



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	33-13
Applicant:	Everest Holdings Pty Ltd
Assessment Manager:	Fraser Coast Regional Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	410 Esplanade Hervey Bay and described as Lot 61 on RP 35211 – the subject site

Appeal

Appeal under section 526 of the *Sustainable Planning Act 2009* (SPA) against the decision of Council to give an Enforcement Notice under section 248 of the *Building Act 1975* (BA) requiring the Applicant to cease the use of a building as a Night Club until such time as a valid Certificate of Classification is obtained and evidence provided that the Performance Requirements of Parts C, D & E of the Building Code of Australia (BCA) have been satisfied in relation to the use.

Date and time of hearing:	10.20 am, 6 November 2013.
Place of hearing:	The subject site.
Committee:	Mr Don Grehan – Chair
Present:	Mr Richard Olujic – Applicant’s representative; Mr Geoff Mitchell – Applicant’s representative; Mr Richard Jones – Council representative; Mr Andy Gaze – Council representative; and Mr Laurance Eves – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(c) of SPA **sets aside** the Enforcement Notice and in accordance with section 564(1) of SPA, **make the following directions** as considered appropriate.

1. The Applicant shall, within 60 business days of the date of this decision:
 - (a) Install a fire exit to serve the back of house area formerly used as a gated carport;
 - (b) Install illuminated exit signage to identify the location of that exit to any person seeking egress; and
 - (c) Provided to Council for inclusion on the property records written advice signed by the property owner confirming the installation of the exit in accordance with this Decision and

written confirmation from a Licenced Electrician confirming installation of the illuminated exit signage.

2. The Applicant is advised that, having regard to the layout of the building, the installation of the exit must comply with Deemed to Satisfy Provisions D2.19, D2.20 and D2.21 of the BCA namely:
 - Where the exit incorporates a door, the door must swing in the direction of egress and must not be a sliding door, revolving door, roller shutter or tilt-up door.
 - The opening through the exit must have a clear width of not less than 750mm between obstructions including door jambs, door stops and door leaves.
 - The door must be readily openable without a key from the side that would face any person seeking egress by a single hand downward action or pushing action on a single device which is located between 900mm and 1100mm from the floor.
3. Council are advised that should the Applicant fail to comply with the directions of this Decision they may commence enforcement action under section 248(1)(b) of the Building Act 1975.

Background

Following a complaint in relation to the operation of a night club from a building on the subject site, Council undertook a review of the development history of the premises.

During their enquiries, Council identified that the Building Approval pertaining to the Night Club had been issued in the absence of a required Material Change of Use Approval and, as such, the Building Approval and subsequent Certificate of Classification were invalid.

Additionally, Council believed Building Approval did not specifically identify the proposed use of the building as a night club or specifically address the BCA requirements for that use.

Accordingly, with concerns as to occupant safety, Council issued an Enforcement Notice requiring that use of an occupation of the building for the purpose of a night club cease until the matters of BCA compliance are addressed and until a valid Certificate of Classification was obtained.

The Applicant was dissatisfied with Council's enforcement action given the belief that originating Building Approval and subsequent Certificate of Classification are valid and provide lawful occupancy to the building. As such, the Applicant lodged an appeal with the Building and Development Committee on 11 October 2013.

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 Committees Registrar on 11 October 2013.
2. Fraser Coast Regional Council Show Cause Notice, (Reference No. DOCS#2370810) dated 04 July 2013.
3. Fraser Coast Regional Council Enforcement Notice, (Reference No. DOCS#2407331) dated 18 September 2013.
4. Application documents, Approved Plans, Decision Notice, Inspections Advices and Form 11 Certificate of Classification appurtenant the Development Approval for Building Works -

“Commercial (Additions)”, Reference No. 20050093 granted by Fraser Coast Building Certification Pty Ltd dated 04 November 2005 (The Building Approval).

5. Verbal submissions from the Applicant’s representative given at the hearing.
6. Verbal submissions from Council's representative given at the hearing.
7. Integrated Planning Act 1997 Reprint No. 6E (IPA)
8. The *Sustainable Planning Act 2009* (SPA).
9. The Standard Building Regulation 1993, Reprint 3J (SBR)
10. The *Building Act 1975* (BA).
11. The *Integrated Planning Act 1997* (IPA)
12. The Building Code of Australia, Vol. 1, 2005 and 2013 (BCA).

Findings of Fact

The Committee makes the following findings of fact:

- The subject site accommodates a motel/hostel, reception area, manager’s residence, night club and other ancillary structures. Advice received from the Applicant indicates that the primary buildings were approved by the former Burrum Shire Council on the 27th of September 1968.
- This Appeal relates solely to the single storey building known as “Vipers” night club located adjacent to the Esplanade.
- In context of the 1968 approval, the “Vipers” night club building was approved as a restaurant and while the specific history of its continuous use is unable to be determined, advice from the Applicant indicates that on 22 July 1993 the former Hervey Bay City Council issued approval for the extension of the restaurant.
- On the 16th of December 1996, the former Hervey Bay City Council issued correspondence to the Executive Director of Liquor Licensing to the effect that Council had no objections to an application for an On-Premises (Cabaret) License for the premises now known as “Vipers” night club.
- Council records indicate that on the 28th of June 1999 the former Hervey Bay City Council issued a Certificate of Classification assigning a classification of Class 6 to the building.
- On the 30th of August 2005 the Applicant lodged a building application with Fraser Coast Building Certification Pty Ltd proposing “Commercial (Additions)” to the building now known as “Vipers” night club. The plans titled “Building Refurbishment” indicated the construction of new awnings to the allotment boundary bordering the Esplanade and an internal fit out complete with DJ’s Box, seating areas, bar, cold room, male and female amenities and emergency lighting and exit signage schedules.
- Section 5.3.4(1) of the *Integrated Planning Act 1997* (IPA), as in effect at the date the building application was made, clarifies that the private certifier must not approve the application if it is inconsistent with an earlier approval. Accordingly, in assessing the 2005 building application the building certifier was required to consider the proposed building works and reconcile the use against the existing 1999 Certificate of Classification.
- The most appropriate BCA classification pertaining to the proposed use is a Class 9B being an assembly building which is defined by the BCA to mean (in part) a building where people

may assemble for entertainment, recreational or sporting purposes including a discotheque, nightclub or a bar area of a hotel or motel.

- In deciding the Building Application, the Building Certifier would need to address a Change of Classification from Class 6 to Class 9B.
- In addressing the Change of Classification, Section 110 of the SBR as in effect at the date the building application was made, provides the building certifier with concessional options in certain circumstances namely:

110 Concessional approval for some existing buildings

- (1) The classification for a building, in existence before 14 December 1993, may be changed without the entire building, or part of the building, being made to comply with this regulation applicable to the new classification (other than BCA, parts E1 and E4).*
 - (2) The classification may be changed only if the building, or part—*
 - (a) will be structurally sound and capable of withstanding the loadings likely to arise from its use under the new classification; and*
 - (b) will reasonably provide for—*
 - (i) the safety of persons in the building or part if there is a fire (including means of egress); and*
 - (ii) the prevention of fire; and*
 - (iii) the suppression of fire; and*
 - (iv) the prevention of the spread of fire.*
 - (3) The building certifier must not approve the change of classification for the building or part containing any of the special fire services mentioned in schedule 2, without first receiving from the fire authority a report on the suitability of the fire services.*
 - (4) An approval may impose the conditions the building certifier considers necessary about any of the matters mentioned in—*
 - (a) BCA, part E1 or E4; or*
 - (b) subsection (2)(a) or (b).*
- There is no specific evidence documenting whether or not the certifier exercised the concessional options of Section 110 in the assessment of the building application.
 - On the 4th of November 2005, Mr Chris Olive of Fraser Coast Building Certification Pty Ltd decided the application and issued the Building Approval, however the Decision Notice does not reference an assigned BCA classification.
 - On the 31st of March 2006 Mr Chris Olive of Fraser Coast Building Certification Pty Ltd issued a Form 11 Certificate of Classification in relation to the Building Approval noting the building description as “Commercial (Additions)” and assigning a classification of Class 9B to all of the building.
 - Section 5.3.5(4) of IPA was in effect at the date the building application was made. This section clarifies that the private certifier must not decide the application until all necessary development permits and preliminary approvals are effective for other assessable development and aspects related to the development. Notwithstanding, no section of the BA, IPA, SPA or SPR contain provisions which invalidate an Approval issued in contravention to Section 5.3.5(4) of IPA.

- In 2013 Council received a customer service request regarding the operation of Vipers Nightclub and following investigations by both Planning and Building Departments of Council ascertained that:
 - (a) At the time of the granting of the Building Approval in 2005, the increase in scale and intensity of use associated with the proposed “Commercial (Additions)” to the building known as “Vipers” night club was sufficient to require the approval of a Development Application for Material Change of Use.
 - (b) There was no evidence of an Application for Material Change of Use being made, approved or in effect for the use prior to the issue of the Building Approval.
 - (c) As the Building Approval was issued in the absence of an effective development permit for a material change of use, both the Building Approval for a nightclub and the subsequent Certificate of Classification were invalid.
 - (d) The Building Approval did not specifically identify the proposed use of the building as a night club or specifically address the requirements for a discotheque or nightclub contained with Part E2 of the BCA.
- On the 18th of September 2013 Council issued an Enforcement Notice, (Reference No. DOCS#2407331), requiring the Applicant to:
 - (1) Immediately cease the use and occupation of the building, or ensure that the building immediately ceases to be used and occupied, as a nightclub "Class 9B" building; or
 - (2) Prior to 4:30 pm on 18 October 2013 provide written confirmation to Council from a suitably qualified and licensed person that the Nightclub building complies with the Performance Requirements of Sections C, D & E of the Building Code of Australia concerning fire safety, to the satisfaction of Council; and
 - (3) Obtain a valid Certificate of Classification for the nightclub on the Premises in circumstances where effective development permits for building work and a material change of use have first been obtained.
- A retrospective application for Material Change of Use in relation to the nightclub has subsequently been approved by Fraser Coast Regional Council.

Reasons for the Decision

- The Committee can find no legislative provisions to support the assertion that the failure of the building certifier to gain all necessary development permits prior to granting the Building Approval invalidates either the Building Approval or subsequent Form 11 Certificate of Classification.
- Having reviewed the building approval documents, the Committee is satisfied that the authorised works, despite being variously referred to as “Commercial (Additions)” and “Building Refurbishment”, relate to building alterations and a tenancy fit-out consistent with the proposed use as a nightclub.
- Having reviewed the building approval documents and inspected the building, the Committee is satisfied that the Building Certifier exercised the concessions available under Section 110(1) having regard Section 110(2) of the SBR, as applicable at the date of approval.

- The Committee is satisfied that the Form 11 Certificate of Classification issued in conjunction with the Building Approval assigns a classification of 9B to the building which, in accordance with the BCA definition of an assembly building, includes the use of a building as a discotheque or nightclub.
- The Committee is not satisfied that the egress provided to the back of house area formerly used as a gated carport is currently sufficient to satisfy Performance Requirements DP4, DP5, DP6 or EP4.2 of the BCA.

Don Grehan
Building and Development Committee Chair
Date:17 December 2013

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.

An appeal to the Planning and Environment Court 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