



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

**Appeal Number:** 3-09-069

**Appellant:** Brian Boehme and Mary Ann Boehme

**Assessment Manager:** Gold Coast City Council (Council)

**Concurrence Agency:** Not Applicable

**Site Address:** 1857 - 1861 Gold Coast Highway, Burleigh Heads described as Lot 1 on RP 170 471 – the subject site.

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### Appeal

Appeal under section 4.2.13 of the *Integrated Planning Act 1997* (IPA) against the decision of the Gold Coast City Council to issue an Enforcement Notice under section 248 of the *Building Act 1975* (BA) requiring the repair, rectification or demolition of an office building that the Council reasonably believes is dangerous, is in a dilapidated condition and is unfit for use or occupation.

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**Date of hearing:** 1.00pm - Monday 28 September 2009

**Place of hearing:** 1857 - 1861 Gold Coast Highway, Burleigh Heads and 1863 Gold Coast Highway, Burleigh Heads Queensland.

**Tribunal:** Don Grehan - Chair

**Present:** Mr Brian Boehme - Appellant  
Mrs Mary Ann Boehme - Appellant  
Mr Geoff Mitchell - Appellant's Representative.  
Mr Brian Gobie - Gold Coast City Council Representative.  
Mr Bob Clowes - Gold Coast City Council Representative.

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### Decision:

The Tribunal, in accordance with section 4.2.34 (2)(b) of the IPA, **changes** the enforcement notice issued by Council dated 06 August 2009 and, in accordance with section 4.2.34(1) of the IPA, **makes directions** as considered appropriate.

The Enforcement Notice (Ref No. PN56553/16), dated 06 August 2009 is changed to the following extent:

Items 1, 2 and 3 (inclusive) are deleted and are replaced by:

1. By the fourth (4<sup>TH</sup>) day of January 2010, carry out the following works to the satisfaction of the Principal Building Surveyor:

- (a) Fasten all loose undamaged elements and remove all broken or damaged elements from on or within the building on the Premises ("the Building"), inclusive of but not limited to:
    - (i) All broken, damaged or loose external glazed facade panels.
    - (ii) All broken, damaged or loose external glazed awning panels.
    - (iii) All broken or damaged or loose internal partition wall linings.
    - (iv) All broken or damaged or loose internal partition wall framing.
    - (v) All broken or damaged or loose suspended ceiling panels.
    - (vi) All broken or damaged or loose suspended ceiling grid framing.
    - (vii) All damaged carpeting and floor tiles.
    - (viii) All broken, damaged or loose air-conditioning ductwork.
  - (b) Decommission all electrical services on or within the building save for any security lighting or alarm systems, any emergency and exit lighting systems and any fire detection or alarm systems.
  - (c) Clean the building and the premises to the following extent:
    - (i) Removal of all graffiti from north and west facades of the building;
    - (ii) Removal of all debris and waste material from on or within the building to Council waste disposal facility;
    - (iii) Removal of all debris and waste material from the premises to a Council waste disposal facility.
  - (d) Secure the exterior of the building to prevent the ingress of water and to prevent internal access by persons other than by use of the existing doorways.
2. Prior to any further use or occupation of the building, make application in accordance with the provisions of the IPA to the Gold Coast City Council ("Council") or to a private certifier (class A) for a development permit for building work to repair the building and obtain a Certificate of Classification pursuant to the BA.

The directions in relation to this matter that are considered appropriate are as follows:

- (a) With reference to the amended enforcement notice, the level of compliance required shall be commensurate with the Deemed to Satisfy provisions of Volume 1 of the Building Code of Australia 2009 and or commonly accepted building practices. External finishes shall be visually sympathetic to the surrounding area.
- (b) Upon compliance with the requirements of the amended enforcement notice, Council shall, within 14 days, remove the hoarding located between the building and the road reserve on the subject site.
- (c) Both Council and the Appellant are reminded of that it is an offence against section 4.3.15 of the IPA to fail to comply with an Enforcement Notice, additionally, because the Enforcement Notice is issued under section 248 of the BA, should works failed to be perform under the Enforcement Notice, Council may be able to enter the premises and perform the work at the expense of the owner under the *Local Government Act 1993* with amounts incurred by the Council becoming a debt owing against the land that may be recovered as if it were an overdue rate.

## **Background**

The subject site is located in a prominent position in the Tourist/Residential precinct of Burleigh Heads; a two-storey office building sits upon the subject site and enjoys significant exposure to both pedestrian and vehicular traffic from the adjacent Gold Coast Highway.

The building has been untenanted for approximately seven years during which time it has been the subject of progressive and increasingly destructive acts of vandalism and vagrant occupation. The resultant condition of the building has given rise to safety concerns in relation to the subject site and has driven a history of correspondence between the Appellant and Council. Additionally; the prominence of the location has drawn the issue to the attention of the local media and the matter has been well publicised within the community.

In 2007, in response to their growing concerns, Council erected a hoarding between the building and road reserve with a view to limiting access to the subject site and to negate the risk of injury from debris. Notwithstanding this measure and with no abatement in vandal activity, the condition of the building continued to deteriorate and subsequently Council commenced enforcement action in 2009 seeking the removal of debris, the cleaning and repair of the building or alternately, its demolition.

The Appellant is dissatisfied with Council's enforcement action given the societal nature of the primary cause of the condition of the building, their belief that they have acted reasonably and responsibly in the provision of the building maintenance and security and the contributory effect of the actions of Council and other's. Additionally, the Appellant queries the giving of the Enforcement Notice on the grounds of disputed ownership.

### **Material Considered**

The material considered in arriving at this decision comprises:

- Form 10 – Appeal Notice' and Appellant's correspondence accompanying the appeal lodged with the Registrar on 03 September 2009, inclusive.
- Council's Show Cause Notice, Ref No. PN56553/16, dated 02 July 2009.
- Council's Enforcement Notice, Ref No. PN56553/16, dated 06 July 2009.
- Verbal submissions from the Appellant and their representatives at the hearing.
- Land Title and Trust documents presented by the Appellant at the hearing.
- Verbal submissions from Council's representatives at the hearing.
- Written submissions presented by Council's representatives at the hearing.
- *The Integrated Planning Act 1997* (IPA).
- *The Integrated Planning Regulation 1998* (IPR).
- *The Building Act 1975* (BA).

### **Findings of Fact**

The Tribunal makes the following findings of fact:

- The subject site is in a prominent location adjacent to the Gold Coast Highway at Burleigh Heads with significant exposure to both pedestrian and vehicular traffic.
- The Registered Owner of the subject site is Maylodge Pty Ltd as Trustee for the Brian Boehme Second Family Trust (dated 29 June 1993) by virtue of Trust Document L678574G executed 5 August 1993.
- Maylodge Pty Ltd is in liquidation, the trust has been wound up and its entitlements transferred to the beneficiaries of the Trust, namely BL Boehme, MA, Boehme and MJ Pura.

- The transfer of ownership of the subject site has not been registered due to a caveat on the Title to the land.
- A two-storey office building of mixed construction is located on the subject site. Internal and external primary structural elements of the building are a composition of reinforced concrete, reinforced masonry and steel framing. External finishes of specific note include glazed panel curtain walls and a street front glazed panel awning while internal fitout and finishes consist of light weight sheet lined partitioning, suspended grid ceiling systems, carpets and floor tiling. Mechanical and hydraulic services of note include the provision of ducted air-conditioning and fire hose reels; electrical services are of standard configuration.
- The building has been untenanted for approximate seven years during which time it has been the subject of repeated and increasingly destructive acts of vandalism.
- The extent of damage incurred as a result of vandalism is extensive and includes but is not limited to:
  - (a) Substantial graffiti damage to the ground floor external facades.
  - (b) Substantial graffiti damage to ground and first floor internal finishes.
  - (c) The destruction of, or damage beyond repair to, the majority of the ground floor external glazed facade.
  - (d) The destruction of, or damage beyond repair to, a number of panels of the first floor external glazed facade.
  - (e) The destruction of, or damage beyond repair to, a number of panels of the external glazed awning.
  - (f) The destruction of, or damage beyond repair to, the majority of the ground floor and first floor internal light weight partitions.
  - (g) The destruction of, or damage beyond repair to, the majority of ground floor and first floor suspended ceiling systems.
  - (h) The destruction of, or damage beyond repair to, the ground floor and first floor carpeting inclusive of water damage from external exposure and misuse of fire services.
  - (i) Substantial physical damage to the air-conditioning system inclusive of ductwork and removal of compressor units.
  - (j) Substantial physical damage to the electrical system inclusive of removal of switchboards, fittings and wiring.
- The primary structural elements of the building are undamaged.
- The building has been subject to transient, vagrant occupation.
- The acts of vandalism have been progressive over the period that the building has been untenanted and the subsequent condition of the building in conjunction with the prominence of its location has given rise to a history of correspondence between the Appellant and Council. Additionally, the matter has drawn the attention of the local media on a number of occasions.
- On 21 March 2007, Council erected a timber hoarding to screen and secure the front of building from the road reserve with the view that this measure would:
  - (a) Protect the health and safety of road and foot traffic from falling debris;
  - (b) Deter access to the building by vandals; and
  - (c) Deter access to the building by children.

- On 2 July 2009, Council issued a Show Cause Notice (Ref No. PN56553/13) inviting the Appellant to show cause as to why they should not be given an Enforcement Notice requiring them to:
  1. Within 1 month of the date the Enforcement Notice is given, carry out the following:
    - (a) Remove debris from and clean the building on the Premises ("the Building"), and make application in accordance with the provisions of the IPA to the Gold Coast City Council ("Council") or to a private certifier (class A) for a development permit for building work to repair the building so that it is fit for use or occupation; or alternately
    - (b) Make application in accordance with the provisions of the IPA to the Gold Coast City Council ("Council") or to a private certifier (class A) for a development permit for building work to demolish the building and remove the building material from the Premises.
  2. In respect of the application:
    - (a) Not discontinue the application; and
    - (b) Take all necessary and reasonable steps to enable the application to be decided as quickly as possible.
  3. If a development permit for the building work described in paragraph 1(a) or 1(b) above is given, carry out the building work within 2 months of the date of the development permit is given.
- Council gave Show Cause Notice (Ref No. PN56553/13) to the Appellant, in their belief that the two storey office building was:
  - (a) Dangerous;
  - (b) In a dilapidated condition; and
  - (c) Is unfit for use or occupation.
- In absence of specific definition in either the IPA or the BA, the key terms dangerous, dilapidated and unfit are taken in the context of their common use or meaning and to this end the Macquarie Dictionary provides the following definitions:
 

Dangerous: Full of danger or risk; causing danger; perilous; hazardous; unsafe.

Dilapidated: Reduced to, or fallen into, ruin or decay.

Unfit: Not adapted or suited; unsuitable.
- On 2 August 2009 the Appellant made written representations to Council in response to the Show Cause Notice. Such representations included but were not limited to:
  1. The Applicants belief that they had acted responsibly in the provision of the building maintenance and security until it was no longer reasonable to do so unassisted.
  2. The Appellants belief as to the cause of the condition of the building, namely:
    - (a) The social problems associated with vandalism and vagrancy in the area;
    - (b) Insufficient action by Council and the Police in addressing the vandalism and vagrancy issues;
    - (c) The contributory effects of Council driven publicity regarding the condition of the building; and
    - (d) The contributory effects of the hoarding erected by Council.
  3. The Appellants belief that the condition of the building did not pose a danger to persons given that the subject site is private property and therefore, risk to a person would only arise as a result of their unlawful entry to the premises.

4. The Appellants belief in the futility of them addressing the issue of the condition of the building without the Council and others addressing the causes as previously described.
  5. The Applicants request for Council, at Council's expense, to:
    - (a) Replace the current hoarding with a chain wire fence; and
    - (b) To undertake remedial works to address the condition of the building.
- Having considered the Appellant's representations in relation to the Show Cause Notice, Council, on 6 August 2009, issued an Enforcement Notice, Ref No. PN56553/13 requiring the Appellant to:
    1. By 7 September 2009, carry out the following:
      - (a) Remove debris from and clean the building on the Premises ("the Building"), and make application in accordance with the provisions of the IPA to the Gold Coast City Council ("Council") or to a private certifier (class A) for a development permit for building work to repair the building so that it is fit for use or occupation; or alternately
      - (b) Make application in accordance with the provisions of the IPA to the Gold Coast City Council ("Council") or to a private certifier (class A) for a development permit for building work to demolish the building and remove the building material from the Premises.
    2. In respect of the application:
      - (a) Not discontinue the application; and
      - (b) Take all necessary and reasonable steps to enable the application to be decided as quickly as possible.
    3. If a development permit for the building work described in paragraph 1(a) or 1(b) above is given, carry out the building work within 2 months of the date of the development permit is given.
  - Section 248 of the BA clarifies the circumstances where Council may give an Enforcement Notice and the procedural requirements associated with the giving of the Enforcement Notice.
  - Section 247 of the BA clarifies the specific requirements of a Show Cause Notice.
  - Section 249(1) of the BA clarifies the specific requirements of an Enforcement Notice.
  - Section 249(2) of the BA clarifies the specific circumstance whereby demolition of a building or structure can be imposed.
  - For the purposes of the Act, Schedule 2 of the BA defines the owner, of a building or structure, to mean (in part):

BA, Schedule 2 - Owners:

    - (h) if the building or structure is on land granted in trust or reserved and set apart and placed under the control of trustees under the Land Act 1994—the trustees of the land; or
    - (i) if paragraphs (a) to (h) do not apply—the person for the time being entitled to receive the rent for the building or structure or would be entitled to receive the rent for the building or structure if the building or structure were let to a tenant at a rent.

## Reasons for the Decision

- The tribunal considers that, despite the circumstances surrounding the ownership of the subject site, the enforcement notice has been given to the parties entitled to receive the rent for the building or would be entitled to receive the rent for the building if the building were let to a tenant at a rent.
- While acknowledging the Appellants frustrations, vandalism and vagrancy are broad societal issues that exceed the influence that can reasonably be attributed solely to Council. While Council's may choose to assist property owners in limiting the effects of vandalism, building maintenance and security are the responsibility of the property owner.
- While acknowledging the Appellants concerns, the tribunal does not have jurisdiction in relation to the procedures and process of Council, inclusive of their decision to erect the hoarding, or their decision to interact with the media in relation this matter.
- While acknowledging the Appellants position, the Tribunal does not have jurisdiction in relation to the determination of to whom a duty of care is owed in relation to the safety of a building, in general, the IPA and BA allude to the safety of a person which is taken as a references to any person.
- The Tribunal agrees that the building located on the subject site, in its current condition, is dangerous.
- The Tribunal agrees that the building located on the subject site, in its current condition, is dilapidated.
- The Tribunal agrees that the building located on the subject site, in its current condition, is unfit for use or occupation.
- The Tribunal is satisfied that Council's action in giving the Enforcement Notice complies with the relevant circumstances and requirements of Section 248 of the BA.
- The Tribunal is satisfied that Show Cause Notice (Ref No. PN56553/13) dated 2 July 2009 complies with the specific requirements of Section 247 of the BA.
- The Tribunal is satisfied that Enforcement Notice (Ref No. PN56553/13) dated 6 August 2009 complies with the specific requirements of Section 249 (1) of the BA.
- With reference to Item 1(a) of original Enforcement Notice, Ref No. PN56553/13, dated 6 August 2009 and the requisition that the Appellant, within the given time frames, obtain a development permit for building work to repair the building so that it is fit for use or occupation. While acknowledging Council's position, the tribunal is satisfied that the building in its current condition is not able to be commercially marketed to a tenant at a rent and believes priority should be given to securing and cleansing the building for the safety of persons. Notwithstanding and as reflected in the decision, the Appellant must obtain such Development Approvals prior to any further use or occupation of the building.

- With reference to Item 1(b) of original Enforcement Notice, Ref No. PN56553/13, dated 6 August 2009 and section 249(2) of the BA, while acknowledging Council's concerns, neither Council nor the Tribunal are privy to the financial means of the Appellant and as such the Tribunal cannot be satisfied that it is not practical to take steps to repair, secure, fence off or to cleanse the building in lieu of requiring demolition. Similarly, the tribunal is not satisfied that it is not possible to return the building to a condition that is fit for use or occupation given that it's primary structural elements are undamaged.

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**Don Grehan**  
**Building and Development Tribunal Chair**  
**Date: 2 November 2009**

**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:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002

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