



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

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| Appeal Number: | 12 - 13 |
| Applicant: | Kwee Voon Ling & Tiy Siew Loo |
| Assessment Manager: | Brisbane City Council (Council) |
| Concurrence Agency: (if applicable) | N/A |
| Site Address: | 81 Whites Rd, Manly West and described as Lot 14 on RP 33221 — 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 580 and 582 of the SPA. The Enforcement Notice was issued by Council in relation to the alleged contravention of a condition in the building development approval and the alleged use of the premises for a purpose that is not a lawful use.

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| Date of hearing: | 18 th April 2013 |
| Place of hearing: | Building Codes Queensland Level 7, 41 George St Brisbane 4001 |
| Committee: | Geoffrey Mitchell – Chair Michael Labone - Member |
| Present: | Kwee Voon Ling (Kevin) – Applicant Brennon Brook – Applicant’s representative Graham Brook – 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 issued by Brisbane City Council.

Background

The land, subject to this appeal is located at 81 Whites Rd Manly West.

The subject land is included in the Low Density Residential Area and the Wynnum /Manly Neighbourhood Plan under City Plan 2000 (City Plan).

A development application for a house on the subject land, which complies with the acceptable solutions of the Brisbane City Council House Code, is self-assessable. i.e. does not require a separate application to the Council.

On the 8 December 2012 a private certifier Arthur Leung Accreditation No: A66352 gave a building development application for a Class 1a Dwelling, as defined in the Building Code of Australia 2012 (BCA), with an attached granny flat.

On the 22 November 2012 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 City Plan in that there were no more than 5 unrelated people to fit the requirements under A8 of the House Code and that there was only one household group in each dwelling.

After consideration of the response to the show cause notice, Council was still of the view that the use was not in accordance with the approved plans and the definition of a house in the City Plan and subsequently issued an Enforcement Notice on 5 February 2013.

On 19 March the Applicant appealed Council's enforcement notice to the 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 19 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 2012 (BCA)
6. Brisbane City Plan 2000 (City Plan)
7. Additional correspondence received from Council on the 18th April 2013
8. Additional correspondence received from the Applicants' representative on the 18th and 26th April
9. Verbal representations by the parties at the hearing
10. Court of Appeal decision - *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA

Findings of Fact

The Committee makes the following findings of fact:

- The building subject to the appeal was approved by a private certifier on 8 December 2012.
- The building subject to the appeal was approved as a Class 1a Dwelling with attached granny flat.

- On 22 November 2012 Council issued a show cause notice and the Applicant provided a response to Council.
- On 5th February 2013 Council issued an Enforcement Notice for the alleged use of the premises in contravention of a condition in the building development approval and the alleged use of the premises for a purpose that is not a lawful use.
- The Enforcement Notice was received by the Applicant on the 20th February 2013.
- An appeal was lodged with the Building and Development Dispute Resolution Committee registry on the 19th March 2013.

Reasons for the Decision

At the commencement of the hearing of this appeal Council informed the Committee that it no longer relied on the building development approval condition as a basis for giving the Enforcement Notice. Accordingly, that condition is not considered in this decision. The remaining offence relied on by Council issuing the Enforcement Notice is an offence under s 582 of the SPA about the use of premises, based on the definition of “house” in the City Plan.

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.”

Prior to the issue of the Enforcement Notice, Council issued a show cause notice dated 22 November 2012. The show cause notice set out the facts and circumstances forming the basis for Council’s belief that an Enforcement Notice should be issued to the Applicant.

The jurisdiction of Council to issue an Enforcement Notice arises under s590 of SPA:

“[the] assessing authority reasonably believes a person has committed, or is committing, a development offence”

The facts and circumstances set out in both the show cause notice and the Enforcement Notice relevantly identify that [emphasis added]:

*“Council has formed a reasonable suspicion that the premises are being rented and there is an **intention** for the premises to be occupied by two separate household groups.”*

While actual occupation of the premises by two separate household groups may give grounds for the issue of an Enforcement Notice based on the definition of “house” in the City Plan, the *intention* for the premises to be occupied by two separate household groups is not a ground for the issue of such a Notice. What is required under s590 of the SPA to issue an Enforcement Notice is a reasonable belief that a person *has committed, or is committing*, a development offence.

There was evidence presented to the Committee by the Applicant at the hearing that the premises was being occupied under two separate tenancy agreements, however, that matter did not form part of the facts and circumstances outlined in the show cause notice or the Enforcement Notice.

Council also submitted at the hearing that it relied on the decision of the Court of Appeal in *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA with respect to the “house” definition. Pursuant to that decision, occupation of the premises by “discrete” individuals, as distinct from “individuals” meeting the “house” definition is a matter relevant to whether the use of the premises complies with the “house” definition (see paragraphs 80-88 of the decision). The facts and circumstances of the actual occupation of the premises were also matters that were not outlined in the show cause notice.

In this case, in order to found a reasonable belief that the Applicant *has committed, or is committing* the development offence alleged (as distinct from an *intention to commit* the offence), it is apparent that the belief must be based on facts and circumstances of actual past or present use of the premises in contravention of the house definition. 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 that the appeal is upheld and the Enforcement Notice be set aside.

Geoffrey Mitchell
Building and Development Committee Chair
Date: 28 June 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.

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