not be used by more than five occupants; and
5. Submit to Brisbane City Council, a copy of the Certificate of Classification.

The applicant subsequently lodged an appeal with the Registrar of the Building and Dispute Resolution Committee on 2 September 2011. The intention of the appeal is to overturn requirements within the Enforcement Notice.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for Appeal/ Declaration', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 2 September 2011.
2. Council's Enforcement Notice, dated 25 August 2011.
3. Letter from QFRS dated 18 August 2011.
4. Written representations by the applicant's representative both at the hearing and following. (Including a copy of the Rooming Accommodation Agreement).
5. Oral submissions by the applicant's and the council representatives at the hearing.

6. Property details as available through Council's website.
7. The Brisbane City Plan
8. The *Sustainable Planning Act 2009* (SPA)
9. The *Building Act 1975* (BA)
10. The *Building Regulation 2006* (BR)
11. The *Residential Tenancies and Rooming Accommodation Act 2008*
12. The *National Construction Code 2011*(NCC)

## Findings of Fact

The Committee makes the following findings of fact:

Approximately 35 years ago a detached house was built on the subject site.

Recently site inspections by Council and the QFRS and subsequent discussions with the applicants, has established that the building was being occupied by up to five unrelated persons at a time.

Currently, each of the tenants holds a Rooming Unit Agreement (form r18) with the applicant's. This form and the relevant information pertaining to this agreement are available from the Residential Tenancies Authority (RTA). *The Residential Tenancies and Rooming Accommodation Act 2008* defines rooming accommodation as follows:

*Rooming accommodation is accommodation such as a boarding house, hostel (supported accommodation), off-campus student accommodation or other rooming style accommodation covered by the Act.*

The RTA's fact sheet publications states that:

*If a student rents a room in a boarding house, off-campus student accommodation or other type of rooming accommodation and has signed a rooming accommodation agreement (form r18), the information for residents living in rooming accommodation will apply.*

*If a student, or number of students rent a house, unit or townhouse and have signed a general tenancy agreement (form 18a), this is called a general tenancy.*

The building is currently subject to compliance with the National Construction Code 2011 (NCC) which considers a structure according to the relevant classification. Part 1.3 Classification states:

### 1.3.1

*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.*

### 1.3.2

*(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; or*

*(b) Class 1b-*

*(i) a boarding house, guest house, hostel or the like-*

*(A) with a total area of all floors not exceeding 300sq/m 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 Guide for the NCC further clarifies the differences between Class 1a and 1b as follows:

### **Class 1a**

*Class 1 buildings are not located above or below another dwelling, or another class of building other than a private garage. A sole-occupancy unit used for residential purposes located over another sole-occupancy unit used for residential purposes will always be a Class 2 or Class 3 building (depending on the circumstances). It cannot be a Class 1 building.*

*A single Class 1 dwelling can be made up of more than one building. For example, it may include what is ordinarily called a house, plus one or more habitable 'outbuildings' such as sleepouts. (Note that a habitable building such as a sleepout cannot be classified as a Class 10 building).*

*The height or number of storeys of a Class 1 building makes no difference to its classification.*

*The separating wall between adjoining Class 1 dwellings must start from the ground level.*

### **Class 1b**

*A Class 1b building is a small guest house, boarding house or the like and in some circumstances, multiple dwellings on one allotment used for short term holiday accommodation. Guest, boarding, or lodging houses which do not meet the criteria for a Class 1b building are classified as Class 3 buildings. Class 1b buildings used for short-term holiday accommodation include cabins in caravan parks, tourist parks, farm stay, holiday resorts and similar tourist accommodation. This accommodation itself is typically rented out on a commercial basis for short periods and generally does not require the signing of a lease agreement. Short-term accommodation can also be provided in a boarding house, guest house, hostel, bed and breakfast accommodation or the like.*

*Unlike a Class 1b building described in [A3.2\(b\)\(i\)](#), a Class 1b building described in [A3.2\(b\)\(ii\)](#) does not have any floor area limitation. Therefore, if 4 or more single dwellings are located on the one allotment and used for short-term holiday accommodation, each single dwelling would be classified as a Class 1b building regardless of the floor area of each dwelling or the combined floor area of all of the dwellings.*

*The Class 1b classification can attract concessions applicable to Class 3 buildings. These concessions allow people to rent out rooms in a house, or run a bed and breakfast, without having to comply with the more stringent Class 3 requirements. The reasoning is that the smaller size of the building and its lower number of occupants represents reduced fire risks.*

*Apart from their use, the primary difference between Class 1a and Class 1b buildings is that the latter is required to have a greater number of smoke alarms and in some circumstances, access and features for people with a disability.*

### **Class 3**

*Class 3 buildings provide accommodation for unrelated people. The length of stay is unimportant. Some exceptions to this classification include: certain bed and breakfast accommodation, boarding houses, guest houses, hostels, or lodging houses and the like which fall within the concession provided for Class 1b buildings.*

*Also, any sized building can be classified as Class 1 or Class 2 if it is used to house any number of unrelated people who jointly own or rent it, or share it on a non-rental basis with an owner or tenant.*

In this instance we do not know if the building has a floor area which is greater or less than 300sq/m. If it were greater than 300sq/m then Class 3 rather than 1b would be the appropriate classification under the NCC provisions.

In addition to the provisions of the NCC the building and it's use is also subject to the provisions of the Brisbane City Plan.

## The Brisbane City Plan

The subject site is located within a Low Density Residential Area of the Kuraby Local Plan Area. This area is predominantly characterised by detached housing up to a maximum height of 2 stories. The use of the applicant's property for residential purposes is generally consistent with the intent of the Scheme.

The Brisbane City Plan defines the following specific uses:

**Short term accommodation:** *a use of premises for short term accommodation (typically not exceeding 2 weeks) for tourists and travellers, e.g. holiday cabins, motel, hotel (where it entails mainly accommodation), serviced apartments, guesthouse or backpackers hostel and caravan park (that is also often appropriate for use as long term accommodation).*

The applicant's have demonstrated via the provision of the Rooming Unit Agreement (form r-18) that the property is not being used for short term accommodation purposes.

**House:** *a use of premises principally for residential occupation by a domestic group or individual/s, that may include a secondary dwelling, whether or not the building is attached, but does not include a single unit dwelling.*

The applicant's contend that the property is being used by a domestic group and/or individuals in a manner that is consistent with the intent of the definition of a house. Information provided to the Committee as a consequence of the proceedings, however, do not substantiate the applicant's position. For example, the leasing agreement (form r-18) is an individual "Rooming Agreement" as opposed to a (form 18-a) "General Tenancy Agreement". The intent of a Rooming Agreement is to provide individual lease agreements for each room as opposed to a General Tenancy Agreement which provides an individual contractual agreement for renting a domestic property. Day to day matters relating to issues each resident have are dealt with individually between the owner (or the owners authorised agent) under discrete "Rooming Agreements". It is further noted that no evidence has been provided to suggest that the owner, or an authorised representative of the owner, reside at the property.

In addition, each of the rooms within the property incorporate locks to enable residents to enclose their rooms from the communal portions of the property.

**Multi – unit dwelling:** *a use of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form. Multi–unit dwellings may be contained on one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi–unit dwelling include boarding house, retirement village, nursing home, orphanage or children's home, aged care accommodation, residential development for people with special needs, hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi–unit dwelling does not include a house or single unit dwelling as defined elsewhere.*

It appears that the current use of the property is more clearly defined as a multi-unit dwelling – boarding house. As a result of the information provided the following observations have been made:

1. The property is being used as the principal place of residents for long term tenancy
2. The property is being managed by the owner, or an authorised representative of the owner, under individual “Rooming Agreements”. The owner does not reside at the property and does not form part of the domestic group
3. Each room is locked in order to restrict access to each individual
4. As a consequence of points 2 and 3 above, it is arguable that the property is being resided in by several discrete individuals
5. The Council's Enforcement Notice directs the applicant's to amend the classification of the building to be a Class 1b building. The Brisbane City Plan generally supports the classification of the building as a Multi –unit dwelling -boarding house.

### **Reasons for the Decision**

The building is used to accommodate up to five unrelated persons at a time. Each of the bedrooms is fitted with a lock and individually keyed. Each of the tenants is under an individual tenancy agreement which relates to their allocated room. Each of the agreements can potentially offer different rental periods. Each of the tenants is potentially unknown to the others until they begin to occupy a room within the building.

None of the tenants can access the other rented rooms to assist in the event of fire given the individual locks that have been fitted. Similarly, there is no resident caretaker or property manager who might be responsible for the tenant's welfare and/or the activities carried out therein.

As the building is used in this manner the Committee has determined it to be a hostel, boarding house, guest house or the equivalent. The building is therefore to be classified at least a class 1b, possibly a Class 3 depending on the overall floor area that applies. It is necessary to ensure the individual's safety, the building must be upgraded if required to satisfy the regulations as applicable for a Class1b structure.

**Debbie Johnson**  
**Building and Development Committee Chair**  
**Date: 17 November 2011**

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### **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**