



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	35- 15
Applicant:	Mark and Lynette Spicer (Applicant)
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	22 Lowndes Street, Salisbury and described as Lot 1 on SP 269801 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) in relation to two (2) Enforcement notices Issued by the Council, being:

- a) an Enforcement Notice issued pursuant to section 590 of the SPA in respect of carrying out assessable development without a permit, compliance with a development permit and unlawful use of a premises (Enforcement Notice 1);
- b) an Enforcement Notice issued pursuant to section 248 of the *Building Act 1975* (BA) in respect of the use of a premises without a certificate of classification (Enforcement Notice 2).

Date and time of hearing:	Tuesday 19 November 2015 at 3:00 PM
Place of hearing:	Level 16, Mineral House, 41 George Street, Brisbane
Committee:	Geoffrey Mitchell – Chair Samantha Hall - Member
Present:	Mark Spicer – Applicant Richard Thorn – Council Representative Steven Thompson – Council Representative

Decision:

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

- a) In relation to Enforcement Notice 1 - **dismisses** the appeal on the grounds it does not have jurisdiction to decide an appeal about an enforcement notice issued in respect of the use of the subject site;

- b) In relation to Enforcement Notice 2- **dismisses** the appeal and confirms the enforcement notice issued by the Council.

Background

The appeal was lodged by the Applicant in response to Enforcement Notices issued by the Council to the Applicant as owner of the subject site. The appeal was filed pursuant to section 533 of the SPA.

Enforcement Notice 1 (issued under the SPA)

On 27 July 2015, the Council issued a Show Cause Notice to the Applicant in respect of carrying out assessable development without a permit, compliance with a development permit and unlawful use of a premises.

The Show Cause Notice was issued pursuant to section 588 of the SPA and listed a number of facts and circumstances upon which the Council's grounds for giving the notice were based.

On 25 August 2015, the Applicant responded to the show cause notice via correspondence from its legal representatives, which provided a response to the various items in the Show Cause Notice.

The Council considered the Applicant's response to the Show Cause Notice and decided that it was appropriate to issue an Enforcement Notice to the Applicant.

On 11 September 2015, the Council issued an Enforcement Notice to the Applicant.

On 9 October 2015, the Applicant lodged this appeal with the Committee Registrar.

Enforcement Notice 2 (issued under the BA)

On 13 July 2015, the Council issued a Show Cause Notice pursuant to section 247 of the BA to the Applicant in respect of the use of premises without a Certificate of Classification.

The following items were included within the 'Facts and Circumstances' section of the Show Cause Notice:

1. *"Council records indicate that on 3 November 2014, Mr Arthur Leung, trading as CAPT Building Consultants, issued a Development (Building) Approval (A003989015) for a Class 1b "new dwelling for rooming Accommodation for maximum 5 persons".*
2. *"On 6 July 2015, an inspection of the premises by a Council officer confirmed that a new dwelling had been constructed at the premises."*
3. *"On 8 July 2015, a further inspection of the premises by a Council officer resulted in an occupant of the premises being spoken to. During the subsequent conversation, the Council officer was informed that the dwelling consisted of three (3) self-contained units and that the three (3) self-contained units were currently occupied and in use by non-related occupants."*
4. *"An Inspection of Council records that day confirmed there was no record of a Certificate of Classification having been issued with regards the 1B 'Rooming Accommodation'."*
5. *"On 9 July 2015, Mr Leung confirmed that a Certificate of Classification had not been issued with regards to the development at the premises."*
6. *"Council reasonably believes the dwelling was constructed at some time in 2015. Council records indicate that there has been no Certificate of Classification obtained for the use of dwelling on the premises."*

On 17 August 2015, the Applicant responded to the Show Cause Notice via correspondence from its legal representatives, which in summary stated that there was no need for the Council to issue an Enforcement Notice as there were already actions being taken by the Applicant to obtain the relevant Certificate of Classification.

On 7 October 2015, the Applicant further responded to the Show Cause Notice via correspondence from its legal representatives, under the cover of which was provided a copy of a Form 21 - Final Inspection Certificate dated 28 September 2015 (Form 21 Certificate), issued by Troy Keefe, Building Certifier (Accreditation Number A1301993).

The Council considered the Applicant's responses to the Show Cause Notice and issued the Enforcement Notice 2 based on the following facts:

1. *"No Certificate of Classification has been obtained from the Private Building Certifier for the new dwelling on the premises.*
2. *Occupation of the premises has commenced.*
3. *An inspection of Council records on 1 September 2015 determined that no record existed as to a certificate of Classification having been issued with regards the new dwelling on the premises.*
4. *On consideration of the response dated 17 August 2015, Council has determined it is appropriate to issue an Enforcement Notice."*

On 9 October 2015, the Applicant lodged this appeal with the Committee Registrar.

During the hearing, the Applicant advised verbally that he wished to withdraw the appeal in relation to Enforcement Notice 2, as he was satisfied that it had been satisfactorily dealt with by the giving of the Form 21 Certificate.

On that basis, the Committee Chair concluded the hearing and requested the Applicant confirm his instruction to withdraw in writing.

Subsequent to the hearing, the Applicant advised the Committee that he did in fact want the matter to be considered by the Committee and requested a hearing afresh.

The Committee requested consent for the matter to be dealt with by written submissions.

On 24 November 2015, the Committee received a written submission from the Council.

On 27 November 2015, the Committee received a written submission from the Applicant.

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 9 October 2015.
2. Verbal representations at the hearing.
3. Written submissions provided by the parties after the hearing.
4. The SPA.

5. The BA.
6. The *Building Regulation 2006* (BR).

Findings of Fact

The Committee makes the following findings:

Jurisdiction of the Committee

Background

Section 248 of the BA, relevantly provides local governments with the power to give Enforcement Notices in respect of specified matters that relate to a building, a structure or building work.

Section 250 of the BA, relevantly provides that “a person who is given an enforcement notice under section 248, may appeal to a building and development dispute resolution committee as if the appeal were an appeal under” the SPA.

Section 590 of the SPA, relevantly provides that if an assessing authority reasonably believes a person has committed or is committing a development offence under the SPA, the authority may give an Enforcement Notice to that person.

The Committee’s jurisdiction to hear appeals is set out in the SPA. Section 508 of the SPA, relevantly provides the following broad jurisdiction for the Committee to hear matters set out in specific parts of the SPA:

- a) “to hear and decide a proceeding for a declaration about a matter mentioned in division 3, other than a matter done for chapter 6, part 11; and
- b) to decide any matter that may be appealed to a building and development committee under divisions 4 to 7; and
- c) to decide any matter that under another Act may be appealed to a building and development committee.”

In this appeal, sections 508(b) and (c) of the SPA are relevant for consideration.

Divisions 4 to 7 referred to in section 508(b) of the SPA, are those divisions included in Part 2 (Building and development dispute resolution committees) of Chapter 7 (Appeals, offences and enforcement).

Section 533 of the SPA, is in division 6 and it provides the Committee with jurisdiction to hear appeals about an Enforcement Notice as follows:

- (1) *“A person who is given an enforcement notice may appeal to a building and development committee against the giving of the notice”.*

“Enforcement notice” is defined in schedule 3 of the SPA, to mean an enforcement notice in section 590 of the SPA, that is, an enforcement notice issued in respect of a development offence under the SPA.

This definition does not include an Enforcement Notice issued under the BA.

The wide scope of the jurisdiction provided by section 533 of the SPA, is constrained by the preliminary section within division 6, being section 526 of the SPA, which provides the following:

“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.”*

Consideration of Enforcement Notice 1

Enforcement Notice 1 was issued under section 590 of the SPA.

Section 508(b) of the SPA, relevantly provides the Committee with the power to decide a matter that may be appealed to the Committee under divisions 4 to 7.

Section 533 of the SPA, which is in division 6, provides the Committee with the power to hear an appeal about an enforcement notice issued under section 590 of the SPA. However, this broad power is constrained by section 526 of the SPA, which limits the power to specified matters.

Enforcement Notice 1 is not one of the specified matters in section 526 of the SPA and therefore the Committee does not have the jurisdiction to hear an appeal about this Enforcement Notice.

Consideration of Enforcement Notice 2

Enforcement Notice 2 was issued under section 248 of the BA.

The power to appeal Enforcement Notice 2 to the Committee is provided in section 250 of the BA.

Pursuant to section 508(c) of the SPA, Enforcement Notice 2 is a matter that under another Act, being the BA, may be appealed to the Committee.

Therefore, the Committee has jurisdiction to hear an appeal about Enforcement Notice 2.

The Committee notes that because the definition of enforcement notice in schedule 3 of the SPA is limited to an enforcement notice given under section 590 of the SPA, Enforcement Notice 2 is not a matter that may be appealed to the Committee under divisions 4 to 7 and no consideration of sections 533 or 526 of the SPA is necessary.

Substantive issues (Enforcement Notice 2)

On 25 September 2015, Troy Keefe, Building Certifier (Accreditation Number A1301993), issued a Development Approval for Building Works (Rooming Accommodation and Secondary Dwelling for max 5 persons) and a Building Classification 1b and 10a.

On 28 September 2015, Troy Keefe, Building Certifier (Accreditation Number A1301993), issued a Form 16 - Inspection certificate for the Final Inspection stage.

On 28 September 2015, Troy Keefe, Building Certifier (Accreditation Number A1301993), issued a Form 21 – Final inspection certificate for Class of building 1b, 10a. (rooming accommodation & secondary dwelling for max. 5 persons).

Section 100 of the BA, relevantly provides the following:

This part applies to a building certifier for a building development approval who is a local government building certifier or a private certifier (class A), unless the building is—

- (a) a single detached class 1a building; or*
- (b) a class 10 building or structure.*

Section 102 of the BA, relevantly provides the following:

- (1) This section applies if—*
 - (a) the building certifier has inspected the building and—*
 - (i) decided that it has been substantially completed; or*
 - (ii) given written consent to the occupation of part of the building before all of it has been substantially completed; or*
 - (iii) if the development is alterations to an existing building—decided that they have been substantially completed; and.....*
- (2) The building certifier must, as soon as practicable, ensure the owner of the building is given a certificate of classification by a building certifier that complies with the requirements under section 103 for a certificate of classification (the **certificate requirements**).*

Section 103 of the BA relevantly provides the following:

- A certificate of classification must—*
- (a) **be signed in the approved form**; and*
 - (b) state the building's classification, having regard to—*
 - (i) the class of the building stated in the decision notice for the development; and*
 - (ii) the use for which the building was designed, built or adapted;*

Section 254 of the BA, relevantly provides that the chief executive may approve forms for use under the BA.

The approved form for a Certificate of Classification is a Form 11 as amended and initially published in the Government Gazette, August 2008.

Section 114 of the BA, relevantly provides the following:

- (1) This section applies if—*
 - (a) the building the subject of a building development approval is not—*
 - (i) a single detached class 1a building; or*
 - (ii) a class 10 building or structure; and*
 - (b) a certificate of classification has not been given for the building.*
- (2) A person must not occupy or use the building unless the person has a reasonable excuse.*
- (3) The owner of the building must, unless the owner has a reasonable excuse, ensure the building is not occupied or used by someone else.*

The evidence presented indicates to the Committee that the building on the subject site is a class 1b building and is not a single detached class 1a building nor a class 10 building or structure.

No evidence has been produced to the Committee as to the existence of a Form 11 Certificate of Classification.

No evidence has been presented to the Committee to establish the existence of a “reasonable excuse” to occupy the building.

An offence is being committed and the Council is entitled under section 248 of the BA to give a notice (an Enforcement Notice) to the owner of the building.

Reasons for the Decision

Enforcement Notice 1

The Committee does not have the jurisdiction to decide an appeal about Enforcement Notice 1 as it is not one of the specified matters in section 526 of the SPA.

Enforcement Notice 2

The Committee does have jurisdiction to hear an appeal about the issue of Enforcement Notice 2.

The evidence presented shows the building on the subject site is occupied and that it holds a building classification of 1b.

It is an offence under section 114 of the BA, to occupy a class 1b building without the building receiving a Certificate of Classification.

The Committee can find no evidence of the issue of a Form 11 - Certificate of Classification for the building on the subject site.

There are reasonable grounds for the belief that an offence is being committed and the Council is entitled under section 248 of the BA to give a notice (an Enforcement Notice) to the owner of the building on the subject site.

Geoffrey Mitchell
Building and Development Committee Chair
Date: 21 January 2016

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