



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Declaration number:	54-10
Applicant:	AAD Design Pty Ltd
Assessment manager:	Brisbane City Council (Council)
Concurrence agency: (if applicable)	N/A
Site Address:	178 Cornwall Street, Greenslopes and described as Lot 3 on RP 12083 — the subject site

Declaration

Application for a declaration under section 510 of the *Sustainable Planning Act 2009* (SPA) about whether a development application for a house for occupation by more than 5 unrelated persons was properly made.

Date of hearing:	9:00am on Tuesday 24 August 2010
Place of hearing:	Level 5, 63 George St, Brisbane
Committee:	Ms Kari Stephens – Chairperson Mr Robert Quirk - General Referee Mr Greg Rust - General Referee
Present:	Mr Marc Joyce – Applicant representative Mr Murray Ploetz – Applicant representative/owner Mr Steve Adams – Council representative Ms Helena Lulham – Council representative Mr Elliot Thornton – Council representative

Decision

- [1] The Committee declines to make the declaration sought that the development application was a properly made application.

Background

- [2] The site is located at 178 Cornwall Street, Greenslopes and is improved with a detached residential dwelling. The site is located in the "character residential" zone, and has a site area of 440m². The premises contains nine bedrooms. Despite its size, the premises maintains the appearance of a house.
- [3] The Applicant, AAD Design Pty Ltd (AAD) made a development application for a development permit for a material change of use "house (non-complying)". It was received by Council on 28 June 2010. The

development application was made under the provisions of the Council's City Plan (planning scheme). The proposed use is intended to accommodate up to 11 unrelated persons for the purpose of student accommodation.

- [4] It is proposed that each of the students will rent a bedroom from the owner, Mr Ploetz, under a separate arrangement with him. Some student couples may share a bedroom. Each student, or couple, will have available to him, her or them, their own food storage areas in the cupboard and fridge(s), although, they share the common facilities. The accommodation is offered on the basis of a minimum tenancy of six months. There will be up to 11 students living on the premises at any one time.
- [5] The furniture and white goods in the common areas are provided by the owner. He pays for the electricity. The rent charged is an all up fee, inclusive of electricity. The owner has arrangements for a cleaner to clean the common areas once per week. He supplies the toilet paper and cleaning products for the premises.
- [6] The rental is \$150-160 per week per bedroom for one student. The rental is \$220-240 per week per bedroom where the room is shared by a couple. Rent is paid on a weekly basis.
- [7] The development application was accompanied by:
 - (a) the approved IDAS forms;
 - (b) the mandatory supporting information;
 - (c) the fee for administering the application for the use asserted in the development application in the amount of \$1,200.00; and
 - (d) the consent of the owner of the land the subject of the application.
- [8] It is common ground between AAD and the Council that:
 - (a) if the use is a "house", \$1,200.00 is the fee required by s 260(1)(d) of the SPA;
 - (b) if the use is not a "house" but a "multi-unit dwelling" or undefined use, AAD did not provide the fee fixed by the Council as required by s 260(1)(d) of the SPA, and the amount provided was insufficient;
 - (c) that the relevant IDAS forms were completed and accompanied the development application; and
 - (d) that the consent of the land owner was provided.
- [9] During the hearing the Council conceded that if the number of students residing in the premises was five, or less, then the use would be a self-assessable "house" under the planning scheme.

Discussion

- [10] The development application was made after the commencement of the SPA. The SPA, therefore, governs the Committee's assessment of the application for a declaration before it.
- [11] The Council gave a notice under s266 of the SPA that the development application was not properly made. The notice stated that the use was "multi-unit dwelling (boarding house – 9 units)" and that the fee required was \$16,100.00. The Committee has been asked to make a declaration that the development application was properly made.
- [12] A determination on whether a development application is properly made can only be decided after an assessment of s261(a) and s260(1) of the SPA, which includes the items in paragraph [7].
- [13] If the proposed use was actually for a house, then the development application would have been properly

made. Central to the issue before us, therefore, is the issue of whether the proposed use is properly characterized as a “house” or “multi-unit dwelling”. This is because if the proposed use is a “multi-unit dwelling” then AAD did not provide the prescribed fee.

Construction of planning schemes

[14] The general principles relating to the construction of planning schemes were summarized by Britton SC DCJ in *Westfield Management Ltd v Pine Rivers Shire Council & The Warehouse Group (Australia) Pty Ltd*; they are:¹

- “(a) They should be construed broadly rather than pedantically or narrowly and with a sensible, practical approach;
- (b) they should be construed as a whole;
- (c) they should be construed in a way which best achieves their apparent purpose and objects;
- (d) in the light of the proscription against prohibiting development contained in IPA (s6.1.2(3));
- (e) statements of Intent or Aims or Objectives are intended to provide guidance for the task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular use should be rejected as inappropriate;
- (f) a Strategic Plan sets out broad desired objectives and not every objective needs to be met before a proposal can be approved;
- (g) a Strategic Plan should be read broadly and not pedantically;
- (h) although planning documents have the force of law they are not drawn with the precision of an Act of Parliament;
- (i) a conflict alone may not have the effect of ruling out a particular proposal; and,
- (j) implementation objectives must be read sensibly and in context. They are but a function of the principle objective. The purpose of the objective is better understood by reading all of the implementation objectives and understanding the strategy that is inherent.” (citations omitted)

The Respondent’s Planning Scheme

[15] The Council’s Planning Scheme includes the following definitions:²

*“House: a **use** of premises principally for 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*

...

*Multi-unit dwelling: a **use** of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form. Multi-unit dwellings may be contained on one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi-unit dwelling include boarding house, retirement village, nursing home, orphanage or children’s home, aged care accommodation, residential development for people with special needs, hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi-unit dwelling does not include a house or single unit dwelling as defined elsewhere” (emphasis ours)*

¹ [2004] QPELR 337, [18]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382

² Planning Scheme, chapter 3 Definitions.

- [16] The focus of the above definitions is “use” not on the “premises”. “Premises” is defined in the SPA.³
- [17] The use “multi–unit dwelling” is stated to be independent of the building form used. In the definition of “house” the use is said to be “principally for residential occupation” by a “domestic group or individuals”. In the definition of “multi–unit dwelling” the corresponding language used is “principal place of longer term residence” by “several discrete households, domestic groups or individuals”. Whilst the definition of “house” does not refer to “household(s)” it appears that one of the key distinguishing features is that a multi-unit dwelling will involve “several discrete” households, domestic groups or individuals.⁴ The planning scheme does not define “household”, “domestic groups” or “individuals”.
- [18] The Macquarie Dictionary defines household as “the people of a house collectively; in previous times, a family, including servants.”⁵ The phrase “domestic group” appears to refer to those persons living together, who have some close personal relationship, whether or not it is formalised, in the manner of a household.⁶
- [19] The regime on the premises the subject of the development application, appears to be more aptly described as discrete domestic groups or individuals rather than a domestic group or individuals. Whilst there are some aspects of the arrangements that suggest that they do not involve “several discrete households, domestic groups or individuals”, such as some sharing of cooking and groceries, on balance, we disagree with AAD’s submission that the arrangements are not discrete. The reference to individuals in the definition of “house” appears to address the situation where individuals may have a tenancy for a dwelling together.
- [20] AAD also made the submission that because no daily meals are provided, that the proposal is not a boarding house. However, that doesn’t mean that the use is not a “multi-unit dwelling”. “[B]oarding house” is just an example used in the definition, and that which was nominated by Council in its notice.
- [21] The House Code, in performance criteria (PC)8 and acceptable solution (AS)8, also provides some indication that the definition of “house” does not apply in this case.⁷ The code is for assessing a material change of use and/or building work for a “house”.⁸ The difficulty, therefore, with referring to the matters in PC8 and AS8 is that you actually have to determine that the use is a “house” before you can apply the code. However, as the planning scheme is to be construed as a whole, consideration should be given to those provisions.⁹
- [22] Whilst the phraseology is a little different to that used in the definition of “house”, when regard is had to AS8, the use is not for “domestic residential purposes” as required by PC8, because the use is for more than 5 persons. This performance criteria confirms Council’s intention with respect to what the use of “house” was intended to be.¹⁰
- [23] The same conclusion is reached if the “best fit” approach is adopted because of the discrete nature of the students’ occupation¹¹

³ SPA, sch. 3 “**premises** means— (a) a building or other structure; or (b) land, whether or not a building or other structure is situated on the land.”

⁴ See *Bhat v Brisbane City Council* [2003] QPELR 109, [33].

⁵ Macquarie Dictionary, macquariedictionary.com.au noun “household”.

⁶ Macquarie Dictionary, macquariedictionary.com.au “domestic – *adjective* 1. of or relating to the home, the household, or household affairs;” “*noun* group – 1. any assemblage of persons or things; cluster; aggregation. 2. a number of persons or things ranged or considered together as being related in some way.”. See also *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145, 149; *Beaudesert Shire Council v Smith* [1998] QPELR 368; *Beaudesert Shire Council Town Planning Scheme 1985* “domestic group – One or more persons (not necessarily related by blood, marriage or adoption) who occupy a dwelling unit as a single functional household.”

⁷ Planning Scheme, House Code, [4].

⁸ Planning Scheme, House Code, [1].

⁹ *Westfield Management Ltd v Pine Rivers Shire Council & The Warehouse Group (Australia) Pty Ltd* [2004] QPELR 337, [18]; *Sunshine Coast Regional Council v Ebis Enterprises Pty Ltd* [2010] QPEC 52, [14].

¹⁰ Planning Scheme, House Code, [4], PC8.

¹¹ *Livingstone Shire Council v Hooper* [2004] QPELR 308, 314, 315; *Yu & Leung v Brisbane City Council* [2006] QPELR 102, [16]

- [24] The use of student accommodation is also of the same type, *ejusdem generis*, as at least some of the examples given in the definition of “multi-unit dwelling”. Those examples being “boarding house”, “community dwelling” and “hostel”.¹² None of these examples are defined in the planning scheme.
- [25] AAD’s argument that if the number of students was reduced to five then the use would be a house, is not the use proposed in the development application. What must be characterised is the proposed use, not any potential use.¹³ The proposed use is for 11 students.
- [26] The use is not “short term accommodation”.¹⁴
- [27] The Committee does not consider that the other legislation, or the non-statutory documents produced by the Council, referred to in the Council’s submissions, provide any assistance in construing the relevant parts of the planning scheme.
- [28] The use is also not an undefined use. Whilst an argument could be made that the use is an undefined use, on a proper construction of the planning scheme the use is best described as a “multi-unit dwelling”.
- [29] The Committee disagrees with AAD’s argument that the question is whether each premises is or is not a “house”, as the issue is what is the use.
- [30] The Committee agrees with AAD that there is a lack of clarity in the definitions as it relates to this use. However, the Committee is required to determine the application on the planning scheme as it is.
- [31] In terms of the owner’s submission in relation to the costs associated with making an application for a multi-unit dwelling and complying with the associate codes, it is not a relevant consideration in determining this application.

Material Considered

- [32] The material considered in arriving at this decision comprises:
- (a) ‘Form 10 – Notice of Appeal’, grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 15 July 2010.
 - (b) Council’s notice dated 12 July 2010 that the application was not a properly made application.
 - (c) Verbal and written submissions from the parties at the hearing and further submissions provided thereafter. AAD included in its submissions, a number of documents from the owner.
 - (d) Council’s planning scheme.
 - (e) The SPA.

Findings of Fact

- [33] The Committee makes the following findings of fact (summary):
- (a) The development application stated that the use was for a “house (non-complying)” containing nine bedrooms and intended to accommodate up to 11 unrelated persons for the purpose of student accommodation.

¹² See for example *Canwan Coals Pty Ltd v Federal Commissioner of Taxation* [1974] 1 NSWLR 728, 734.

¹³ *Livingstone Shire Council v Hooper* [2004] QPELR 308, 314, 315; *Yu & Leung v Brisbane City Council* [2006] QPELR 102, [16].

¹⁴ Planning Scheme, “short term accommodation” – a use of premises for short term accommodation (typically not exceeding 2 weeks) for tourists and travellers, e.g. holiday cabins, motel, hotel (where it entails mainly accommodation), serviced apartments, guesthouse or backpackers hostel and caravan park (that is also often appropriate for use as long term accommodation)”; see also *Sunshine Coast Regional Council v Ebis Enterprises Pty Ltd* [2010] QPEC 52.

- (b) The development application was received by the Council on 28 June 2010.
- (c) On 12 July 2010, the Council gave a notice under s266 of the SPA that the development application was not properly made, stating that the use was "multi-unit dwelling (boarding house - 9 units)" and that the fee required was \$16,100.00.
- (d) The proposed student accommodation is rented on a room by room basis from the owner. Rent is paid on a weekly basis, inclusive of electricity and weekly cleaning of the common areas. The owner supplies the toilet paper and cleaning products. The minimum tenancy is six months.
- (e) Some student couples may share a bedroom. Each student, or couple, will have available to him, her or them, their own food storage areas in the cupboard and fridge(s), although, they share the common facilities.
- (f) The furniture and white goods in the common areas are provided by the owner.
- (g) The use is a "multi-unit dwelling".
- (h) AAD did not provide the fee fixed by Council for the development application as required by s260(1) of the SPA, and as a consequence, it was not a properly made application.

Reasons for the decision, conclusion and determination

- [34] Based on an assessment of the facts, it is the Committee's decision that the proposed use is a "multi-unit dwelling", as that term is defined in the planning scheme, and as a result, the development application was not properly made because the correct fee was not provided with the development application.
- [35] Our detailed reasons are set out above.
- [36] The application is not properly made.
- [37] The application for a declaration is dismissed.

Kari Stephens
Building and Development Committee Chair
Date: 29 September 2010

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:

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