



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>26 - 17</b>
<b>Applicant:</b>	Paul Whyte (Applicant)
<b>Assessment Manager:</b>	Brisbane City Council (Council)
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	Unit 1, 28 Lamette Street, Holland Park and described as Lot 1 on Building Unit Plan 105088 (with an alternate address of Unit 1, 14 Holland Road, Holland Park) – the subject site

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### **Appeal**

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) in relation to five (5) Enforcement Notices issued by the Council, being:

- a. Two Enforcement Notices issued pursuant to section 590 of the SPA with respect to carrying out development without a permit and use of a premises when the use is not a lawful use (Council Ref: CA111442 and CA111445)
- b. Two Enforcement Notices issued pursuant to section 248 of the *Building Act 1975* (BA) with respect to the use of the premises without a certificate of classification (Council Ref: CA111443 and CA111444)
- c. An Enforcement Notice issued pursuant to section 116 of the *Plumbing and Drainage Act 2002* (PDA) with respect to undertaking compliance assessable work without compliance with the Plumbing and Drainage Regulation (Council Ref: CA111598).

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<b>Date and time of hearing:</b>	29 August 2017 at 10:00am
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	James Dunstan– Chair Bradley Hodgkinson – General Referee Neal Charlton – General Referee
<b>Present:</b>	Paul Whyte – Applicant Andrew Schulz – Representative for the applicant Mark Higgins – Council representative Heath Vogler – Council representative Paula Sundholm – Council representative Ted Hancox – Council representative

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## Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA:

- a. In relation to Enforcement Notices CA111442 and CA111445 (issued under the SPA) - **No decision made** on the grounds the Committee **does not** have jurisdiction to decide an appeal about the Enforcement Notices issued in respect of the use of the subject site;
- b. In relation to Enforcement Notices CA111443 and CA111444 (issued under the BA) - **Confirms** the Enforcement Notices issued by the Council.
- c. In relation to Enforcement Notices CA111598 (issued under the PDA) - **Confirms** the Enforcement Notice issued by the Council.

## Background

For the purposes of this decision, the matters relevant to the five Enforcement Notices that are the subject of this appeal (and the associated ShowCause Notices which precede them) interrelate. Accordingly, for the purposes of providing background, each notice is not individually summarised.

The subject site contains a two storey (ground and level above) multiple dwelling unit as defined by the *Brisbane City Plan 2014*. Unit 1 (which is the subject of this appeal) is one of these three units. The subject site is located at the corner of Holland Road and Lamette Street, with driveway access located at the Holland Road frontage of the premises for all three units. At the time of the hearing, when viewed from Holland Road frontage there are three individual driveways and three post-boxes.

Based on the information and records provided by the Council and the Applicant to the Committee, the following events have taken place with respect to the subject site:

- In October 1967, Council issued an approval for a “multiple dwelling, class A to contain 3 units”;
- In October 1996, Council undertook an inspection of the premises to ensure a Building Unit Plan (BUP) had been drawn in accordance with the building’s construction. Photos of the premises taken at the time show a panel lift type garage door at the lower level of unit 1. A file note made by the investigating officer states that “the building is considered to be substantially complete and would be generally in accordance with the relevant approval granted in 1967”. Moreover, a Council plumbing inspector carried out an inspection and provided a plumbing inspection report for the BUP which indicated all fixtures were in compliance with the approved drainage plan. The approved drainage plan identifies that each unit was designed with a washtub under house and a kitchen sink, water closet, bath and basin on the top floor.
- In March 2005, the applicant purchased Unit 1.
- In February 2017, Council undertook an inspection of the premises under warrant to enter the ground floor garage area of Unit 1. Photos taken during the inspection show the garage area of Unit 1 occupied for what Council considers to be residential purposes. In particular:
  - Replacement of the panel lift type garage door (as seen in the 1996 site photos) with a sliding door; and
  - Installation of partition walls, floor coverings and internal fit out to create rooms which appear to be intended for habitable use as a self-contained dwelling;
  - The rooms created, installed and furnished appear to have been used as:
    - A bathroom containing a shower/bath, vanity basin and toilet facility, with no record of an approval for the additional plumbing fixtures;
    - A living room space at the front of the building;

- A bedroom at the rear of the unit;
  - A full kitchen including cooking and washing up facilities; and
  - A laundry facility at the rear of the unit.
- At the time of inspection by Council, the unit was being occupied by residents;
- In March 2017, Council issued Show Cause Notices under the BA and PDA in relation to:
  - Failure by the Applicant to ensure that a Building Code of Australia (BCA) classification or use change was not made to the building unless a building certifier had approved the change and the changes comply with the building assessment provisions; and
  - Unauthorised plumbing that had been installed without the required approvals.
- In March 2017, the Applicant provided a written response to Council's Show Cause Notices.
- Subsequently, Council issued Enforcement notices as follows:
  - CA111442 and CA111445 were both issued on 18 May 2017;
  - CA111443 and CA111444 were both issued on 18 May 2017; and
  - CA111598 was issued on 25 May 2017
- The Applicant lodged an appeal to the Committee's Registrar against all five (5) Enforcement Notices on 12 June 2017.

## **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 12 June 2017.
2. Enforcement Notice CA111442 dated 18 May 2017.
3. Enforcement Notice CA111443 dated 18 May 2017.
4. Enforcement Notice CA111444 dated 18 May 2017.
5. Enforcement Notice CA111445 dated 18 May 2017.
6. Enforcement Notice CA111598 dated 25 May 2017.
7. Verbal representations at the hearing.
8. Written submissions provided by the parties after the hearing.
9. *Sustainable Planning Act 2009* (SPA).
10. Sustainable Planning Regulations 2009 (SPR).
11. *Building Act 1975* (BA).
12. Building Regulations 2006 (BR).
13. National Construction Code Series, Building Code of Australia, Volume 2, 2016 (BCA)
14. *Plumbing and Drainage Act 2002* (PDA)
15. Standard Plumbing and Drainage Regulation 2003 (SPDR)
16. *Sewage and Water Supply Act 1949-1982*

## Findings of Fact

### Enforcement Notices CA111442 and CA111445

The Committee makes the following finding of fact:

1. Notices CA111442 and CA111445 are Enforcement Notices given pursuant to section 590 of SPA. An appeal to the Committee about an Enforcement Notice issued under section 590, is brought under section 533. Section 533 is contained within Chapter 7, Part 2, Division 6. Importantly, this division (Division 6) commences at section 526 'Matters about which a person may appeal under div 6'states:

#### ***526 Matters about which a person may appeal under div 6***

*An appeal to a building and development committee under this division may only be about—*

- (a) a matter under this Act that relates to the Building Act, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission, or the Plumbing and Drainage Act 2002; or*
  - (b) a matter that under another Act may be appealed to a building and development committee; or*
  - (c) a matter prescribed under a regulation.*
2. With regards to section 526(c), section 25 of SPR extends the above jurisdiction to include decisions made by a local government acting as a concurrence agency for a privately certified building application (for example, sitting relaxations, amenity and aesthetics, and other matters).
  3. The Enforcement Notices CA111442 and CA111445 are not concerned with any of the matters mentioned in section 526 of the SPA. Accordingly, the Committee is of the view that it **does not** have jurisdiction to consider the appeal against Enforcement Notices CA111442 and CA111445

### Enforcement Notice CA111443

The committee makes the following finding of fact:

1. The original building was approved in 1967 (BA6046/67) as a three unit multiple dwelling. Each unit was approved with a garage and laundry area on the lower storey.
2. Council does not have available plans of the original approval however documentation from the council minutes reflects the use as above.
3. An application was made for a BUP, which was inspected and approved by Council as being generally in accordance with the original 1967 approval and a BUP granted.
4. Photographs from this inspection in 1996 show the lower level of the unit containing a garage door.
5. On 15 February 2017, Council undertook a site inspection and determined works had been undertaken to the lower storey of the building including:
  - a. Removal of the garage door and replacement with a glass sliding door;
  - b. Installation of a kitchen facility in the lower storey area in Unit 1;
  - c. Creation and installation of a bathroom facility through new partition walls and fixtures;
  - d. Creation of new habitable rooms including bedroom and living areas through new partition walls;

6. Photographs provided by Council from this inspection show the area was being occupied as a habitable space.
7. Council had no evidence of a building approval or development approval permitting the change of use from a non-habitable garage space to habitable rooms, and subsequently issued Show Cause and Enforcement Notices.
8. A site inspection of the premises by the Committee on 29 August 2017 confirms the works documented by Council have been carried out and completed. The area appeared to no longer be occupied, however still contained all facilities required to meet a habitable use and sole occupancy unit.
9. At the hearing, representations were made by the owner and owners representative that the areas were used for hobbies, for a gym, and that these types of uses were not habitable. Reference is made to the BCA definition of a habitable room, which states:

***Habitable room*** means a room used for normal domestic activities, and—

*(a) includes a bedroom, living room, lounge room, music room, television room, kitchen, dining room, sewing room, study, playroom, family room, home theatre and sunroom;*

*but*

*(b) excludes a bathroom, laundry, water closet, pantry, walk-in wardrobe, corridor, hallway, lobby, photographic darkroom, clothes-drying room, and other spaces of a specialised nature occupied neither frequently nor for extended periods.*

10. The Committee has determined based on the site inspection, submissions and photographic evidence provided that the uses of these rooms are considered associated with a habitable use.

#### Enforcement Notice CA111444

The Committee makes the following finding of fact:

1. The original building was approved in 1967 (BA6046/67) as a three unit multiple dwelling. Each unit was approved with a garage and laundry area on the lower storey.
2. Council does not have available plans of the original approval however documentation from the Council minutes reflects the use as above.
3. An application was made for a BUP, which was inspected and approved by council as being generally in accordance with the original 1967 approval and a BUP granted.
4. On 15 February 2017, Council undertook a site inspection and determined works had been undertaken to the lower storey of the building including:
  - a. Creation of new rooms at the rear of the garage area through new partition walls;
  - b. Complete separation of the garage space and rooms at the back;
  - c. The new room created in the garage appeared to be used for habitable use.
5. Photographs provided by Council from this inspection show the area was being occupied as a habitable space.
6. Council had no evidence of a building approval or development approval permitting the change of use and subsequently issued Show Cause and Enforcement Notices.

7. A site inspection of the premises by the Committee on 29 August 2017 confirms the works documented by Council have been carried out and completed. The area contained gym equipment and appeared to be currently in use.
8. At the hearing, representations were made by the owner and owners representative that the areas was used as a gym, and that this use is not habitable. Reference is made to the BCA definition of a habitable room, which states:

***Habitable room*** means a room used for normal domestic activities, and—

*(a) includes a bedroom, living room, lounge room, music room, television room, kitchen, dining room, sewing room, study, playroom, family room, home theatre and sunroom; but*

*(b) excludes a bathroom, laundry, water closet, pantry, walk-in wardrobe, corridor, hallway, lobby, photographic darkroom, clothes-drying room, and other spaces of a specialised nature occupied neither frequently nor for extended periods.*

The Committee has determined based on the site inspection, submissions and photographic evidence provided that the uses of these rooms are considered associated with a habitable use.

#### Enforcement Notice CA111598

The Committee makes the following finding of fact:

1. Council documents include a Plan of House Drain No 62227 being a design plan for plumbing and drainage work for proposed construction at 14 Holland Road, Holland Park. This plan identifies that each unit was designed with a washtub underhouse and a kitchen sink, water closet, bath and basin on floor level. Council provided an annotated copy of the drainage plan with stamped notation explaining terminology and the relationship between ground floor fixtures and top level fixtures when a building has an under house. The Plan of House Drain No 62227 and notation would indicate that a kitchen sink, water closet, bath and basin was designed for the top level of each unit.
2. Brisbane City Council Clearance Certificate for Sewerage–Septic Tank Installation dated 22 July 1968 issued for Drainage Plan No 62227 indicates approved plumbing fixtures installed at the time. It is noted that the Clearance Certificate includes a shower installed under-house. The approved shower is in addition to proposed work shown on the Plan of House Drain No 62227.
3. A plan of as-constructed drainage dated 1 May 1968 identifies installed underground sanitary drainage work recorded by Council at the time. Council provided an annotated copy of the drainage plan with stamped notation explaining terminology of referenced terms including “FAI DT”. FAI DT is abbreviated for “Fixtures Above Inlet Disconnecter Trap.” The plan of as constructed drainage dated 1 May 1968 identifies top level waste fixture connections from kitchen sinks, baths and basins to disconnecter traps below.
4. A site inspection of plumbing work undertaken by the Committee on the 29 August 2017 identified multiple FAI DT vents located on external walls of the building terminating approximately 300 mm above ground level. The plan of as-constructed drainage dated 1 May 1968 identifies FAI DT locations.
5. A Brisbane City Council plumbing inspection report dated 19 September 1996 certifies that an inspection of the existing plumbing fixtures has shown that all fixtures are in compliance with

approved Drainage Plan No 62227. This inspection was carried out in relation to the issuing of a Building Unit Plan in 1996.

6. Council Enforcement Notice CA111598 issued on the 18 May 2017 identifies that Council inspected the premises on the 15 February 2017. This inspection revealed that a kitchen with a sink, dishwasher, bathroom and toilet was installed on the ground floor of the unit.
7. A site inspection of the premises undertaken by the committee on the 29 August 2017 confirms that additional plumbing fixtures to that shown on Councils Clearance Certificate for Sewerage–Septic Tank Installation Drainage Plan No 62227 have been installed. The additional plumbing fixtures include a kitchen sink, water closet, bath and basin installed in the under-house area of Unit 1.

## **Reasons for the Decision**

### Enforcement Notices CA111442

The Committee **does not** have the jurisdiction to decide an appeal about these Enforcement Notices issued pursuant to 590 of the SPA as they concern matters not mentioned in section 526 of the SPA.

### Enforcement Notices CA111445

The Committee **does not** have the jurisdiction to decide an appeal about these Enforcement Notices issued pursuant to 590 of the SPA as they concern matters not mentioned in section 526 of the SPA.

### Enforcement Notice CA111443

The Committee has reviewed all lodged documentation in relation to the alterations and additions made to the subject site and finds that the building works have created a habitable space. There is no evidence of any building works approvals in place approving the change of use of this area from non-habitable garage space to habitable rooms. Therefore, the Committee **confirms** the Enforcement Notice issued by the Council.

### Enforcement Notice CA111444

The Committee has reviewed all lodged documentation in relation to the alterations and additions made to the subject site and finds that the building works have created a habitable space. There is no evidence of any building works approvals in place approving the change of use of this area from non-habitable garage space to habitable rooms. Therefore, the Committee **confirms** the Enforcement Notice issued by the Council.

### Enforcement Notice CA111598

The Committee has reviewed all lodged documentation in relation to plumbing and drainage work on the subject site and finds no evidence to support that a kitchen sink, bath, basin and toilet installed in the underfloor area of Unit 1 was assessed for compliance with the Standard Plumbing and Drainage Regulation 2003 or relevant legislation applicable at the time of installation. Therefore, the Committee **confirms** the Enforcement Notice issued by the Council.

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**James Dunstan**  
**Building and Development Committee Chair**

**Date: 06 October 2017**

**Reissued: 17 October 2017 (changed - minor administrative error)**

## **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) 1800 804 833 Facsimile (07) 3237 1248**