



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	06 – 2011
Applicant:	Michael Holt
Assessment Manager:	Burdekin Shire Council Building Certifiers
Concurrence Agency: (if applicable)	Whitsunday Regional Council (Council)
Site Address:	10 Herbert St Bowen, Lot 4 on RP750080

Appeal

Appeal under section 532 of the *Sustainable Planning Act 2009* (SPA) against the decision of Trevor Maltby for and on behalf of Burdekin Shire Council Building Certifiers to revoke a certificate of classification for Class 3 and 6 buildings, and issue a certificate of classification for Class 4 and 6 buildings.

Date of hearing:	Wednesday 20 April 2011 at 1:40pm
Place of hearing:	Whitsunday Regional Council Chambers cnr Herbert and Powell St, Bowen
Committee:	Martin Clark – Chair Malcolm Edmiston – General Referee
Present:	Michael Holt – Applicant Lee Glindemann – Whitsunday Regional Council Lachlan Mee – Whitsunday Regional Council Trevor Maltby – Burdekin Shire Council Building (on speaker-phone)

Decision:

The Committee, in accordance with section 564 (2) of the SPA:

1. **sets aside** the decision appealed against, and **allows** the appeal.
2. **directs** the certifier to re-issue the certificate of classification as originally issued on 20 July 2010.

Background

The building subject to the appeal is a large two-storey framed structure located on one of the main commercial streets in Bowen. The premises are zoned “Central Business Precinct” under the provisions of the Bowen Shire Council Planning Scheme which came into effect in July 2007.

The applicant commenced upgrading the premises in 2009.

The applicant contends that there was an established use right for short-term budget-type accommodation and a take-away restaurant on the subject site. On that basis the applicant lodged a building works application with Burdekin Shire Council Building Certifiers for the construction of additional laundry facilities in connection with this use in November 2009. This was subsequently approved under a Class 3 and 6 classification under the Building Code of Australia (BCA). A compliance permit was also issued by Council for works at the premises under the *Plumbing and Drainage Act 2002*, dated August 2009.

The applicant requested confirmation of existing use rights from Council for the use of the premises as an “accommodation building” on 25 February 2010.

Council's reply dated 5 March 2010 does not confirm the use right, but advises that “... *should you have adequate proof ... in terms of previous use(s) ... as an accommodation facility, you may continue with this use without ... obtaining planning approval from Council ...*”

Documents submitted with the application for appeal show that a planning approval was issued by the former Bowen Shire Council in 1998 for “accommodation units” comprising of three 2 bedroom units. There is apparently no record of this approval being acted on and completed, but it is confirmed in a written communication from Council dated 17 January 2011 stating that the “... *property was rated an “accommodation building” in the 1990s ...*”. There is also an accommodation premise licence issued under the Council's Local Law 6 and dated September 2000, which classifies the premises as “flats”. The “total number of boarders, units or flats” is indicated as 1.

Subsequent to the Certificate of Classification for Class 3 and 6 - “Alterations to the Existing Buildings” being issued on 20 July 2010, the certificate was amended to read “Alterations to the Existing Buildings - Laundry Area only”.

Concurrently, the applicant was required to renew the accommodation premises licence under Local Law 6. A licence was issued on 30 September 2010. It is noted that the licence was issued to the applicant under the trading name “Aussie Mates Backpackers”, was for a “backpacker/hostel”, and “total number of occupants” is stated as 43. The expiry date is 30 September 2011. The Local Law itself would have expired on 31 December 2010, but under special provisions for amalgamated Councils the expiry date is deferred to 31 December 2011.

The building has a compliant fire system, installed by an accredited installer. A certificate of classification for the fire management plan was issued by a Class A building certifier on 26 August 2010 on behalf of Council. The certificate identifies the building as a class 3 budget accommodation building. The installation was approved by the Queensland Fire and Rescue Service under section 55 1(b) of the *Fire and Rescue Service Act 1990* and subordinate legislation.

Council responded to a query from the Queensland Fire and Rescue Service on 17 January 2011 regarding the installation, stating that “*The current operations of the hostel on the subject site are considered a lawful land use by Council.*”

The applicant received a series of letters from the Council and building certifier, namely:

- A letter dated 25 January 2011 from Council's Chief Executive Officer stating that the licence approval for the backpacker hostel had been withdrawn.
- A letter dated 27 January 2011 from the Program Manager Development, advising that a material change of use application was required.
- A letter dated 31 January 2011 from the Council's Community and Environment Division stating that due to the building certifier withdrawing the certificate of classification, the licence is withdrawn, the use must cease, and failure to remove the subject equipment will result in enforcement action being taken by Council.
- A letter dated 2 February 2011 from the building certifier advising that Council has advised that no approval has been granted for the use, that the Council has the existing use of the buildings for the property as Class 4 (residential) and Class 6 (shop).

Subsequent to the hearing, the applicant was granted time to obtain other documents and evidence to support his case, but no additional materials were provided.

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 4 February 2011.
2. The certificate of classification and notices issued by the building certifier.
3. The Bowen Shire Council Planning Scheme and Local Laws as available through Council's website.
4. The application material including drawings.
5. The applicant's grounds for appeal against the Certifier's reasons for the decision.
6. Verbal submissions made at the hearing by the applicant.
7. Verbal submissions made at the hearing by the building certifier and Council's representatives.
8. The SPA.
9. The *Building Act 1975* (BA).
10. The Building Regulation 2006.
11. The BCA.

Findings of Fact

The Committee makes the following findings of fact:

- The subject property had been registered as an accommodation building under Bowen Shire Council's Local Law.
- A registration was issued in 2001 for one flat, being caretaker accommodation. Caretaker accommodation is Class 4.
- A certificate of classification for building work comprising alterations to a Class 3 and 6 building was issued by a Class A certifier on behalf of Burdekin Shire Council on 20 July 2010.
- A certificate of classification for a fire management plan was issued by a Class A certifier on behalf of Council on 26 August 2010, classifying the buildings as Class 3 and 6.
- A registration was issued dated 30 September 2010 under local law provisions, for backpackers accommodation, 43 persons. This was subsequently withdrawn.
- Three certificates of inspection relating to the premises were issued by a Queensland Building Services Authority licensed trade contractor and fire certifier between April and October 2010.
- On request from Queensland Fire and Rescue Community Safety Operations, Council confirmed the legality of the use on 17 January 2011.
- In a letter dated 25 January 2011 to the applicant, following an inspection on 17 January 2011, QFRS Community Safety Operations confirmed that the premises complied with the requirements of the *Fire and Rescue Service Act*, the Building Fire Safety Regulation 2008 and the BA.

Reasons for the Decision

The Committee is satisfied that from the time the original certificate of classification was issued on 20

July 2010 to the inspection by the Queensland Fire and Rescue Service on 17 January 2011, based on the evidence available, actions taken, and advice given by the Council and involved agencies, this indicated that the use of the premises as backpackers accommodation was lawful.

Under section 136 of BA, the building certifier is required to act in the public interest, and must amend a certificate of classification if it comes to his attention that the incorrect documentation has been issued.

In this case, the documentation indicates that the premises comply with the requirements of Queensland's building assessment provisions.

While it is apparent that a planning approval or a demonstrated prior or established use right may not exist for the use claimed, this does not invalidate the original certificate of classification.

Advice (Caveat)

This decision relates to the matter of the certificate of classification only. It is not intended, and does not remove, the need for the applicant to apply for a material change of use under the provisions of the planning scheme, or demonstrate that a sufficient prior use right exists, and does not render the use of the premises for backpackers accommodation lawful.

Martin Clark
Building and Development Committee Chair
Date: 30 June 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 Local Government and Planning
PO Box 15009
CITY EAST QLD 4002
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