



Building and Development Tribunals
Queensland Government

Department of Local Government, Planning,
Sport and Recreation

APPEAL
Integrated Planning Act 1997

File No. 03-06-037

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

LOCAL GOVERNMENT: Cairns City Council

SITE ADDRESS: *withheld - "the subject site"*

APPLICANTS : *withheld - "applicant"*

NATURE OF APPEAL:

Appeal under Chapter 4 of Part 2 of the *Integrated Planning Act 1997*, against the decision of the Cairns City Council to give an Enforcement Notice to the Applicant, in relation to building work at "*the subject site*" described as "*the subject site*". The Enforcement Notice required the applicant to carry out the building work detailed on Amended Drawing No 0323-5 approved by private building certifier Mr H Weber (A73379) on 15th November 2004.

**DATE AND PLACE
OF HEARING:**

10.00 am on Tuesday 4th April, 2006

TRIBUNAL: Nigel Daniels

PRESENT: Applicant / Owner
Applicant / Owner

Builder
Engineer

Kerry Maggs - Cairns City Council

DECISION:

Under the provisions of the *Integrated Planning Act 1997*, section 4.2.34, the Tribunal **sets aside the decision appealed against and makes a decision replacing the decision set aside (the new decision).**

The new decision, replacing the decision made by the Cairns City Council, is to issue an Enforcement Notice, as follows:

The Council reasonably believes that building work has been carried out in contravention of the Development Permit for building work issued by private building certifier Mr Harald Weber (A73379) on 2 September 2003 and an amendment issued by Mr Harald Weber on 15 November 2004 for construction of a Class 1a single detached dwelling on property at "*the subject site*".

The building work believed to be in contravention of the Development Permit is the construction of the footings and piers supporting the building in the proximity of drainage on or adjacent to the property (the building work).

You are required to do the following:

1. Provide evidence sufficient to establish to the Council's reasonable satisfaction that the building work has been constructed in conformity with the Development Permit; or,
2. If it can not be established that the building work is in conformity with the Development Permit, provide evidence sufficient to establish to the Council's reasonable satisfaction whether the building work, as constructed, either
 - complies with the requirements of the *Standard Building Regulation 1993*, the Building Code of Australia (BCA), relevant codes referenced in the BCA, and Council's requirements for construction in proximity to sewers; or
 - does not comply with those requirements; and
3. If it is established that the building work does not comply with the Development Permit referred to in paragraph 1, above, and does not comply with the requirements referred to in paragraph 2 above, then you are required to carry out such remedial building work as is necessary, to the reasonable satisfaction of the Council, to ensure that the building work does comply with those requirements referred to in paragraph 2.

The evidence required by this Enforcement Notice may be in the form of a report prepared by the private building certifier for the building work, the consultant engineer for the building work, or other competent person.

BACKGROUND:

The “*builder*” was engaged by “*applicants*” to construct a dwelling at “*the subject site*”.

During the course of construction it became evident that the building work was in proximity to sewer drains. The Cairns City Council as the local government having responsibility for (“ownership of”) the drains sought assurances that the drains would not be adversely affected by the building work. It is also a requirement of the standards referenced under the provisions of the *Building Act 1975* that the proximity of the drains should not adversely affect the structure of the building.

The Council initially took action in its capacity as “owner” and amended drawings were provided for piers to be constructed of sufficient depth so that both the drains and the structure of the building would be protected.

In the absence of evidence that there was adequate protection of the drains, the Council, this time in its capacity as regulator of the provisions of the *Building Act 1975*, gave Enforcement Notices requiring remedial building work to be carried out. An Enforcement Notice was given to the owners and a separate Enforcement Notice was given to the builder.

The owners appealed against the giving of the Enforcement Notice.

The builder appealed against the giving of the Enforcement Notice.

FINDINGS OF FACT AND REASONS FOR THE DECISION:

Evidence of compliance

Submissions to the Tribunal indicated that some of the work, as constructed, departed from the approved drawings. It could not be established with reasonable certainty that the building work, as constructed, complies with the provisions of the *Building Act 1975*, its subordinate legislation and referenced codes. To achieve certainty, further investigation is required; which may include but not necessarily be limited to on-site exploratory excavation.

Giving of the Enforcement Notice

The owners indicated that in their opinion the Enforcement Notice should be given to the builder, and not to themselves. This is not a matter for consideration by the Tribunal, which must address issues to which the *Building Act 1975* applies. Under the provisions of Section 22 of the *Building Act 1975*, an Enforcement Notice may be given to the owner or to a person who does not comply with a particular matter in the Act.

MATERIAL CONSIDERED:

- Form 10 – Building and Development Tribunals Appeal Notice and material attached to the Notice;
- Written submissions by the applicant and the Council;
- Verbal submissions, at the hearing;
- The *Building Act 1975*;
- The *Standard Building Regulation 1993*;
- The *Integrated Planning Act 1997*.

NOTES:

Function of Cairns City Council

The issues raised by the Cairns City Council in relation to the building work the subject of the Enforcement Notice were initially raised in the Council's capacity of owner having responsibility for the drainage in proximity to the building work.

This decision of the Tribunal does not address the Council's rights or obligations as owner having responsibility for the drainage.

However, the Council acted in its capacity of a local government under the provisions of the *Building Act 1975* Section 22, when it issued the Enforcement Notice; which it may do even though the work was approved and inspected by a private building certifier.

This decision of the Tribunal does address the Council's actions as a local government responsible for administering the provisions of the *Building Act 1975*.

Nature of appeal

The *Building Act 1975*, in Section 24 refers to appeals against the giving of an Enforcement Notice and provides that the appeal (made under Section 22 of the *Building Act 1975*) is made as if it were an appeal under the *Integrated Planning Act 1997*.

The *Integrated Planning Act 1997*, Section 4.2.34, provides that a tribunal may make its decision in relation to a decision appealed against.

For the purposes of this appeal, the giving of the Enforcement Notice is taken to mean the Council's decision to give the Enforcement Notice.

Nigel Daniels
Referee, Building and Development Tribunal.

Date: 18 May 2006.

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, Building & Development Tribunals
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