Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	**13-18**
Appellants:	Renae Jay Regeling and Andrew John Regeling
Local government:	Scenic Rim Regional Council
Site Address:	87-89 Old Coach Road Tamborine and described as Lot 206 on SP 230702 ─ the subject site

Appeal

Appeal under section 229 and Schedule 1, Table 1, section 4 of the *Planning Act 2016* against an infrastructure charges notice given by Scenic Rim Regional Council on the ground the notice involved an error relating to the application of the relevant adopted charge under the Scenic Rim Regional Council Adopted Infrastructure Charges Resolution (version no. 7) October 2017.

Date and time of hearing:	25 June 2018	
Place of hearing:	Scenic Rim Regional Council	
Tribunal:	Michelle Pennicott	Chair
	James McPherson	Member
Present:	Renae Jay Regeling	Appellant
	Andrew John Regeling	Appellant
	Geoffrey Mitchell	GMA Certification Group (for Appellants)
	Renee Gorman	GMA Certification Group (for Appellants)
	Thomas Eldridge	Stroud Homes (for Appellants)
	Trudi Margad	Stroud Homes (for Appellants)
	Scott Turner	Manager Planning, Scenic Rim Regional Council
	Shane Adamson	Adamson Town Planning (for Council)

Decision

The Development Tribunal, in accordance with section 254(2)(b) of the *Planning Act 2016*, changes the decision appealed against (the infrastructure charges notice dated 16 February 2018) in the following respects (as marked):

Current amount of infrastructure charge without deduction for offset/refund
**Total infrastructure charge without deduction for offset/refund: ~~$14,167~~ $NIL

The current total amount payable
Total infrastructure charge (with deduction for offset where applicable): ~~$14,167~~ $NIL

Details of Infrastructure Charge Calculation

Note: Total Infrastructure Charge = Proposed Demand – Credit for Existing use – Offset (if applicable).

Use	No of Units	Units of Measure	Charge Rate	Amount
Residential Dwelling	~~2~~ 1	3+ Bedroom	~~$28,334.00~~ $14,167.00	~~$28,334.00~~ $14,167.00

Credit for Existing Use

Use	No of Units	Units of Measure	Charge Rate	Amount
Residential Dwelling	1	3+ Bedroom	$14,167.00	$14,167.00

Background

1. On 8 February 2018, the Appellants received a development permit for building works for a Class 1a Dwelling, issued by GMA Certification Group.

2. On 16 February 2018, the Scenic Rim Regional Council ("*Council*") gave the Appellants an infrastructure charges notice. The infrastructure charges notice calculated the infrastructure charge based on a proposed demand of 2 Residential Dwellings of 3+ bedrooms.

3. The Appellants have appealed against the infrastructure charges notice on the ground the notice involved an error relating to the application of the relevant adopted charge under the Scenic Rim Regional Council Adopted Infrastructure Charges Resolution (version no. 7) October 2017. The Appellants contend the error is that the development involves only 1 dwelling, not 2 dwellings.

Material Considered

4. The material considered in arriving at this decision comprises:

   (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar 6 March 2018, including:

      (i) Infrastructure charges notice dated 16 February 2018; and

      (ii) GMA Certification Group decision notice dated 8 February 2018, including approved plans Job No. 17L206OL, Issue 3 01/02/18, Sheets 1 to 12 ("*Approved Plans*").

   (b) Written submissions on behalf of the Council from Shane Adamson of Adamson Town Planning dated 15 June 2018.

   (c) Written submissions from the Appellants dated 18 June 2018.

   (d) Oral submissions made at the hearing.

   (e) Site inspection on the day of the hearing.

   (f) *Planning Act 2016*.

   (g) *Planning Regulation 2017*.

   (h) Adopted Infrastructure Charges Resolution (version no. 7) October 2017.

   (i) Beaudesert Shire Planning Scheme 2007 amended 29 January 2016.

   (j) National Construction Code.

Findings of Fact

5. The building work which triggered the giving of the infrastructure charges notice involves the construction of one building.

6. At the time of the site inspection the building was still under construction but nearing completion, with fixtures, fittings and equipment in the process of being installed.

7. Within the building, there is a centrally located triple garage. There is a door leading from the garage to the northern part of the building ("*northern part*") and there is also a door leading from the garage to the southern part of the building ("*southern part*").

8. The Approved Plans show that the northern part will include:

   (a) an entry from the street;

   (b) 2 bedrooms (marked Bed 5 and Bed 6);

   (c) a living/dining area;

   (d) a kitchen;

   (e) a shower;

   (f) a toilet; and

   (g) two wash basins.

9. The Approved Plans show that the southern part will include:

   (a) an entry from the street;

   (b) 4 bedrooms (marked Master Bed, Bed 2, Bed 3 and Bed 4);

   (c) a family room, dining room, home theatre and child's retreat,

   (d) a kitchen;

   (e) a bath;

   (f) two showers (one being in the Master Bed ensuite);

   (g) two toilets (one being in the Master Bed ensuite); and

   (h) 3 wash basins (two being in the Master Bed ensuite).

10. The Approved Plans show a laundry (comprising a washtub, washing machine, dryer and cupboards) in the centrally located triple garage.

11. The Approved Plans do not show any facilities for washing clothes (whether a washing machine or a washtub) or space or connections for the installation of facilities for washing clothes in either the northern part or the southern part. The site inspection was consistent with this.

12. The Appellants said in oral submissions that they would not be putting facilities for washing clothes in either part.

13. Other features of the premises on completion of construction will be:

   (a) there will be one driveway leading to the central triple garage;

   (b) there will be one mailbox;

   (c) there will be one water meter;

   (d) there will be one electricity meter;

   (e) there will be an (unfenced) alfresco area adjoining each part's living area;

   (f) there will be a clothes line and a pool in the backyard (the pool will be fenced so as to be accessible from both parts); and

   (g) there is already a large shed on the rear boundary of the backyard.

14. The Appellants will reside in the southern part with their two children. Mr Regeling's parents will reside in the northern part.

15. The Appellants and Mr Regeling's parents already live together as an extended family at their current address.

16. As grandparents, Mr Regeling's parents assist with the children. The extended Regeling family engage in family life together including sharing of meals from time to time. These arrangements will continue when the Regelings move to the subject site. The kitchen and other facilities in the northern part enable Mr Regeling's parents to cater for themselves independently when it suits.

17. Both doors leading from the garage to each part are fitted with construction locks during the construction of the building. Those will be removed by the builder on completion and the Appellants have stated to the Tribunal that they do not intend to fit locks as they wish to enable free passage for the extended family between the two parts. Locks could however be readily installed.

Reasons for the Decision

Decision framework

18. This is an appeal commenced under section 229 and Schedule 1, Table 1, section 4 of the *Planning Act 2016* against the infrastructure charges notice on the ground the notice involved an error relating to the application of the relevant adopted charge.

19. The appeal is by way of a reconsideration of the evidence that was before the person who made the decision appealed against 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.*[1]

20. The Appellants must establish the appeal should be upheld.[2]

Power to levy adopted charges

21. The *Planning Act 2016* governs infrastructure charging in Queensland. Although not new to Queensland, infrastructure charging continues to be an area subject to change, particularly with the new Act and the consequential amendments required to be made to local government infrastructure plans and adopted infrastructure charges resolutions. For the Scenic Rim Regional Council, it is made no easier by it having three planning schemes in its local government area.

22. 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.

23. A charges resolution is not part of a planning scheme.[3]

24. Section 112 of the *Planning Act 2016* provides that a regulation may prescribe:
    (a) the maximum amount (the "*prescribed amount*") for each adopted charge; and
    (b) the development for which there may be an adopted charge.

25. Section 114 of the *Planning Act 2016* provides that an adopted charge may be made for development if the charge is:
    (a) prescribed by regulation for the development; and
    (b) no more than the maximum adopted charge[4] for providing trunk infrastructure for the development.

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1 *Planning Act 2016* s253(4) and (5)

2 *Planning Act 2016* s253(2)

3 *Planning Act 2016* s118

4 The maximum adopted charge for trunk infrastructure for the 2017-2018 financial year is the prescribed amount in the *Planning Regulation 2017* for an adopted charge for the infrastructure: *Planning Act 2016* s112. For future financial years, section 112 provides an increase formula.

26. Therefore, although adopted charges are resolved by the local government, the charges resolution is constrained by what the State prescribes in a regulation.

Maximum amount of an adopted charge

27. Section 52 of the *Planning Regulation 2017* provides that, for section 112(1) of the *Planning Act 2016*, schedule 16, column 2 states the prescribed amount for each adopted charge for providing trunk infrastructure for the use stated in schedule 16, column 1.
28. Relevantly, Schedule 16 states the following under the heading "*Residential uses*":

Table 1—Prescribed amount	
Column 1	**Column 2**
Use	**Prescribed amount**
Residential uses	
1 Dwelling house 2 Dual occupancy 3 Caretaker's accommodation 4 Multiple dwelling	1 $20,494.45 for each dwelling with 2 or less bedrooms 2 $28,692.25 for each dwelling with 3 or more bedrooms

29. It can be seen that for all four residential uses, the prescribed amount is on a **dwelling** basis.

30. The dictionary in Schedule 24 of the *Planning Regulation 2017* defines particular words used in the *Planning Regulation 2017*.[5]

31. The four use terms are all defined in Schedule 24, as is the word "*dwelling*". Dealing first with the four use terms, they are defined as follows:

Dwelling house	***dwelling house*** means a residential use of premises involving— (a) 1 dwelling for a single household and any domestic outbuildings associated with the dwelling; or (b) 1 dwelling for a single household, a secondary dwelling and any domestic outbuildings associated with either dwelling.
Caretaker's accommodation	***caretaker's accommodation*** means the use of premises for a dwelling for a caretaker of a non-residential use on the same premises.
Multiple dwelling	***multiple dwelling*** means a residential use of premises involving 3 or more dwellings, whether attached or detached, for separate households.
Dual occupancy	***dual occupancy***— (a) means a residential use of premises for 2 households involving— (i) 2 dwellings (whether attached or detached) on a single lot or 2 dwellings (whether attached or detached) on separate lots that share a common property; and (ii) any domestic outbuilding associated with the dwellings; but (b) does not include a residential use of premises that involves a secondary dwelling.

5 *Planning Regulation 2017* s3

32. It can be seen (underlining our emphasis) that all four uses apply where there is a **dwelling** and that the number of **dwellings** informs which of the four uses applies in a particular case.

33. Specifically in relation to Dwelling house, it can be seen that the use can involve, not only 1 dwelling for a single household, but also a secondary dwelling. "*Secondary dwelling*" is defined in Schedule 24 of the *Planning Regulation 2017* as:

Secondary dwelling	***Secondary dwelling*** means a dwelling, whether attached or detached, that is used in conjunction with, and subordinate to, a dwelling house on the same lot.

34. Therefore, a Secondary dwelling is also a "*dwelling*". Therefore, a Dwelling house use can involve two dwellings. However, if it does, the secondary dwelling must be used in conjunction with, and subordinate to, the dwelling house on the same lot.

35. In contrast, a Dual occupancy use involves two dwellings but neither needs to be used in conjunction with, and subordinate to, the other dwelling.

36. As the Appellants' written submissions mention, the Planning and Environment Court has recently considered, in *Katherine Lalis v Bundaberg Regional* Council [2018] QPEC 26, the meaning of the phrase "*used in conjunction with, and subordinate to*" which distinguishes the two uses.

37. However, for the purpose of Schedule 16 of the *Planning Regulation 2017*, if there are two dwellings there is no difference in the prescribed amount if one the dwellings is, or is not, used in conjunction with, and subordinate to, the other dwelling. For both a Dwelling house involving a secondary dwelling and a Dual occupancy, the charge will be for two dwellings and the amount simply turns on how many bedrooms are in each dwelling. In contrast, for a Dwelling house that has only one dwelling, the charge will be for one dwelling only.

38. The *Planning Regulation 2017* definition of "*dwelling*" is therefore of central importance:

dwelling	***dwelling*** means all or part of a building that— (a) is used, or capable of being used, as a self-contained residence; and (b) contains— (i) food preparation facilities; and (ii) a bath or shower; and (iii) a toilet; and (iv) a wash basin; and (v) facilities for washing clothes.

39. In Victoria, the definition of the use term "*dwelling*" in Clause 74 of the planning schemes that apply across all of Victoria, is similar but not identical to Queensland's:

> "A building used as a self-contained residence which must include:
> a) a kitchen sink;
> b) food preparation facilities;
> c) a bath or shower; and
> d) a closet pan and wash basin.
>
> It includes out-buildings and works normal to a dwelling."

40. The material differences are that in the Queensland definition:

    (a) it is explicit that a dwelling can be **part** of a building only;

    (b) it is a dwelling if it is **capable of being used** as a self-contained residence; even if not actually so used; and

    (c) there are **five facilities** required to be contained in the dwelling - the additional item being facilities for washing clothes, which is not required in the Victorian definition.

41. Many decisions in Victoria have grappled with the definition and in particular the difficulty with the definition including elements of both use and facilities. Those decisions are not binding on this Tribunal but are nevertheless insightful in understanding the possible permutations, particularly given it is essentially untested in Queensland (despite the former Queensland Planning Provisions having contained a similar definition[6]).

42. The *Planning Regulation 2017* definition of "*dwelling*" has two limbs:

    (a) it must be used, or capable of being used, as a self-contained residence; and

    (b) it must contain the five listed facilities.

43. Both limbs must be satisfied. Therefore:

    (a) The five listed facilities must **all** be present. The absence of any one removes it from being a dwelling. The approach taken in Victoria to its four listed facilities, illustrated in the cases extracted below, is apt to Queensland except in Queensland there needs to be the five listed facilities, the fifth being facilities for washing clothes:

        - *Intex Pty Ltd v Yarra CC & Anor* [2002] VCAT 472 at [44]:

          "The Scheme definition makes reference to a caretaker's house as "a dwelling". Caretaker's house is nested within the definition of "dwelling" at Clause 74. That may well assume that it is self-contained, if relying on the definition of "dwelling" at Clause 74: A building used as a self-contained residence which must include:

            - a kitchen sink;
            - food preparation facilities;
            - a bath or shower; and
            - a closet pan and wash basin.

          It includes out-buildings and works normal to a dwelling.

          The definition does not specify laundry facilities.
          Based on the evidence, the proposal before me involves caretaker's houses that are not fully self-contained as the bathroom must be accessed from outside the dwelling and shared with any other occupants of each Shell".

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6 The former Queensland Planning Provisions definition was:

"A building or part of a building used or capable of being used as a self-contained residence that must include the following:
(a) food preparation facilities
(b) a bath or shower
(c) a toilet and wash basin
(d) clothes washing facilities.
This term includes outbuildings, structures and works normally associated with a dwelling."

- *Van Oeveren v Yarra CC* [2015] VCAT 1593 at [37], citing *Anderson v Yarra CC* [2007] VCAT 1537:

  "While the building as a whole includes the elements of a dwelling as set out in the scheme, being a kitchen sink, food preparation facilities, a bath or shower and a closet pan and wash basin, all of these, except the bedroom, appear to be shared with employees of the hairdressing salon. In *Anderson v Yarra CC*, the Tribunal found that a caretakers dwelling must have exclusive use of these facilities."

- *Alderock Investments Pty Ltd v Mornington Peninsula SC* [2006] VCAT 1818 at [20]:

  "First, if one concentrates on the definition of "Dwelling" from Clause 74 of the Planning Scheme, both the former garage and the balance of the building each satisfy the four required elements of a "dwelling". In other words, if you look at each of the former garage and the balance of the building separately, in each case there is a toilet, shower, a kitchen sink and a food preparation area. In particular, the former garage area goes well beyond a "kitchenette" in featuring a significant kitchen bench area and a stove and oven (there is also a separate bedroom). <u>It is unimportant for our purposes here that there is a shared use of the single laundry in the building, since the definition of "Dwelling" makes no reference to "laundry"</u>."

The last sentence above (underlining our emphasis) highlights the critical point of difference in Queensland. Although unimportant in Victoria, it **is** important in Queensland if there is a shared use of a single laundry since the Queensland definition of "*dwelling*" does make reference to facilities for washing clothes.

It is also to be noted that there is no restriction in the definition on there being 2 or more of each facility for example, 2 toilets, 2 food preparation areas, etc; but there must be at least one of each of the listed facilities.[7]

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[7] See for example *Bass Coast SC v Schill* [2009] VCAT 2119 at [32]:

"…i. the presence of multiple bathrooms and toilets on each level certainly does not make it multiple dwellings because that is a common convenience nowadays;

ii. the presence of independent entries/exits does not make it multiple dwellings (see *Biasin* [10]);

iii. the presence of more than one kitchen does not necessarily make it more than one dwelling (see *Biasin* [11] and my *Rod Butterss* [12] case…."

and the footnotes cited in the above paragraphs:

"[10] Biasin v Mornington Peninsula SC [2004] VCAT 1149 per Rickards M (as she then was)
[11] ibid
[12] Chernov v Bayside CC [2004] VCAT 1525 (3 August 2004). Rod Butterss owned a mansion along Brighton's Golden Mile with at least two kitchens, one for daily use and one for entertaining with indoor barbecue broiling facilities. It could not be taken for multiple dwellings but rather one magnificent dwelling."

(b) Even if the five listed facilities are all present, if the building or part is not used or capable of being used as a "*self-contained residence*", that will also remove it from being a dwelling. The building or part may fail on this requirement in two respects:

(i) Where the building or part is not used as a **residence** or capable of being used as a **residence**, within the ordinary meaning of that term (dwell, abode, habitation). Therefore, premises may have all five listed facilities, but not be used or capable of being used as an abode or for habitation. An example might be a commercial use such as a hairdressing salon.

(ii) Where the building or part is not **self-contained** or capable of being **self-contained**. This reinforces the requirement that the five facilities must be "*contained*" in the part of the building which is being questioned as a potential dwelling, as highlighted in the cases extracted above. The dictionary definition of "*self-contained*" makes clear that the part in question must contain in itself all five facilities without the need for sharing. The relevant portions of the dictionary definitions are as follows:

> Macquarie Dictionary (online ed, at 13 August 2018):
>
> "1. Containing in oneself or itself all that is necessary; independent.
>
> 2. (of a flat or house) having its own kitchen, bathroom, and lavatory; not necessitating sharing."
>
> Oxford English Dictionary (online ed, at 13 August 2018):
>
> "1. a. *gen*. Independent of external factors or relations; having all that is needed in itself; complete in itself.
>
> 2. *Brit*. (orig. Sc.). Of living accommodation: having no rooms shared with another household or set of occupants, and usually having a private entrance."

44. Putting this analysis of the definition of "*dwelling*" back together with Schedule 16 of the *Planning Regulation 2017*, it means:

(a) each building or part that is used or capable of being used as a self-contained residence and contains the five listed facilities is a **dwelling**; and

(b) for each dwelling in a Dwelling house, Dual occupancy, Caretaker's accommodation or Multiple dwelling use, the maximum amount that can be charged for the use is the prescribed amount **per dwelling** in Schedule 16 of the *Planning Regulation 2017*.

<u>Development for which there may be an adopted charge</u>

45. Section 52(3)(a) of the *Planning Regulation 2017* provides that, for section 112(3)(b) of the *Planning Act 2016*, if development:

(a) is a material change of use, reconfiguring a lot or building work; and

(b) is for a use stated in Schedule 16, Column 1,

a local government may have an adopted charge for trunk infrastructure for the development.

Scenic Rim Regional Council Adopted Infrastructure Charges Resolution

46. The version of the Council's charges resolution at the time the building work development permit was issued was the *Scenic Rim Regional Council Adopted Infrastructure Charges Resolution (version no. 7) October 2017* ("*Charges Resolution*"), as referenced in the infrastructure charges notice.

47. The first sentence in the Charges Resolution states that it is made under section 113 of the *Planning Act*.

48. Section 5 of the Charges Resolution states that the Council resolves to adopt the charges mentioned in Table 2, Column 3, for development for a use mentioned in Table 2, Column 2.

49. Appreciating the limitation in section 52(3)(a) of the *Planning Regulation 2017* that there can only be an adopted charge for development for *a* **use stated in Schedule 16, column 1**, the Charges Resolution in Table 2 sensibly uses the same use terms as those stated in Schedule 16.

Table 2 – Adopted charges schedule

Column 1 Use category	Column 2 Use	Column 3 (A) Charge category	Column 3 (B) Charge	Column 3 (C) Stormwater charge	Column 4 Part of local government area (LGA) to which charge applies	Column 5 Charges Breakup
Residential	Dwelling house Caretaker's accommodation	$ per 1 or 2 bedrooms dwelling	$10,119	N/A	Across LGA	50.00%
	Multiple dwelling Dual occupancy	$ per 3 or more bedrooms dwelling	$14,167	N/A	Across LGA	50.00%

50. The relevant portion of Table 2 is as follows:

51. It can be seen that in conformity with Schedule 16 of the *Planning Regulation 2017*:

    (a) the four Residential uses listed in Column 2 are Dwelling house, Caretaker's accommodation, Multiple dwelling and Dual occupancy;

    (b) the charge amount is based on the number of **dwellings** (and bedrooms in each); and

    (c) the charge amount does not exceed the maximum prescribed amount in Schedule 16 (in Schedule 16 it is $20,239.90 for a 1 or 2 bedroom dwelling or $28,335.90 for a 3 or more bedroom dwelling).

Meaning of the terms used in Table 2 of the Charges Resolution

52. Section 12 (Dictionary) of the Charges Resolution further supports the Charges Resolution observing the charging limitations of Schedule 16 of the *Planning Regulation 2017* by stating that words and terms used in the Charges Resolution have the meaning given in the *Planning Act 2016* or the *Planning Regulation 2017:*

> "Words and terms used in this resolution have the meaning given in the *Planning Act 2016* or the *Planning Regulation 2017*.
>
> If a word or term used in this resolution is not defined in *Planning Act 2016 or the Planning Regulation 2017*, it has the meaning given in this section."

53. In support of their contention that there is only one dwelling, the Appellants submit that the building has only been approved as a Class 1a Dwelling by the building work development permit and it is the National Construction Code requirements for a Class 1 building that should inform the determination of how many dwellings there are. The Appellants draw attention to section 3.8.3.2 of the National Construction Code which states as follows:

> "3.8.3.2 Required facilities
>
> (a) A Class 1 building must be provided with—
>
> (i) a kitchen sink and facilities for the preparation and cooking of food; and
>
> (ii) a bath or shower; and
>
> (iii) clothes washing facilities, comprising at least one washtub and space in the same room for a washing machine; and
>
> (iv) a closet pan; and
>
> (v) a washbasin.
>
> (b) If any of the facilities in (a) are detached from the main building, they must be set aside for the exclusive use of the occupants of the building."

54. The Council on the other hand contends that there are two dwellings because "*dwelling*" in Table 2 of the Charges Resolution should take the meaning it has in the planning scheme.

55. What is the role of the planning scheme for Table 2 of the Charges Resolution?

56. As observed at paragraph 23 above, a charges resolution is not part of the planning scheme.

57. The Council presently has three planning schemes for its local government area. Those planning schemes were not made under the *Planning Act 2016* and therefore do not reflect use terms and definitions in the *Planning Act 2016*.

58. Section 4 of the Charges Resolution ("*Comparison of planning scheme use categories and adopted charges schedule use categories*"), states:

> "Table 1 provides a guide to the uses under the planning schemes that correlate to the uses mentioned in column 2 of the adopted charges schedule in section 5 of this resolution."

59. The relevant part of Table 1 of the Charges Resolution states:

Table 1 - Planning scheme use categories and adopted charges schedule use categories

Current planning scheme use categories			Adopted charges schedule use categories
Beaudesert Shire Planning Scheme 2007	**Boonah Shire Planning Scheme 2006**	**Ipswich Council Planning Scheme 2006**	
Residential uses			
House; Dual Occupancy; Caretakers Residence; Managers/Workers House; Medium Density Residential	House; Relatives' Accommodation; Caretakers Residence; Multiple Dwelling	Single Residential; Display Housing; Dual Occupancy; Caretaker Residential; Multiple Residential	Dwelling house Dual occupancy Caretaker's accommodation Multiple dwelling

60. The Beaudesert Shire Planning Scheme 2007 ("*2007 Planning Scheme*") is the applicable planning scheme for the subject site.

61. It can be seen that, as a guide, House, Dual Occupancy, Caretakers Residence, Managers/Workers House and Medium Density Residential uses under the 2007 Planning Scheme correlate to the Table 2, Column 2 uses of Dwelling house, Dual occupancy, Caretaker's accommodation and Multiple dwelling.

62. The Council contends that under the 2007 Planning Scheme the applicable use is Dual Occupancy and therefore for the purpose of Table 2 of the Charges Resolution there are two dwellings.

63. The definitions of "*House*" and "*Dual Occupancy*" in the 2007 Planning Scheme are as follows:

> "***House*** means a dwelling unit, used for residential purposes, including the use of the premises for either long or short term accommodation. "
>
> "***Dual Occupancy*** means premises containing two dwellings on one lot (whether or not attached) where the use is primarily residential.
>
> Note: The term does not include House or Medium Density Residential Development as defined herein."

64. The terms "*dwelling unit*" and "*dwelling*" as they appear in the use definitions are defined as follows:

> "***Dwelling or Dwelling Unit*** means a self contained unit intended for the residential use of 1 family."

65. "*Self contained*" is not defined in the 2007 Planning Scheme. The 2007 Planning Scheme (section 1.4.4) states that undefined terms take their meaning from the Macquarie Dictionary current the commencement date, which was 30 March 2007[8].

66. In the Macquarie Dictionary (4th ed, 2005), the relevant parts of the definition of "*self-contained*" was as follows:

> "1. Containing in oneself or itself all that is necessary; independent.
>
> 2. (of a flat or house) having its own kitchen, bathroom, and lavatory; not necessitating sharing."

67. The Council contends that as there are two units which each contain in itself a kitchen, bathroom and lavatory, there are two dwellings and the use is that of Dual Occupancy under the 2007 Planning Scheme and therefore for the purpose of Table 2, Column 2 of the Charges Resolution, there are two dwellings.

68. The difficulty with the Council's contention is that it requires giving Table 1 of the Charges Resolution a role greater than that stated in section 4 of the Charges Resolution. As indicated at paragraph 58 above, section 4 of the Charges Resolution states that the role of Table 1 is to provide a **guide** to the uses under the three planning schemes that correlate to the uses mentioned in Table 2, Column 2.

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[8] 2007 Planning Scheme, s1.1.2, footnote 1

To read in definitions from the 2007 Planning Scheme in applying Table 2 would also:

(a) ignore the clear words of section 12 of the Charges Resolution which state that words and terms used in the Charges Resolution have the meaning given in the *Planning Act 2016* or the *Planning Regulation 2017*; and

(b) run the risk of not observing the legislative limitation that:

(i) a local government may only have an adopted charge for *a* **use stated in Schedule 16** of the *Planning Regulation 2017* and therefore by definition it must be a **use stated in Schedule 16** of the *Planning Regulation 2017* (and those uses have the meaning in Schedule 24 of the *Planning Regulation 2017*); and

(ii) an adopted charge may be no more than the prescribed amount in Schedule 16 (and for the residential uses in Schedule 16, the prescribed amount is on a **dwelling** basis, with the term "*dwelling*" having the meaning in Schedule 24 of the *Planning Regulation 2017*).

69. We therefore also do not accept the Appellants' contention that because the development approval which triggered the infrastructure charges notice was for building work, the National Construction Code provisions inform the number of dwellings that are the subject of the levied charge.

70. In accordance with section 12 of the Charges Resolution, because "*dwelling*" is defined in the *Planning Regulation 2017*, a reference to "*dwelling*" in the Charges Resolution has the meaning given in the *Planning Regulation 2017.*

71. Therefore, the correct calculation of the adopted charge will depend on the number of "*dwellings*" within the meaning of the *Planning Regulation 2017*.

How many dwellings are there?

72. As outlined above at paragraphs 38 to 43, the definition of "*dwelling*" in the *Planning Regulation 2017* has two limbs:

(a) it must be used or capable of being used as a self-contained residence; and

(b) it must contain the five listed facilities, the fifth being "*facilities for washing clothes*".

73. For limb (a), both the northern part and southern part are each clearly capable of being used as a residence (dwell, abode, habitation). Will they also be used or capable of being used as self-contained residences and for limb (b) will they each contain within itself the five facilities? These are questions of fact to be determined from the evidence.

74. Although the Appellants have indicated that the doors leading into each part from the garage will not have a lock (after the construction lock is removed) we consider that each part is "*capable*" of being a self-contained part.

75. As stated in the findings of fact in paragraphs 8 and 0, both the northern part and southern part each contain the first four facilities within itself. However, what neither part will contain within itself are facilities for washing clothes. As stated in the

findings of fact in paragraphs 10 and 11, the Approved Plans show a laundry (comprising a washtub, washing machine, dryer and cupboards) in the centrally located triple garage. The garage however is a shared area. The Approved Plans do not show in either the northern part or southern part any facilities for washing clothes (whether a washing machine or a washtub) or space or fittings for the installation of facilities for washing clothes. The site inspection confirmed that.

76. We therefore find that there are not two parts to the building that will each be used or are capable of being used as a self-contained residence, containing within each part all of the **five necessary facilities**. Rather, it is only the building as a whole that will constitute a self-contained residence containing all of the five necessary facilities. There is therefore only one "*dwelling*" within the defined meaning of that term in the *Planning Regulation 2017* and therefore only one "*dwelling*" for Table 2, Column 3 of the Charges Resolution.

77. For completeness, having regard to the facts set out in paragraphs 13 to 16 above, we are satisfied that the dwelling will be used by the Appellants and grandparents as a single household[9] so as to be a Dwelling house use within the meaning of the *Planning Regulation 2017* and therefore constitute, for the Charges Resolution, a Column 2 Residential use that attracts the Column 3 charge.[10]

Calculation of the levied charge

78. There is no dispute between the parties that there are more than 3 bedrooms in the building, therefore the Table 2, Column 3 charge for the one dwelling is $14,167.

79. There is also no dispute between the parties that the existing use credit is correctly stated in the infrastructure charges notice, namely $14,167.

80. Therefore, after deducting the existing use credit ($14,167) from the Table 2, Column 3 charge for the 3 or more bedrooms dwelling ($14,167),[11] the levied charge is nil.

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9 "*Household*" is defined in the *Planning Regulation 2017* as "*1 or more individuals who—*
(a) live in a dwelling with the intent of living together on a long-term basis; and
(b) make common provision for food and other essentials for living."

10 There may well be a lacuna in the use definitions in the *Planning Regulation 2017* where two parts to a building each contain all facilities except for facilities for washing clothes and therefore there is only one dwelling, but the residents are not a single household (eg. because they do not make common provision for food or other essentials for living). Seemingly, that leaves the use as an undefined use in the *Planning Regulation 2017*. It would not be a Rooming accommodation use because the residents would occupy a self-contained unit as defined under the *Residential Tenancies and Rooming Accommodation Act 2008*. Fortunately, for infrastructure charging purposes, the Charges Resolution (consistent with Schedule 16 of the *Planning Regulation 2017*) provides for uses not listed, including a use that is unknown. In that event the maximum adopted charge is the charge in column 3(A) and 3(B) for a use category in column 2 that appropriately reflects the use at the time of assessment and the local government decides to apply the use. For completeness, if that were to be the case here we would, in the shoes of the local government, still decide to apply the Residential use category for a Dwelling house use and the maximum charge of $14,167.

11 This reflects that a charge may be only be for extra demand placed on trunk infrastructure that the development will generate: s120 *Planning Act 2016*

81. It goes without saying that if further development were to be carried out which changes the number of dwellings, additional charges might be levied. This decision also has no bearing on the issue alluded to in the Council's written submissions as to whether the use complies with the 2007 Planning Scheme's requirements. As Mr Adamson correctly observed, that is not a relevant issue in the appeal and is a matter for further consideration by the Council.

Michelle Pennicott
Development Tribunal Chairperson
Date: 21 August 2018

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.

Enquiries

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