



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3-08-037**

**BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

**Assessment Manager:** Gold Coast City Council

**Site Address:** *withheld*—“the subject site”

**Applicant:** *withheld*

**Nature of Appeal**

The appeal was lodged pursuant to Section 4.2.13 of the *Integrated Planning Act 1997* (IPA), and Chapter 9 of the *Building Act 1975* against a decision by Gold Coast City Council, to issue an Enforcement Notice under the *Building Act 1975*.

**Date and Place of Hearing:** 9.00am Thursday 26 June, 2008 at the offices of the Department of Infrastructure and Planning

**Tribunal:** Peter Nelson – Chairperson  
Malcolm Edmiston – General Referee

**Present:** Applicant / Owner  
Colin Church – Gold Coast City Council Representative  
Martin Roberts – Gold Coast City Council Representative

**Decision**

The Tribunal, in accordance with Section 4.2.34 (2)(b) of the IPA, **changes** the Enforcement Notice as follows:

1. Item (2) of the Enforcement Notice dated 7 May, 2008 states – *The owner of the building must, unless the owner has a reasonable excuse, ensure the building is not occupied or used by someone else. Maximum penalty- 165 penalty units.*
2. Under the heading ‘You are required to do the following’ Item b. states – *Comply with Chapter 5 Part 4 Section 114 of the Building Act 1975 in that there is to be no occupation or use of Units 2a and 2b located on the ground floor without a Certificate of Classification for that part of the building.*

**These clauses are to be deleted from the Enforcement Notice.**

### **Conditions to be attached to the Decision**

1. The Applicant is to engage a suitably qualified Architect or Building Designer to prepare detailed plans of the existing building under dispute. The plans are to reflect that the footings and concrete slabs were approved in the original drawings. The plans are to take into account the fire precautions required under the current Building Code of Australia, particularly around the internal staircase and any party walls.
2. Alterations or up-grading of the building that are revealed to be necessary, are to be carried out by licensed tradesmen.
3. The plans are to be submitted to a licensed Private Certifier, who after inspection, and being satisfied that the building is sound, will issue a Certificate of Classification.
4. The Certificate of Classification is to be presented to Council to satisfy the Enforcement Notice.
5. The above work is to be completed within 120 days from the receipt of this decision by the Applicant.
6. If the Certificate of Classification is not delivered to Council within the timeframe specified (without an extension being granted by Council), then Council can proceed to prosecute the Enforcement Notice.

### **Background**

- The original development was constructed in the 1960's as a Motel with all required permits in place.
- The original owner/builder enclosed the lower section of the Manager's quarters in the early 1980's which was then a breezeway and office area, and converted this area into two flats. The development was then strata titled.
- The Applicant purchased this section of the development as three strata titled units in 2002 as an investment. The units were tenanted and the purchase was made by the Applicant, in good faith, believing that all permits were in place.
- Council has been paid rates and a 'letting fee' for the units for many years.
- There has been correspondence on this matter between the original owner, the Applicant, and Council dating back to 1976.
- After 28 years this matter has come to a head with the issuing of an Enforcement Notice.

### **Material Considered**

- Letter from Council to previous owner dated 17 November 1976
- Letter from Council to previous owner dated 28 August 1980
- Letter to Council from Applicant dated received 19 June 2006
- Council Development Compliance Dept file note dated 21 June 2006
- Show Cause Notice dated 14 July 2006
- Letter to Council from Solicitor acting for Applicant dated 17 July 2006
- Enforcement Notice dated 7 May 2008

- Grounds for Appeal from Applicant
- Response to Grounds for Appeal from Council
- 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 12 May 2008
- Verbal submissions made by the Applicant at the hearing
- Verbal submissions made by Council representatives at the hearing
- The *Integrated Planning Act 1997*
- The *Building Act 1975*

### **Findings of Fact**

- The additional units that are the subject of this Enforcement Notice have been in existence, with Council's knowledge, at least 28 years. This is shown in correspondence brought into evidence at the hearing.
- At the time of the carrying out of the subject work, Council had the power to prosecute for a breach and issue a 'Show Cause Notice'. This would have been followed by a Notice to Bring the Work into Conformity with the *Standard Building By-laws 1975*. There was no power, at that time, to require the owner to make a building application and pay fees (this was seen as a deficiency in the legislation which was amended later). Had the work been brought into conformity at the time when the building work had taken place, then no further action could be taken. The legislation at this time gave Council **12 months** to bring a prosecution for the unauthorised building work, and the occupation, for that part of the building work that would now require a Certificate of Classification. As Council **did not prosecute within this time period** there can not be any prosecution now, as the matter lapsed **27 years ago**. However, there is no time restriction on serving a 'Show Cause Notice' (other than the time to respond), or in issuing an 'Enforcement Notice'. Accordingly, even though the 'Show Cause Notice' was issued in 2006 an 'Enforcement Notice' issued in 2008 **is valid**.
- Council has issued rate notices and a rental levy on the units in question for many years.
- There had been an inspection in 1980 by Council, but it seems nothing was done at this time according to Council's records.
- The nature of this appeal is that Council wants the Applicant to get a Private Certifier to issue a Certificate of Classification for the building work in question so that it can close the matter.

### **Reasons for the Decision**

1. Allowing the existing tenants to remain in the flats:
  - The flats have had tenants living in them for 28 years with Council's knowledge.
  - There is no dispute that there is any health or safety risk attached to the building work.
  - Council has been paid fees and rates (by way of notice) for the tenancies over many years.
  - When the flats were strata titled Council would have sealed the plans.

- Unnecessary hardship would be created for the existing tenants.
- An agreement by both parties, in line with principles set out in this decision, was reached at the hearing that will settle the dispute.

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Peter Nelson  
Building and Development Tribunal Chairperson  
Date: 30 June 2008

## **Appeal Rights**

Section 4.1.37. of the IPA provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
City East QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**