



Building and Development Dispute Resolution Committees—Decision

X

Sustainable Planning Act 2009

Appeal Number:	14 - 13
Applicant:	Michael Erlbaum & Erez Erlbaum
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	6 Brook St, South Brisbane and described as Lot 4 on RP 11698 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against the giving of an Enforcement Notice by Council under section 578 and 582 of the SPA.

Date of hearing:	29 May 2013
Place of hearing:	Building Codes Queensland Level 7, 41 George St Brisbane 4001
Committee:	Geoffrey Mitchell – Chair
Present:	Allan Erlbaum – Applicant Trevor Gerhardt – Applicants representative Richard Thorn – Council representative Mark Higgin – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **sets aside** the Enforcement Notice given by Brisbane City Council.

Background

The subject site is a rectangular block 440m² in size. The site is located in the “Low-Medium Residential Area”, “Demolition Control Precinct”, “West End / Woolloongabba District Local Plan: under the Brisbane City Planning Scheme.

There is a Development Approval for Building Works approved alterations and additions to an existing dwelling on the property.

There is a Development Approval by Council for the raising and extending an existing dwelling on the property.

As a result of a review of the approved plans associated with the building approval and an inspection of the property on the 19 September 2012 and 24 January 2013, Council formed the view that either the premises had been altered to a multi-unit dwelling or that there were more than five unrelated persons residing at the premises.

On the 24 January 2013 Council issued a show cause notice.

The Applicants responded to the show cause in terms that they were of the belief the building complied with the Development Approvals and that there were no more than 5 unrelated people residing at the property.

After consideration of the response to the show cause Council was of the view that cause had not been shown and subsequently issued an Enforcement Notice on 1 March 2013.

On 28 March 2103 the Applicant appealed Council's Enforcement Notice to the Building and Development Committee Registrar..

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 Registrar on 28 March 2013.
2. The *Sustainable Planning Act 2009* (SPA)
3. The *Building Act 1975* (BA)
4. The Building Regulation 2006 (BR)
5. The Building Code of Australia (BCA)
6. Brisbane City Plan 2000 (City Plan)
7. Statutory declaration provided by the Applicant at the hearing
8. Additional correspondence received from Council at the hearing
9. Additional correspondence received from the Applicants representative on 30 May and 13 June 2013
10. Verbal representation by the parties at the hearing

Findings of Fact

The Committee makes the following findings of fact:

- The building subject to the appeal was approved by a private certifier in February 2012.
- The aforementioned building approval was for a Class 1a dwelling
- The building subject to the appeal received a Development Application (A003320764) from the Council in October 2012 for the raising of an existing dwelling and to allow the building to be outside the building envelope.
- On 1 March 2013 Council issued an Enforcement Notice for carrying out assessable development with out an effective development permit and for using the premises for a use that is not lawful.
- An appeal was lodged with the Building and Development Dispute Resolution Committee registry on the 28 March 2013.

Reasons for the Decision

The Development Approval given by Council was for a “house” in a Demolition Control Precinct and more particularly to allow the raising of an existing premise and to allow the siting to be outside the building envelope. The Council did not need to turn its mind to the internal configuration of the building as the Application stated it was for a “house”. The Council in this application is more concerned that the appearance of the premise be consistent with the surrounding development.

A “house” is defined in the City Plan as:

“a use of premises principally for the residential occupation by a domestic group or individual/s, that may include a secondary dwelling, whether or not the building is attached, but does not include a single unit dwelling.”

In February 2012 a private certifier gave a Development Approval for buildings works, albeit prior to the required planning approval being in place, for building in under the existing dwelling and for an extension to the rear of the premises. The application and the approval were given for a Class 1a dwelling.

A Class 1a dwelling is defined in the BCA as:

*“(a) **Class 1a** — a single dwelling being—*

(i) a detached house; or

(ii) one of a group of two or more attached dwellings, each being a building, separated by a [fire-resisting wall](#), including a row house, terrace house, town house or villa unit....

which are not located above or below another dwelling or another Class of building other than a [private garage](#)”

The Council argues that they issued the Enforcement Notice because the approved building plans appeared to include a number of “self contained” units.

The BCA prescribes the minimum facilities required to be provided in a dwelling however places no limits on exceeding the minimum number. A review of the Development Application forms for both the Building Development Application and the Development Application all reference a house. The approved building plans give no indication that the construction is other than for a Class 1a Dwelling.

The existence of separate facilities in itself does not necessarily change the BCA classification of the building.

The Committee is satisfied that the Building Development Approval is consistent with the Development Approval by Council and that no additional assessable work has been conducted on the premises.

The use of premises is a somewhat contentious area at present as the City Plan lacks any definition of the term “domestic group” as listed in the “house “ definition, and “household group” as used in the Acceptable Solutions of the House Code of the City Plan. The City Plan is silent on the financial relationship of any of the occupants of the premise.

One of the criteria relied upon by Council is the number of unrelated persons that make up the household group. The Council has cited an examination of the Electoral Rolls to conclude that there are more than 5 persons on the premises which is the number set in the House Code.

The Applicants in their response to Council to the show cause notice of 24 January 2013, and further by verbal confirmation at the hearing and the presentation of a statutory declaration at the hearing, have stated that there are no more than 5 unrelated persons occupying the house.

The BCA defines a Sole-Occupancy Unit as:

“Sole-occupancy unit means a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes—

(a) a dwelling; or

(b) a room or suite of rooms in a Class 3 building which includes sleeping facilities....”

This definition gives some insight into occupant relationship and the key element is in relation to the exclusivity of the individual areas. If areas of the premise are being used exclusively by certain occupants, to the exclusion of the other occupants it would change the BCA classification of the premise.

The Council has presented no facts and circumstances in relation to the interaction of the occupants which is a key criterion to establish a “group” for the purposes of the City Plan and for the determination of the use for the purposes of the Building Development Approval.

Those facts and circumstances are also necessary matters to be outlined in the show cause notice in order for the Applicant to have a proper opportunity to make representations before any decision is made with respect to the giving of an Enforcement Notice.

The decision of the Committee is to uphold the appeal against the giving of the Enforcement Notice

Geoffrey Mitchell
Building and Development Committee Chair
Date:

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) 3237 0403 Facsimile (07) 3237 1248