Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**41-18**
Appellant:	Kylie Fraser
Respondent:	Brisbane City Council
Site Address:	84 Kingsley Terrace, Manly and described as Lot 441 on RP 33018 ─ the subject site

Appeal

Appeal under section 229 and Schedule 1, Table 1, Item 4 of the *Planning Act 2016* against an infrastructure charges notice given by Brisbane City Council on the ground the notice involved an error relating to the working out of extra demand, for section 120.

Date and time of hearing:	21 January 2019	
Place of hearing:	Development Tribunals, Level 16, 41 George Street, Brisbane	
Tribunal:	Michelle Pennicott	Chair
	Tamara Peverill	Member
Present:	Kylie Fraser	Appellant
	Milena Mog	Lead Principal Planner Appeals, Brisbane City Council
	Roger Greenway	Principal Planner Appeals, Brisbane City Council

Decision:

The Development Tribunal, in accordance with section 254(2)(a) of the *Planning Act 2016*, confirms the infrastructure charges notice given by the Brisbane City Council.

Background

1. On 18 January 2018, the Appellant made a development application to the Brisbane City Council (**Council**) for:
   (a) a development permit for material change of use for a Dwelling house; and
   (b) a development permit for building work for refurbishment of a Commercial character building including partial demolition.

2. On 12 February 2018, the material change of use component of the development application was amended to be for a Dwelling unit.

3. On 13 August 2018, the Council issued a decision notice for:
   (a) a development permit for building work for Commercial Character Building – Partial Demolition; and
   (b) a development permit for material change of use for a Dwelling Unit.

4. On 13 August 2018, the Council issued an infrastructure charges notice. The infrastructure charges notice:
   (a) levied a charge of $13,047.36;
   (b) stated under 'Type of Approval': 'Material change of use – Development Permit';
   (c) stated under 'Description': 'Extension to a Commercial Character Building Activity (Dwelling Unit)';
   (d) stated the premises to which the charge applies as Lot 441 RP 33018; and
   (e) attached 'Details of calculation', showing how the levied charge was worked out.

5. The Details of calculation showed that the levied charge of $13,047.36 had been calculated by subtracting from the development demand of one 3 or more bedroom dwelling house ($14,167.95) a demand credit of 7.69 sq m GFA for Shop ($1,120.59).

6. On 8 October 2018, the Appellant appealed to the Tribunal against the infrastructure charges notice. The grounds for appeal were stated as 'Council has made an error in their application of a whole new charge for the residential component'.

Jurisdiction

7. The grounds for appeal (that the Council has made an error in the application of a whole new charge for the residential component) falls within the jurisdiction of the Tribunal. Section 229 and Schedule 1, Table 1, section 4 of the *Planning Act 2016*, allows an appeal to be brought against an infrastructure charges notice on grounds which include the notice involved an error relating to the working out of extra demand for section 120 (Limitation of levied charge).

Decision framework

8. The appeal is by way of a reconsideration of the evidence that was before the person who made the decision appealed against. [1] However the tribunal may, but need not, consider other evidence presented by a party to the appeal with leave of the tribunal or any information provided under section 246 of the *Planning Act 2016.*[2]

9. The Appellant must establish the appeal should be upheld.[3]

10. The Development Tribunal must decide the appeal by:
    (a) confirming the decision; or
    (b) changing the decision; or
    (c) replacing the decision with another decision; or
    (d) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time. [4]

Material Considered

11. The material considered in arriving at this decision comprises:
    (a) Form 10 – Application for appeal/declaration and attachments, including:
        (i) Brisbane City Council decision notice dated 13 August 2018;
        (ii) Brisbane City Council's approval package dated 13 August 2018, including stamped approved plans and documents; and
        (iii) Infrastructure charges notice dated 13 August 2018, including Details of calculation
    (b) Development application
    (c) Information response dated 12 June 2018
    (d) Letter Urban Strategies to the Council dated 7 August 2018
    (e) Written submissions on behalf of the Council dated 21 January 2019
    (f) Oral submissions of the Appellant and on behalf of the Council made at the hearing on 21 January 2019
    (g) Email on behalf of the Council dated 23 January 2019
    (h) Email on behalf of the Council dated 14 March 2019
    (i) Email from the Appellant dated 20 March 2019
    (j) Email on behalf of the Council dated 11 April 2019
    (k) Email from the Appellant dated 15 April 2019
    (l) Planning Act 2016
    (m) Planning Regulation 2017
    (n) Brisbane City Plan v08.00/2017 effective 1 December 2017 (**City Plan**)
    (o) Brisbane Infrastructure Charges Resolution (No. 7) 2018 (**Charges Resolution**).

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1 *Planning Act 2016* s253(4)
2 *Planning Act 2016* s253(5)
3 *Planning Act 2016* s253(2)
4 *Planning Act 2016* s254(2)

Findings of Fact

Existing and previous uses

12. The premises the subject of the infrastructure charges notice is stated as being Lot 441 on RP 33018 (**Lot 441**).

13. There is an existing building on Lot 441 which is 120.83m^2 (**existing building**).

14. The evidence before the original decision maker about the existing and previous uses on Lot 441 include the following statements in the town planning report accompanying the development application:

> '4.2 Existing and Previous Uses
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> … It is likely that the site has been occupied by the Commercial Character Building since the time of its initial subdivision. Traditionally, these Commercial Character Buildings also acted as residences, with a dwelling at the rear of the building behind the "shop front".'
>
> '5.5 Infrastructure Charges
>
> … The client has advised that the Commercial Character Building previously contained a residence. This was commonplace for these types of suburban buildings (shop front with family residence at the rear) …'.

15. It was also described in the town planning report as a 'semi-derelict building'.

16. On 7 August 2018, the Appellant's town planner provided a letter to the Council which included the following statements about previous uses on Lot 441:

> 'The Commercial Character Building has recently been used as an Office …
>
> The rear of the Commercial Character Building has, we believe, always contained a residence. A residence, with kitchen and bathroom, is still contained within the building …'.

17. In the Council's written submissions to the Tribunal dated 21 January 2019, the Council stated the following in relation to previous uses on Lot 441:

    (a) Council records indicate that the existing building was constructed in 1946 or earlier;

    (b) Council records also indicated that the building has been used as a Butcher Shop in 1951, a hardware shop in 1956 and has had a number of additions in the form of outbuildings in the seventies and eighties. The use reverted back to a residential property in 1992;

    (c) the existing building has been rated as a Dwelling house since 12 July 1992;

    (d) in a December 2001 development application, the extrinsic material accompanying the application maintained that the site was only used as a detached house.

18. The Appellant's written submissions to the Tribunal dated 20 March 2019 included the following statements:

> '… These properties were traditionally owned by Greek families who lived in the property and operated a shop in a large front room that opened onto the street. These properties were principally homes with the shop as a secondary use. We purchased 84 Kingsley Terrace from Chris and Maria Christopher, a Greek couple who together with their two sons did exactly that – lived in the property and operated their front room as a shop.

> As it stands the main building has three bedrooms, a kitchen, a laundry and a bathroom along with two additional toilets, so essentially it is a three bedroom residence with a shop front.'.

19. It is apparent from these statements, some anecdotal, that the existing building has been put to various uses over its long existence. Possible equivalent use descriptions under today's planning regime are:

    (a) Shop;

    (b) Office;

    (c) Dwelling house, Caretaker's accommodation or Dwelling unit, depending on how it was occupied.

20. There is no direct evidence as to whether each was 'lawful at the time the use was carried out', within the meaning of section 120(2) of the *Planning Act 2016*.

21. The development plans before the original decision maker included an 'Existing floor plan' which depicts the existing building, marked 'Existing Commercial Character Building'. It describes some spaces within and adjoining the building, but not all. Those which are described are:

    (a) extg Carport;

    (b) extg Laundry;

    (c) extg WC;

    (d) extg WC;

    (e) extg Bath;

    (f) Deck; and

    (g) Extg Kitchen.

22. To the extent it has been suggested that a previous use within the existing building was a combined shop and residence, it is not possible to determine from the Existing floor plan what that exact composition was, as is relevant to the calculation of demand units under the Charges Resolution, namely, the floor area of the shop component vs the floor area of the residence.

    <u>The development the subject of the infrastructure charges notice</u>

23. The development approval the subject of the infrastructure charges notice is stated as being a development permit for material change of use.

24. The material change of use is for a Dwelling unit.

25. The approved Dwelling unit will be 2 storeys with 3 bedrooms, a media room, a rumpus room, living, kitchen, dining, laundry and 2 bathrooms. It will be sited to the rear of the existing building.

26. The development application for material change of use did not seek a change of use in respect of the existing building.

27. The development application did seek approval for building work in respect of the existing building, described as 'alterations, repair and refurbishment of the semi-derelict building, including minor demolition of components of the Commercial Character Building'. It was explained in further detail in the town planning report accompanying the development application as comprising:

'Commercial Character Building

- Repair of the building, as detailed on the submitted architectural plans.
- Partial demolition of water closet, bathroom, laundry and carport at the rear of the building. These structures are in poor condition and need to be removed.
- Raising and re-stumping the Commercial Character Building. Re-grading of the footpath undertaken by Council has raised the footpath at the street corner above the entry to the building causing unavoidable water damage to the building; storm water can run down Gordon Parade and straight in or under the front door. This will be corrected as part of the proposed works to the existing building.
- Two open- air car parks at the rear of the building. This is one more than the single carport currently allows.
- The proposal will reduce the GFA of this building from approximately 120sqm to 113sqm. This is a reduction of 7sqm.'.

28. Although there were various references throughout the town planning report to the fact that the revitalised Commercial Character Building 'will serve the future local needs of residents within the Wynnum-Manly area', no specific use was proposed:

> 'The proposal involves alterations to an existing Character Commercial Building. No use is proposed.'.[5]

29. The information response dated 12 June 2018 indicated that the repair and stabilisation of the existing building was so that 'it can, in future, be used as a shop, office or similar use'.

30. Under City Plan,[6] for premises affected by the Commercial character building overlay, which the subject site is, a code assessable development permit is required for material change of use for a Shop or Office use where it involves work that is more than just internal alterations or fit outs. A Food and drink outlet also requires a code assessable development permit.

31. The 7 August 2018 letter on behalf of the applicant reiterated that no change of use was proposed in respect of the existing building:

> 'The Commercial Character Building has recently been used as an Office. The proposal does not seek to introduce any other or new uses to the site; the applicant/owner wishes only to obtain approval for building work to repair and strengthen the building. Thus, Infrastructure Charges should not be applied to the floor area of this building.'.

Reasons for the Decision

32. For reasons which follow, the Tribunal finds that the infrastructure charges notice did not involve an error relating to the working out of extra demand. The Appellant seeks to have the previous use of the existing building as a dwelling attributed to the new Dwelling unit so that no charge is payable. However the new Dwelling unit is not replacing the existing building. After the material change of use, there will be two buildings instead of one on Lot 441. There will be extra demand.

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5 Town planning report Appendix A – Brisbane City Council Codes, page 26

6 Part 5.10 Categories of development and assessment—Overlays, Part Table 5.10.7—Commercial character building overlay

33. Specifically, the extra demand is the demand generated by the Dwelling unit material change of use less the demand generated by the highest previous use of the 7.69m^2 of GFA in the existing building which will be demolished (being a Shop use).

The Appellant's position on levied charges

34. Prior to the Council issuing of the infrastructure charges notice, the Appellant's town planning consultant wrote to the Council by letter dated 7 August 2018 about infrastructure charges and stated:

> 'Infrastructure Charges
>
> The Commercial Character Building has recently been used as an Office. The proposal does not seek to introduce any other or new uses to the site; the applicant/owner wishes only to obtain approval for building work to repair and strengthen the building. Thus, Infrastructure Charges should not be applied to the floor area of this building.
>
> The GFA of the Commercial Character Building is to be reduced from 120.83sqm to 113.14sqm. The proposal removes the laundry, bathroom and toilets (one internal and one external) from the rear of the building.
>
> The rear of the Commercial Character Building has, we believe, always contained a residence. A residence, with kitchen and bathroom, is still contained within the building. A detached Dwelling Unit is to be constructed at the rear of the Commercial Character Building and the residence removed from the Commercial Character Building. Given the presence of the residence at the rear of the Commercial Character Building, we ask Council to apply a credit towards Infrastructure Charges for the new dwelling so that it does not attract additional charges.'.

35. In short, the representations on behalf of the Appellant were that no infrastructure charges should be payable because:

    (a) No change of use is proposed to the existing building (referred to in the representations as the 'Commercial Character Building') and therefore no charge should be applied to the floor area of the existing building;

    (b) The new dwelling should be treated merely as the relocation of a residence which has been present within the existing building.

36. The Council's infrastructure charges notice did not levy a charge for the floor area of the existing building. The infrastructure charges notice did however levy a charge for the new Dwelling unit (less a credit for the 7.69m^2 shown on the approved plans as to be demolished).

37. Consistent with the representations made on behalf of the Appellant to the Council on 7 August 2018, the Appellant's grounds of appeal to the Tribunal maintained that there should be no charge for the new dwelling.

38. The Appellant in her written submissions to the Tribunal dated 20 March 2019 expressed her position as:

> 'I will simply be removing the residential component and its perceived 'demand' from the shop and relocating it to a separate dwelling at the rear of the block and re-establishing the combined business/residential use.'.

39. At the hearing, the Appellant explained her desire and efforts to repurpose the site for the benefit of her family and the community. The Appellant does not consider herself a developer and she expressed genuinely held concerns about whether the levied charges would be spent on infrastructure that would actually be used by the occupants of the subject site. The Appellant indicated that all along she has sought to understand why infrastructure charges are payable in these circumstances. The

Council representatives at the hearing, although not the authors of the Charges Resolution, capably explained the statutory context in which infrastructure charges are levied in Brisbane.

40. To her credit, the Appellant acknowledged in later written submissions of 20 March 2019 that she understood that the levying of charges is not based on actual extra load, but the calculation of a formula.

41. That formula, contained in the Charges Resolution, involves a number of parts and this simple development of a Dwelling unit illustrates the complexities of working out that calculation where only part of a lot is being redeveloped and where the balance of the lot has a long history of various uses.

Statutory context in which infrastructure charges are levied

42. Section 113(1) of the *Planning Act 2016* provides that a local government may by resolution (a 'charges resolution') adopt charges (each an 'adopted charge') for providing trunk infrastructure for development.

43. The Charges Resolution specifies defined uses and specifies a charge amount for those uses. The charge amount is based on a unit of measure (referred to in the Charges Resolution as a 'demand unit'). The Charges Resolution stipulates the following as demand units:

    (a) For residential uses, the number of dwellings of a certain number of bedrooms (1 or 2 bedrooms vs 3 or more bedrooms); and

    (b) For non-residential uses, the number of square metres of gross floor area and the number of square metres impervious to stormwater.

44. A charges resolution does not, of itself, levy an adopted charge.[7]

45. If a development approval has been given and an adopted charge applies to providing trunk infrastructure to the development, the local government must give an infrastructure charges notice to the applicant.[8]

46. The infrastructure charges notice levies a charge (a 'levied charge').[9]

47. The levied charge may be only for the extra demand placed on trunk infrastructure that the development will generate.[10]

48. Therefore critical to this statutory limitation of what a levied charge may only be for are two questions:

    (a) What is the development?

    (b) What is the extra demand that the development generates?

The development

49. Section 280 of the *Planning Act 2016* states that 'the development' means the development the subject of the development approval to which the infrastructure charges notice relates.

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7 *Planning Act 2016* s113(2)

8 *Planning Act 2016* s119(1) and (2)

9 *Planning Act 2016* s119(12)

10 *Planning Act 2016* s120(1)

50. In this case, the infrastructure charges notice identifies the development approval as being the material change of use development permit, which is for a Dwelling Unit use.

51. The Charges Resolution categorises a Dwelling unit as an 'Other use', subject to an assessment of the use and the demand placed upon the trunk infrastructure networks.[11]

52. It was explained to the Tribunal[12] that the Council considered that that the Dwelling Unit would have a similar impact on Council's trunk infrastructure networks as a 3+ bedroom Dwelling house given its capacity to accommodate a family that would have a similar daily vehicle generation rate and demand on the community purposes and stormwater network as a 3+ bedroom Dwelling house.

53. The adopted charge in the Charges Resolution for a 3 or more bedroom Dwelling house is $14,167.95.

The extra demand that the development will generate

54. Section 120(2) of the *Planning Act 2016* states that the demand generated by the following three things must not be included when working out the extra demand that the development will generate:

    (a) an existing use on the premises if the use is lawful and already taking place on the premises;

    (b) a previous use that is no longer taking place on the premises if the use was lawful at the time the use was carried out;

    (c) other development on the premises if the development may be lawfully carried out without the need for a further development permit.

55. The effect of section 120(2) is to recognise that premises being developed may already be generating, will have previously generated or is permitted without the need for further approval to generate, a certain level of demand on trunk infrastructure and it is only to the extent the development is changing that demand (specifically, increasing it) that charges are payable.

56. The phrase in section 120(2) that the three listed matters 'must not be included' when working out the extra demand is seemingly simplistic, but how that is practically done in the form of a calculation will depend on the context. Where the existing or previous use is being physically replaced by the development 'must not be included' must practically mean 'must be deducted' in the calculation. For example, if a dwelling is physically replacing a shop, deduct the demand of a shop from the demand of a dwelling. Where the existing use is physically remaining, such that it will continue to generate demand, 'must not be included' must practically mean 'must not be factored in' the calculation. For example, if a shop exists and a dwelling is being added, do not factor in the shop. It would be wrong to deduct the shop because the dwelling will be additional or 'extra' demand over and above the shop.

57. The alternative would be to read the references in section 120 to 'the development' and 'the premises' as both concerning the narrow unit of occupation that is being

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11 Section 11(3)

12 Email from the Council to the Tribunal dated 14 March 2019

developed, such that where there is a separate unit of occupation on the same lot which is remaining unchanged, that is treated as neither part of the development or the premises.[13]

58. Here, the Council treated the extra demand as the new 3 bedroom Dwelling unit less 7.69m^2 to be demolished from the existing building.

59. Although the existing building on Lot 441 has previously been used as a dwelling, a shop, a shop/dwelling and an office, the existing building is physically remaining after the material change of use. As conceded by the Appellant in her written submissions of 20 March 2019, 'I appreciate that there will now be two separate buildings rather than one and it was this that triggered the application'.

60. The development statistics shown on the Location plan that was before the original decision maker illustrate the significant increase in built form on Lot 441 that will follow the development:

    (a) Existing GFA of 120.83m^2. After the development it will be 113.14m^2 plus an additional 195.54m^2;

    (b) Existing site cover of 39.2%. After the development the combined site cover will be 71.2%.

61. The development application was explicit that no change of use was proposed in respect of the existing building.

62. Therefore, for the purpose of working out the extra demand under section 120, the existing building to the extent it is remaining and is not the subject of the change of use must not be factored in. The Council therefore has not made an error in failing to credit it wholly against the new Dwelling unit.

63. What the Council did deduct in working out the extra demand was a demand credit for 7.69m^2, which represents that part of the existing building being demolished. The Details of calculation attached to the infrastructure charges notice shows that the 7.69m^2 has been attributed a dollar value of $1,120.59. That was calculated by applying the demand unit for a Shop (m^2 GFA) to the applied adopted charge amount for a Shop ($145.72).

64. In attributing a dollar value to the demand generated by those uses which must not be included under section 120(2) of the *Planning Act 2016*, it is appropriate to do so using the same demand units and applied adopted charges by which the charge for the development itself is calculated. In other words, 'apples with apples'. As expressed by his Honour Judge Robertson in *Como Glasshouse Pty Ltd v Noosa Council* [2017] QPEC 75 at [25], 'The legislative scheme as promulgated and adopted by Council, uses increase in GFA to effectively calculate "additional demand", and does not in any way permit a form of "comparative demand analysis" …'.

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[13] The Charges Resolution seems to take such an approach for calculating demand credits (although not for development demand) by stating that demand credits will be allocated to 'the part of the premises' where, for example, the previous lawful use 'physically took place': section 16(4)(b)(iii). The *Planning Act 2016* does not expressly provide for a charges resolution to include a method for working out extra demand (in contrast, for example, to a method for working out the cost of infrastructure for offset or refund: *Planning Act 2016*, section 116). Largely, the demand credit provisions of the Charges Resolution appear to reflect section 120(2) of the *Planning Act 2016* and indeed an editor's note at the end of section 16(3) of the Charges Resolution directs a reader to section 120(2) of the *Planning Act 2016*. It is not within the scope of this Tribunal's jurisdiction to determine the validity of the demand credit provisions in the Charges Resolution.

65. The Council explained at the hearing that Shop rate was used in determining the amount to be deducted because it was the highest adopted charge rate of the previous uses. There was evidence before the original decision maker that the existing building was used as a dwelling and also as a combined shop/dwelling use (although there was no evidence of the exact GFA/bedroom split of that combined use). However, for either of those previous uses, because the residential adopted charge is not based on GFA,[14] the demolition of 7.69m^2 of itself would not produce a reduction in demand as far as the Charges Resolution is concerned. The previous Shop use therefore produces the highest demand for deducting it from the Dwelling unit demand.[15]

66. It remains for another day, when the existing building is the subject of a change of use, for the demand associated with it to be brought to account.

Michelle Pennicott
Development Tribunal Chairperson
Date: 23 May 2019

[14] Residential adopted charges are based on a demand unit of "1 or 2 bedroom dwelling" or "3 or more bedroom dwelling"

[15] Office is also a lower adopted charge rate ($105.22 per demand unit of m^2 of GFA) compared to Shop ($145.72 per demand unit of m^2 of GFA)

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

(a) an error or mistake in law on the part of the Tribunal; or
(b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.
http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court

Enquiries

All correspondence should be addressed to:

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