



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 14 – 14

Applicant: Michael Erlbaum & Erez Erlbaum

Assessment Manager: Brisbane City Council (Council)

Concurrence Agency: N/A
(if applicable)

Site Address: 6 Brook St, South Brisbane and described as Lot 4 on RP 11698 - — the subject site

Appeal

Appeal under section 250 of the *Building Act 1975* (BA) against the giving of an Enforcement Notice under section 248(1) of the BA. The Enforcement Notice relates to Council forming the opinion that the dwelling on the premises is dangerous.

Date of hearing: N/A

Place of hearing: By written submission

Committee: Geoffrey Mitchell – Chair
Danyelle Kelson – Member

Present: N/A

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the *Sustainable Planning Act 2009* (SPA) sets aside the Enforcement Notice.

Background

The subject site is a rectangular block 440m² in size. The site is located in the “Low-Medium Residential Area”, “Demolition Control Precinct”, “West End / Woolloongabba District Local Plan” under the Brisbane City Planning Scheme.

A Development Approval for Building Works for alterations and additions to an existing dwelling on the property has been issued by a private certifier.

There has been a Development Approval given by Council for the raising and extending an existing dwelling on the property.

The Council has inspected the premises on a number of occasions to determine if the building is being used for other than for which it was approved. Council’s visits of 19 September 2012 and 24 January 2013 were the subject of the Committee Appeal Number 14-13 which related to the use of the building under the definitions as described in the Brisbane City Plan 2000 (City Plan).

On 13 November 2013 the Council visited the premises and conducted an invasive inspection of the subject building to ascertain compliance with the BA. That inspection revealed that there were no aspects of fire separation provided which the Council considered to be required for the current use of the subject building which it determined was being used as a Class 2 building as defined in the Building Code of Australia (BCA). On this matter Council issued an Enforcement Notice which was the subject of a previous Committee Appeal Number 36-13 which set aside the Enforcement Notice of Council and directed the Applicant to undertake certain actions.

On 10 April 2014 Council issued a further Enforcement Notice without first issuing a Show Cause Notice based on it again forming the opinion that the premises are dangerous.

The Applicant, again dissatisfied with the Council's Enforcement Action lodged another appeal with the Committees Registrar on 14 April 2014 and disputes amongst other things that the building is dangerous.

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 14th April 2014.
2. The *Building Act 1975* (BA)
3. The *Sustainable Planning Act 2009* (SPA)
4. The Sustainable Planning Regulation 2009 (SPR)
5. The *Building Regulation 2006* (BR)
6. Volume One and Two of the National Construction Code Series - The Building Code of Australia (BCA)
7. The Guide to the Building Code of Australia (Guide)
8. Brisbane City Plan 2000 (City Plan)
9. Queensland building work enforcement guidelines 2002 (guidelines)
10. Correspondence and submissions received from the Applicant
11. Correspondence and submissions received from the Council.

Findings of Fact

The Committee makes the following findings of fact:

- The subject building was approved by a private certifier in February 2012 as a Class 1a dwelling.
- In October 2012 the Council issued a Development Approval (A003320764) for the subject building approving the existing dwelling, to be raised and constructed outside the building envelope.
- There are no other development approvals issued in respect of the subject property, either under the BA or the City Plan.
- Due to the presence of a number of "*sole occupancy units*" (SOU) as defined by the BCA the subject building is a Class 2 building and must meet the requirements of the BCA for a building of that classification. These include the requirements for fire safety systems.

While the fire safety systems installed do not presently meet the deemed to satisfy requirements of the BCA for a building of that classification, there are however

smoke alarms installed in each of the units comprising the building.

- On 18 March 2014, the Applicant submitted a Development Application for Building Works to the Council to change the BCA classification to Class 2 as required by Appeal 36-13.
- On 31 March 2014 the Council issued an Information Request to the Applicant requesting further information to satisfactorily assess the Application. Amongst other matters, the Information Request raised the requirement for a Development Permit for Material Change of Use and Preliminary “Permit” for building a “multi unit dwelling” and stated the Development Application for building works would be held pending the required approval.
- There has been no material change in the construction of the subject building since the Committee Appeal Number 36-13.

Reasons for the Decision

1. This appeal was lodged against an Enforcement Notice issued by the Council pursuant to section 248 of the BA due to its concerns about the compliance of the building with the requirements of the BCA for fire safety.
2. The Council dispensed with the giving of a Show Cause Notice under s248(4) BA and proceeded straight to the issue of an Enforcement Notice on the basis it had formed the view the building was dangerous.
3. At paragraph 39 of the Enforcement Notice, the Council stated its belief that the premises were dangerous and that it based its view on its inspection of the premises on 20 November 2013 which found;
 1. No fire retardant materials were evident within the wall cavity to prevent the access of fire between unit 2 and unit 3
 2. An inspection of the floor space between unit 2 and unit 1 revealed that the floor boards of unit 1 were visible and no fire retardant materials were evident
 3. An inspection of the floor space between unit 3 and unit 1 revealed that the floor boards of unit 1 were visible and no fire retardant materials were evident
 4. A series of windows are present within the eastern side ground floor of the primary dwelling which forms the property boundary with the adjoining property.
 5. There was no sign of an integrated fire detection or alarm system.
4. Paragraph 49 of the Enforcement Notice further states that the Council issued the Enforcement Notice without first issuing a Show Cause Notice due to its belief that the fire separation requirements of the BCA for the dwelling on the premises had not been met and that Council bore a responsibility for ensuring the safety of the occupants of the dwelling.
5. In submissions placed before the Committee, the Council referenced a number of studies and coroner's cases pertaining to fires in rental premises and residential buildings other than Class 1 buildings to support its conclusion the building is dangerous.
6. A factor in many deaths by fire is the complete absence of the fire/smoke detection system and/or a system that is not operating correctly. The subject building does have an operating smoke alarm in each of the SOU's which is a primary means of early warning. Depending on the final determination by the Building Certifier on the Development Application for Building Works currently before Council, the current smoke alarm system may be deemed acceptable. Until that determination, it is presumed that the individual smoke alarms installed in the subject building would function as required to give an early warning of a fire to the residents and allow them the opportunity to

escape the premises. Due to the availability of direct egress from each SOU the building will only be required to comply with Type C construction. Type C construction is the lowest risk and described in the BCA as the “least fire-resistant” of the construction types.

7. Generally a local government is required to give a Show Cause Notice before issuing the Enforcement Notice (BA, section 248(3)) to permit the owner an opportunity to show cause why the Notice should not be issued. However section 248(4) of the BA allows the local government to proceed straight to the issue of an Enforcement Notice in cases where they consider the issue is dangerous and not of a minor nature.
8. As stated in the Committee decision in Appeal 36-13,

“Dangerous” is not defined in the BA or the SPA. When a section of an Act uses plain words with well-known or understood meanings, there is no need to depart from those plain ordinary meanings. Having regard to the Macquarie Dictionary, “dangerous” means “full of danger or risk; causing danger; perilous; hazardous; unsafe”.

Guidance on instances when a show cause is not required is provided in the “Queensland building work enforcement guidelines (2002)” available on the Department of Housing and Public Works website (<http://www.hpw.qld.gov.au/SiteCollectionDocuments/qld-building-work-enforcement-guidelines.pdf>). The guidelines provide assistance to local governments about their powers and duties for the investigation and enforcement of offences under the BA and Integrated Planning Act (IPA) (as far as is material, the provisions under the former IPA and current SPA are analogous).

Section 4.2.2 of the guidelines at page 11 states,

“What constitutes a ‘matter of a dangerous or minor nature’ is not defined, nor has it been tested in court. However it is reasonable to assume dangerous is intended to refer to some circumstance where a building or structure is structurally unsound and could collapse or presents another immediate hazard.

A building or structure that was lawfully constructed and remains structurally sound or intact cannot be considered dangerous because it does not meet current safety standards”

9. Since that decision, there has been no material change in the construction of the subject building works. The Committee is still of the view that although it may be inferred the building is unsafe due to the absence of any early warning or protection for occupants in the upper level from a fire situation originating in the lower level of the subject building, there are nevertheless individual smoke alarms present in each of the SOU's. The degree of risk does not represent an immediate hazard such as to find a building “dangerous” as that term is commonly understood.
10. The Committee understands Council’s concerns, but is of the view that a Show Cause Notice ought to have been issued in accordance with the requirements of section 248(3) and section 247 of the BA.
11. In the circumstances, the Enforcement Notice should be set aside.
- 12.

Geoffrey Mitchell

Building and Development Committee Chair
Date: 16 July 2014

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
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 3237 0403 Facsimile (07) 3237 1248