Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	23-013
Appellant:	Vincent Vandervaere
Respondent:	Brisbane City Council
Site Address:	44 Glasgow Street, Zillmere, described as Lot 1 RP 69329

Appeal

Appeal under section 229 and Schedule 1, Table 1, Item 1 of the *Planning Act 2016* against deemed approval/refusal of a building development application.

Date of decision:	9 October 2024
Date and time of hearing:	27 July 2023 and submissions on 11 and 23 August 2023
Place of hearing:	Online hearing
Tribunal:	Michelle Pennicott Chair Don Grehan Member
Present:	Vincent Vandervaere Glenn Davidson - Principal Policy and Legislation Officer Built Environment, Brisbane City Council Tiffany Morotti - Senior Policy and Legislation Officer Built Environment, Brisbane City Council Vadim Ribinsky – Brisbane City Council appointed building certifier

Decision:

The Tribunal orders the Council to decide the building application by 8 November 2024.

Appeal

1. The premises is 44 Glasgow Street, Zillmere, described as Lot 1 on RP69329.

2. The building work the subject of the appeal is described as being for "*Dwelling with guest rooms that may be used as a home based business*": DA Form 2—Building work details, Question 16(d).

3. The plans show a two storey, rectangular building. The ground floor and upper floor are both divided into 4 areas each, with blockwork separating each area. Each area is of similar dimensions – approximately 4m x 8m. There is an internal connection between the two western-most areas on the ground floor, being the area marked 'Bed 1', 'Bed 2' and 'Bath 1' and the area marked 'Living', 'Dining' and 'Kit'. Otherwise, all of the areas are only accessible externally - along a 'Porch' on the ground floor and a 'Verandah' on the upper floor, connected by an external staircase.

4. The areas marked 'Bed 3', 'Bed 4', 'Bed 5', Bed 6' and 'Bed 7' each show a counter with what appears to a sink and each also have a bathroom with a sink, toilet and shower.

5. The eastern-most area on the ground floor is the same dimension as the other rooms, approximately 4m x 8m, but is not marked with the word 'Bed'. It is instead marked 'Lounge', 'Meals' and 'Kit'. It has a counter with what appears to be a sink and a stove. It also has a bathroom with a sink, toilet and shower.

6. The Appellant lodged the building work development application with the Council in December 2022.

7. On 24 February 2023, the Appellant gave a deemed approval notice to the Council.

8. On 1 March 2023, the Council responded to the deemed approval notice by informing the Appellant that the Council was unable to process the development application.

9. The Appellant commenced this appeal on 30 March 2023.

10. The appeal is described as being in respect of "*Building development application refusal/deemed approval refusal*": Form 10—Notice of Appeal/Application for Declaration, Question 3.

11. The grounds for appeal/declaration (Question 4) state:

> "*Council will not honor the submission of deemed approval notice and council are not considering their own guidelines when determining the class of the building and the council have had me demolish my only house on what they are only now after 3 months considering an application invalid, Please see attached for details. Thank you*":

Material considered

12. The following material has been considered in arriving at this decision:

    (a) Form 10—Notice of Appeal/Application for Declaration and attachments;

    (b) Emails from Appellant to the Registry dated 4 April 2023 providing a copy of an email dated 9 December 2022 from the Appellant to the Council and an email dated 13 March 2023 from the Council to the Appellant attaching a response

    (c) Email from the Council to the Registry dated 5 May 2023 in relation to the Council's position on whether the application was properly made

(d) Emails from the Council to the Registry dated 7 July 2023 and 10 July 2023 with links to the building development application and supporting material and communications passing between the Council and the Appellant in relation to the building development application

(e) Council's written submissions dated 11 August 2023 and documents provided on 14 August 2023

(f) Appellant's written submissions dated 23 August 2023.

Background

13. The Council's records which were provided to the Tribunal reveals extensive communication between the Appellant and the Council.

14. Between March 2021 and November 2022, the Appellant made several telephone enquiries with the Council about the redevelopment of the premises and some form of guest accommodation. The enquiries varied and included the following:

(a) On 19 January 2022, the planning information officer enquiry record states:

> "Customer wants to run a "bed and breakfast facility"- purpose built house with several rooms with attached bathroom and kitchen sink. Building certifiers are not ready to signoff it as a house. Had a discussion about definition of house, Rooming accommodation, granny flat for 20 mins. Customer wants Council's opinion on his house plan. Advised him to come in for prelodgement meeting for fees to discuss further."

(b) On 4 February 2022, the planning information officer enquiry record states:

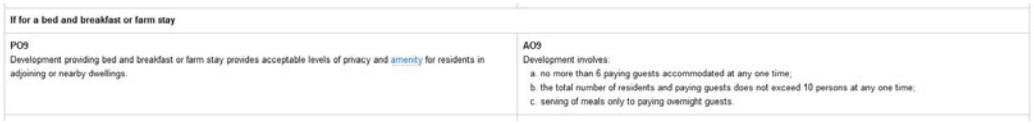
> "vincent is building a house and he cant find a private certifier that will approve guest rooms for Air BnB at the back and he states that council has to provide these services. They have said it is no longer classed as a house due to this accommodation. He spoke to someone previously (there was a job with DA previously - 14745972) and was told that we dont provide that certification services but there is info on our website and state website to say that we will do it. I spoke to Helen Campbell about certification and caller has been told that we do not have an in house building certifiers and we only provide services using contractors for unlawful work or lapsed approvals or where a certifier has passed or retired, etc. We are mostly the archiving agent. She recommended someone like Matthew Wighton to contact him back. He has a design drawn up and the certifiers have said that the guest area looks like a boarding house but he cant find any guidelines about what makes it a boarding house. He wants help on how the house should look like and what is allowable as it is too 'risky' for private certifiers."

15. On 15 November 2022, the Appellant drew to the Council's attention section 51 of the *Building Act 1975*. An email from the Appellant to the Council states:

> ''Below is the relevant section out of the QLD building act 1975 :
>
> I would have been happy to have a private certifier provide the BA but I have spoken to I would say more than 10 over the last year. Often I have had to wait for weeks for them to get back to me only to tell me they are not willing to help. The sticking point is most of them are unclear on the when a house becomes a apartment block, boarding house or guest house.
>
> The national construction code does not define what a household is, neither does the state government. It is the local government that defines what they consider a household. Most councils allow a limited number of short term or long term unrelated

guests to form part of the household. In the BCC area there are no limits for family members, a limit of 5 unrelated individuals sharing a house together and staying long term or 6 short term guests plus 4 long term residents as per the home based business code. Anything exceeding this requires a DA to be applied for and the building will no longer be class 1 dwelling as per the national construction code.

Here is the relevant section from the home based business code:



If for a bed and breakfast or farm stay	
PO9 Development providing bed and breakfast or farm stay provides acceptable levels of privacy and amenity for residents in adjoining or nearby dwellings.	AO9 Development involves: a. no more than 6 paying guests accommodated at any one time; b. the total number of residents and paying guests does not exceed 10 persons at any one time; c. serving of meals only to paying overnight guests.

I have attached the plans for you to have a look. Each bedroom is designed to provide a high level of safety and comfort for the guests.

I believe the current plans comply with all relevant codes."

16. On 15 November 2022, the Appellant submitted a DA Form 2—Building work details to the Council. At Question 16(c), the nature of the proposed building work was identified as "New building or structure" and "Demolition". At Question 16(d), the work was described as "Dwelling with guest rooms that may be used as a home based business".

17. On 16 November 2022, the Council replied that, "having reviewed section 51 of the Building Act 1975 and in consultation with Built Environment officers, Council is not required to provide the assistance of a certifier prior to submission of an application".

18. On 9 December 2022, the Council informed the Appellant that the demolition works proposed would need to be applied for in a separate development application. The Council indicated that to progress the matter, two separate DA Form 2s would be required for each aspect.

19. On 9 December 2022, the Appellant submitted an amended DA Form 2 which removed reference to the demolition. The Appellant then engaged a demolition company for the demolition and that engagement included the private certification of the demolition building work.

20. Between December 2022 and January 2023:

    (a) the Appellant pressed the Council to progress the certification of the new building work, expressing reluctance to proceed with the demolition of the existing dwelling without first obtaining approval for the new building work;

    (b) the Council maintained a position with the Appellant that the certification of new building work could not be progressed until the demolition work was completed; and

    (c) the Appellant proceeded to have the demolition work certified and the demolition work completed and informed the Council that this had occurred.

21. On 27 January 2023, the Council provided a quote for payment of the fee to progress the certification of the new building work ($2,169.25).

22. The Appellant promptly paid the $2,169.25 the same day.

23. Between 27 January 2023 and 21 February 2023, the Council maintained a position that it needed to formally receive the Form 21—Final Inspection Certificate from the

private certifier for the demolition work before taking steps to progress the certification of the new building work.

24. On 21 February 2023, the Council informed the Appellant that the demolition had been finalised on the Council's records and the Council was officially requesting a quote from the certifier, which the Council would issue to the Appellant as soon as it was received. In that communication, the Council indicated, "*the certifier we're referring your case to isn't certifying the building now. That thirty days refers to the time from when the certifier is officially engaged until a decision notice is issued, approving the plans*".

25. On 24 February 2023, the Appellant emailed a deemed approval notice to the Council. The cover email stated:

> "Under the Building Act section 51.2.a the local council has the responsibility to assess and decide the application within the time frames mentioned in the development assessment rules of the planning act. This time frame has long expired and I have yet to receive the decision notice to start work."

26. On 1 March 2023, the Council responded to the deemed approval notice. The response:

    (a) referred to the application as only being treated as received on 20 February 2023, following final certification of the demolition work on 15 February 2023;

    (b) indicated that on receipt of the application on 20 February 2023, a request for consideration and a quote was issued to the Council's contracted certifier;

    (c) indicated it had not been more than ten working days since either date;

    (d) went on to explain that the Council's contracted certifier had declined to tender a quote for the project after reviewing the application based on "major reservations" that what was applied for was not a class 1a dwelling.

27. The Council's response set out the advice from the contracted certifier:

> "I have major reservations with the plans as submitted as this is not a class 1a dwelling. The building certifier ultimately determines the classification and not the applicant.
>
> You can't provide a set of plans that show for example an industrial shed and claim that it is going to be used as shops because that is how you want it, but that's not how it is designed to be used. The NCC (building Code of Australia) groups buildings and structures by the purpose for which they are designed, constructed or adapted to be used, rather than by the function or use they are put to, assigning each type of building or structure with a classification.
>
> These plans show a structure which is all concrete and blockwork with blockwork party walls separating the rooms into self-contained individual sole occupancy units.
>
> The plans show the building's design purpose would likely be either a class 2 or class 3 building where basically each room is designed to exclude the other sole occupancy units with separate external access to each room. There are no stairs internally to any of the rooms and no interconnection which is highly unusual in a family dwelling house and clearly shows these are designed to be kept separate. This could possibly even be adapted for use as a boarding house or hostel type facility.
>
> A dwelling house on the other hand is for the use of a single household and won't contain fire separating walls between floors and bedrooms and will generally have common use areas and shared facilities . The purpose of a fire separating wall (party wall as shown) is a wall to separate adjoining dwellings, or in this case individual rooms so if you see what I am saying the purpose of the building design for classification as per

the NCC definitions is to create a structure that is not for a single household irrespective of what the owner may say or claim.

This would also bring in the issue of any town planning requirements that may apply on the ultimate use this is intended for.

I have also peer reviewed my comments with another Private Certifier that acts as expert witness for the courts generally and he agrees this cannot be considered a class 1a residence.

If the applicant still wants to pursue a class 1a dwelling, then I recommend to Council that I would be refusing it on the basis that it is not the appropriate classification. Other certifiers should come to the same conclusion. My job is to act in the public interest and to protect Council's as well. You don't want to approve an inappropriate development and I certainly won't be approving anything that is unlawful.

That also brings into the question whether or not there is a planning implication and if that structure is suitable for the area. I suspect that is why the applicant is not going to private certifiers because they should again be getting the same answers."

28. On 1 March 2023, the Appellant replied to the Council's email of 1 March 2023. The reply stated, among other things:

> "The structure I have designed contains only 5 guest rooms, a shared area and a 2 bedroom section that will be used for the long term residents. My design only contains 7 bedrooms. Such structures could presumably contain 10 bedrooms and still be a class 1a dwelling as stated above.
>
> …
>
> The plans I have submitted have been clearly designed according to what has been specifically stated as allowed in a dwelling house under the home based business code. As the classification is determined by the purpose of the design, the structure I have submitted is clearly a 1a structure which is able to host a limited number of guests in a safe manner.
>
> …
>
> Block walls have been used because they increase the safety for the guests and help to reduce noise transmission between bedrooms.
>
> …
>
> The guest rooms can not be considered self contained soul occupancy units as the do not have the full kitchen facilities to be classified as a self contained SOCU. The rooms are dependent upon the shared area to access full kitchen facilities. This rules out the structure being classified as a class 2 structure.
>
> Even if they were self contained, granny flats are common and not considered class 2.
>
> …
>
> I intent to use it as my principal place of residence and allow family member to stay with me and to rent out rooms on a short term basis as allowed within a dwelling in the Brisbane City council area under the home based business code."

29. On 14 March 2023, the Council sent a response to the Appellant. The response stated, among other things:

    (a) the Council does not consider the intended use to be a home based business because the business activity (bed and breakfast) is not subordinate to the

residential use of the premises because the scale of the bed and breakfast (B&B component is significantly greater than that of the 'dwelling house' use, evident by the percentage of the building to be used for the business activity;

(b) the proposed use would likely be Short term accommodation, requiring a material change of use before building development approval could be granted;

(c) the built form and use of the building for the purpose of the NCC does not constitute a class 1a building. The NCC guidance is explicit that a building used for a bed and breakfast is considered to be a class 3 building;

(d) the class 1b classification can attract concessions to run a bed and breakfast, but as the proposal is over 300m^2 it cannot be considered a class 1 building;

(e) pursuant to section 64(2)(c) of the *Planning Act 2016*, a deemed approval cannot be sought for a building development application and therefore the deemed approval notice would not be actioned;

(f) due to the above matters the Council has been unable to progress the application.

30. On 15 March 2023, the Appellant responded to the Council. The Appellant stated, among other things:

(a) the Appellant only applied for the building to be a class 1a dwelling;

(b) the rental activity is still a 'residential activity' therefore the subordinate requirement [for home based business use] is not offended;

(c) a household can be made up of both long term residents and guests;

(d) there is no floor space limited in the Home based business code, as bed and breakfast is specifically excluded;

(e) the Appellant intends to use the building as his primary residence, for family, friends and non paying guests and whatever is left he intends to rent within allowable limits;

(f) the class 1b concession is not offended as it is a 500m^2 house and only what is allowable to be rented out within a class 1a structure will be rented out.

31. On 30 March 2023, the Appellant commenced the subject appeal.

Jurisdiction

32. The Tribunal has jurisdiction for an appeal against the deemed refusal of a development application that involves the *Building Act 1975*.[1]

33. The Tribunal also has jurisdiction to decide an application for a declaration about whether a development application is properly made.[2]

34. For a deemed refusal appeal, the Tribunal must decide the appeal by either:

(a) ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or

(b) deciding the application.[3]

---

1 *Planning Act 2016*, Schedule 1 (Appeals), section 1(2)(g) and Table 1, Item 1 (Development applications)

2 *Planning Act 2016*, section 240 (Application for declaration about making of development application)

3 *Planning Act 2016*, section 254(2)(e) (Deciding appeals to tribunal)

Deemed approval

35. The appeal is expressed as being in respect of a "building development application refusal/deemed approval refusal".

36. As indicated in the Background above, the Appellant gave the Council a deemed approval notice on 24 February 2023 and on 14 March 2023 the Council indicated that it would not action that notice as a deemed approval cannot be sought for a building development application.

37. The position of the Council was correct.

38. A deemed approval notice cannot be given for a development application that includes development for which the building assessment provisions are an assessment benchmark.[4]

39. In the Appellant's written submissions of 23 August 2023, the Appellant contends that the building assessment provisions are not an assessment benchmark because his building "*complies with all relevant legislation that is the councils dwelling code and the BCA*".

40. For the building work for which the Appellant was seeking approval, namely the building of a new two storey building, the building assessment provisions are an assessment benchmark.[5]

41. The building assessment provisions are an assessment benchmark whether or not a building complies with it. The Appellant's submissions are incorrect.

42. Therefore, no **deemed approval** can arise from the Council's failure to decide the application.

Deemed refusal

43. Although the basis for appeal is not expressed by the Appellant in terms which align precisely with the language *Planning Act 2016*, the Tribunal proceeds on the basis that the Appellant is therefore appealing against the Council's **deemed refusal** of the development application.

44. "Deemed refusal" means a refusal that is taken to have happened if a decision has not been made when the period under the development assessment rules for making a decision has ended.[6]

45. Under the development assessment rules:

    (a) the assessment manager cannot decide the application until parts 1, 2, 3 and 4, as relevant to the application, have ended;

    (b) the assessment manager must assess and decide the application within 35 days (decision period).[7]

---

4 *Planning Act 2016*, section 64(2)(d) (Deemed approval of applications)

5 *Planning Regulation 2017*, Schedule 9 (Building work under Building Act), Part 2 (Assessment by assessment manager), Table 1—Assessable development under s1

6 *Planning Act 2016*, Schedule 2 (Dictionary), definition of 'deemed refusal'

7 Development Assessment Rules, Version 1.3, section 21.1 and 22.1

46. The Council essentially says the application never progressed beyond part 1 (Application) because the Council was not under an obligation to receive the application because the application was not properly made.

47. The Appellant says that the Council never brought to his attention, until the appeal, that the application was considered not properly made.

Issues

48. In order to answer whether a deemed refusal of the application has arisen and what flows from that, the following issues must therefore be determined:

    (a) Did the Council's obligation to receive, assess and decide under section 51 of the *Building Act* arise? That turns on whether the application was properly made.

    (b) Has the application reached the decision stage and has the due date passed?

    (c) If the due date has passed such that there is a deemed refusal, what should the Tribunal's decision be?

Did the Council's obligation to receive, assess and decide under section 51 of the *Building Act* arise?

49. Section 51(2) of the *Building Act 1975* imposes an obligation on the local government to receive, assess and decide a building development application and appoint or employ a private certifier or another building certifier to perform the building certifying functions for the application.

50. The obligation only arises if the circumstances in section 51(1) of the *Building Act 1975* apply, namely:

    (a) a person wishes to make a building development application to the local government; and

    (b) if the application were made, it would be a properly made application; and

    (c) a private certifier (class A) is not engaged for the application; and

    (d) if a private certifier (class B) is engaged for the application—the private certifier (class B) has not entered into an agreement mentioned in section 140(3) for the proposed application.

51. It is clear the Appellant had not engaged a private certifier for the application and that he wished to make the application to the local government.

52. Curiously, section 51(1) is expressed in hypothetical terms, "*if the application were made*" it would be a properly made application. The application here appears to have advanced beyond a mere hypothetical. The Council required the Appellant to make a correction to the approved form to remove the demolition component, which the Appellant did and the Council issued an invoice to the Appellant for payment of the required fee, which the Appellant paid.

53. However, the Council says the legal obligation to receive, assess and decide did not arise because the application was not a properly made application.

54. There is a specific definition of “properly made application” in the *Building Act 1975* that is used only in section 51(1). “Properly made application” is defined in Schedule 2 of the *Building Act 1975* as a building development application that:

    (a) is a properly made application under the *Planning Act 2016*; and

    (b) complies with any requirements under chapter 3 of the *Building Act 1975* applying to the application.

    Properly made application under the Planning Act

55. A properly made application under the *Planning Act 2016* is defined in section 51(5) as an application that complies with subsections (1) to (3), or that the assessment manager accepts under subsection (4)(c) or (d).

56. The requirements in subsection (1) are relevant to a building development application:[8]

    (a) made in the approved form to the assessment manager;

    (b) accompanied by the documents required under the form to be attached to or given with, the application;

    (c) accompanied by the required fee.

57. Under subsection 4(c), the assessment manager may accept an application that is not made in the approved form or is not accompanied by the documents required under the form.

58. Under subsection 4(d), the assessment manager may accept an application that is not accompanied by the required fee, but only to the extent the required fee has been waived under section 109(b).

59. Further, section 68 of the *Planning Act 2016* provides that the Development Assessment Rules may provide for when a development application may be taken to be properly made for section 51(5) of the *Planning Act 2016*. The Development Assessment Rules, section 1.1, provides that, for section 51(5), an application is taken to be a properly made application on the day the application is received by the assessment manager, unless an action notice is given. Further, the Development Assessment Rules provides that where the assessment manager accepts an application in accordance with section 51(4)(c) of the Act [not made in the approved form or is not accompanied by the documents required under the form] it is considered a properly made application, therefore an action notice is not required to be given.

60. The Council submits the Appellant’s development application was not a properly made application under the *Planning Act 2016* on two grounds:

    (a) it was not made in the approved form; and

    (b) was not accompanied by the documents required under the form.

61. The Tribunal enquired with the Council representatives at the hearing whether the Council was contending that the application was not properly made because the required fee was not paid (for example, if the certifier’s quoted fee is a necessary component of the required fee under the *Planning Act 2016*). The Council representatives confirmed at the hearing that there was no issue with the required fee.

---

8 Subsections (2) and (3) are not relevant to a building development application.

Approved form

62. "Approved form" means a form that the chief executive approves under section 282 of the *Planning Act 2016*.[9]

63. At the top of *DA Form 2—Building work details* it states that it is an approved form made under section 282 of the *Planning Act 2016*.

64. The Council says the *DA Form 2—Building work details* submitted by the Appellant was not completed in full.

65. Specifically, the Council says three aspects of the form were not correctly completed:
    (a) Questions 5, 6 and 7 were not completed;
    (b) Question 16(g) was not filled out correctly; and
    (c) Question 19 checkboxes were cut off.

Questions 5, 6 and 7

66. Questions 5, 6, and 7 of *DA Form 2—Building work details* are:
    (a) Question 5—Identify the assessment manager(s) who will be assessing the development application;
    (b) Question 6—Has the local government agreed to apply a superseded planning scheme for this development application; and
    (c) Question 7—Information request under Part 3 of the DA Rules – agree or not agree to receiving an information request.

67. While the Council is correct to identify that all three questions were not answered by the Appellant, that ignores that the preceding question on the form, Question 4, directs the applicant to go to Question 8 if the application is only for building work assessable against the building assessment provisions.

68. As the Appellant answered "Yes" to Question 4, it was correct for the Appellant to proceed straight to Question 8.

69. The Applicant's failure to answer Questions 5, 6 and 7 is therefore not a basis for saying the application was not properly made.

Question 16(g)

70. Question 16(g) asks, "New building use/classification? (*if applicable*)".

71. The answer provided by the Appellant to Question 16(g) was, "Dwelling".

72. At the hearing, Mr Ribinsky for the Council explained that the Council's position is that Question 16(g) was answered incorrectly by the Appellant because no classification was stated and the classification is important because dwellings can take various forms.

73. Mr Ribinsky indicated that the classification of the building was either a Class 1b or, if over 300m^2, a Class 3.

---

9 *Planning Act 2016*, Schedule 2 (Dictionary), definition of 'approved form'

74. The Appellant, on the other hand, contends the building is a Class 1a.

75. The National Construction Code 2019 (NCC 2019) was in force at the time the building work application was lodged with the Council.

76. A6.0 of NCC2019 required the classification of a building or part of a building to be determined by the purpose for which it is designed, constructed or adapted to be used. The definitions of Class 1 to Class 3 in NCC 2019 were as follows:

> *A6.1 Class 1 buildings*
>
> *A Class 1 building includes one or more of the following sub-classifications:*
>
> *(1) Class 1a is one or more buildings, which together form a single dwelling including the following:*
>
> *(a) A detached house.*
>
> *(b) One of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.*
>
> *(2) Class 1b is one or more buildings which together constitute—*
>
> *(a) a boarding house, guest house, hostel or the like that—*
>
> *(i) would ordinarily accommodate not more than 12 people; and*
>
> *(ii) have a total area of all floors not more than 300 m^2 (measured over the enclosing walls of the building or buildings); or*
>
> *(b) four or more single dwellings located on one allotment and used for short-term holiday accommodation.*
>
> *Limitation 1: For A6.1, a Class 1 building cannot be located above or below another dwelling or another Class of building, other than a private garage.*
>
> *A6.2 Class 2 buildings*
>
> *(1) A Class 2 building is a building containing two or more sole-occupancy units.*
>
> *(2) Each sole-occupancy unit in a Class 2 building is a separate dwelling.*
>
> *A6.3 Class 3 buildings*
>
> *A Class 3 building is a residential building providing long-term or transient accommodation for a number of unrelated persons, including the following:*
>
> *(1) A boarding house, guest house, hostel, lodging house or backpacker accommodation.*
>
> *(2) A residential part of a hotel or motel.*
>
> *(3) A residential part of a school.*
>
> *(4) Accommodation for the aged, children, or people with disability.*
>
> *(5) A residential part of a health-care building which accommodates members of staff.*
>
> *(6) A residential part of a detention centre.*
>
> *(7) A residential care building.*
>
> *Limitation 1: For A6.3, a Class 3 building is not a Class 1 or 2 residential building. However, a building could be a mixture of Class 3 and another Class.*

Sole-occupancy unit means a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes—

(a) a dwelling; or

(b) a room or suite of rooms in a Class 3 building which includes sleeping facilities; or

(c) a room or suite of associated rooms in a Class 5, 6, 7, 8 or 9 building; or

(d) a room or suite of associated rooms in a Class 9c building, which includes sleeping facilities and any area for the exclusive use of a resident.

77. The Appellant contends it is a Class 1a because it is a single dwelling.

78. The Council contends that the building is a Class 1b or Class 3 where each room is designed as a sole-occupancy room, designed to exclude the other sole occupancy units. The Council refers to the separate external access to each room and absence of any internal connection that would usually exist in a single dwelling house.

79. In support of the building being a Class 1a dwelling, the Appellant seeks to draw support from an acceptable outcome of the Home based business code of Brisbane City Plan, AO9, which refers a bed and breakfast having no more than 6 paying guests and 10 residents and guests in total:

If for a bed and breakfast or farm stay	
PO9 Development providing bed and breakfast or farm stay provides acceptable levels of privacy and amenity for residents in adjoining or nearby dwellings.	AO9 Development involves: a. no more than 6 paying guests accommodated at any one time; b. the total number of residents and paying guests does not exceed 10 persons at any one time; c. serving of meals only to paying overnight guests.

80. The Appellant's email to the Council on 1 March 2023 explained his position:

> "The structure I have designed contains only 5 guest rooms, a shared area and a 2 bedroom section that will be used for the long term residents. My design only contains 7 bedrooms. Such structures could presumably contain 10 bedrooms and still be a class 1a dwelling as stated above.
>
> …
>
> The plans I have submitted have been clearly designed according to what has been specifically stated as allowed in a dwelling house under the home based business code. As the classification is determined by the purpose of the design, the structure I have submitted is clearly a 1a structure which is able to host a limited number of guests in a safe manner.

81. In his written submissions of 23 August 2023, the Appellant made the following submissions in relation to AO9 and how it ought inform the building's classification:

> "This shows us that the councils intention is to formalize the fact that in 1a dwellings the owners or occupiers are allowed to use part of the dwelling for hosting 6 guests on a commercial basis. It also tells us that this type of usage is separate from short-term accommodation or rooming accommodation .
>
> Considering this fact building certifiers must understand that 1a dwellings owners can host guests who may stay for short periods and that this may have a an impact on the design of some 1a dwellings. Any design elements that are implemented to host guests as allowable in a 1a dwelling can not result in a change of classification as per A6G1(1) of the NCC.
>
> Furthermore the implementation of a higher level of fire safety standards above and beyond what may be required in a dwelling should be encouraged and can

not be in itself used as a factor to determine a buildings class when the proposed usage is allowable."

82. In the Council's response to the Appellant on 14 March 2023 the Council indicated its position that building classification in the National Construction Code and land use definitions in the planning scheme are separate and distinct and despite use of similar words, they do not have a definitive inter-relationship. The response further indicated the Council's view that the use was not definitionally a Home based business because the bed and breakfast component was not 'subordinate' to the dwelling, which is a requirement of the definition of Home based business in City Plan:

> "Home-based business means the use of a dwelling or domestic outbuilding on premises for a business activity that is subordinate to the residential use of the premises.
>
> Examples include:
> Bed and breakfast, home office, home-based childcare
>
> Does not include the following examples:
> Hobby, office, shop, warehouse, transport depot"

83. In the Appellant's written submissions of 23 August 2023, the Appellant contends the building cannot be a Class 1b or Class 3 building because those classes are where the entirety of the building is for the purpose of providing travel/boarder accommodation and not where there is a household involving the Appellant's primary residence. The Appellant relies on a Queensland Government Building Newsflash, *Budget Accommodation Buildings – Change of Classification from Class 1a to Class 1b* dated 17 March 2006 in support of that proposition:

> "A single dwelling is a building in which the occupants form a common household. For example a family unit or group may share a single dwelling, or individuals may form a group to rent a single dwelling to defray costs.
>
> Additionally, owners or occupiers of a building may accommodate unrelated persons in many circumstances without changing the use from being a single dwelling."

84. What the Appellant's submission does not pick up from the Building Newsflash is the distinction it goes on to make where an owner or occupier accommodates unrelated persons who do not form a common household and the classification being a class 1b or class 3 in that instance:

> "**Interpretation**
>
> Whether a building is used as a single dwelling or as a boarding house, guesthouse, hostel or the like will depend on ordinary meanings and the relevant facts in each particular instance.
>
> A single dwelling is a building in which the occupants form a common household. For example a family unit or group may share a single dwelling, or individuals may form a group to rent a single dwelling to defray costs.
>
> Additionally, owners or occupiers of a building may accommodate unrelated persons in many circumstances without changing the use from being a single dwelling. For example, a family may accommodate up to three boarders, overseas students or travellers and they would be included as part of the common household.
>
> Where an owner or an occupier regularly accommodates four or more unrelated persons the use would be class 1b (or class 3 if more than 12 persons are accommodated or the building exceeds 300m^2). Where owners that do not reside in the building rent individual rooms or beds to four or more unrelated individuals, the building is being used as a boarding house, guesthouse, hostel or the like.

In summary –

A class 1b building – a boarding house, guesthouse, hostel, farm stay or the like with four or more unrelated residents who do not form a common household.

A class 1a building – a single dwelling where any number of occupants form a common household."

85. The Appellant, in his written submissions of 23 August 2023, contends that a class 1b or class 3 structure is one in which only hosts guests:

> "A regular house that is repurposed only to host guests would be a class 1b or class 3 structure. The same house used as a single dwelling accommodating a household with or without an allowable number of guests must be classed as 1a."

86. However, there is nothing in the definitions of Class 1b or Class 3 which exclude their application where the owner or manager resides on site.

87. Although guideline only, the National Construction Code's explanatory information explains the classifications as follows:

> "Explanatory information:
>
> …
>
> The Class 1b classification can attract concessions applicable to Class 3 buildings. These concessions allow people to rent out rooms in a house, or run a bed and breakfast, without having to comply with the more stringent Class 3 requirements. The reasoning is that the smaller size of the building and its lower number of occupants represents reduced fire risks.
>
> …
>
> Class 3 buildings provide accommodation for unrelated people. The length of stay is unimportant.
>
> Some exceptions to this classification include: certain bed and breakfast accommodation, boarding houses, guest houses, hostels, or lodging houses and the like which fall within the concession provided for Class 1b buildings.
>
> Also, any sized building can be classified as Class 1 or Class 2 if it is used to house any number of unrelated people who jointly own or rent it, or share it on a non-rental basis with an owner or tenant.
>
> It is not unusual for a manager's, owner's or caretaker's dwelling attached to a Class 3 building to be thought of as a Class 4 part of the Class 3 building. However, a Class 4 part of a building can only be part of a Class 5-9 building.
>
> Accordingly, such dwellings are either classified as Class 1, Class 2 or Class 3, depending on the circumstances of the building proposal. However, a building could be a mixture of Class 3 and another Class.
>
> Class 3 buildings include—
>
> - the residential parts of hotels and motels; and
> - hotel or motel caretakers', managers' or owners' flats, noting that under certain circumstances such dwellings could be Class 1, Class 2 or Class 3 buildings; and
> - dormitory accommodation, in schools or elsewhere, noting that a dormitory is generally (but not always) considered to be a sole-occupancy unit; and
> - bed and breakfast accommodation, a boarding house, guest house, hostel, or lodging house …".

88. The Tribunal agrees with the Council that the building is not a Class 1a and is instead either a Class 1b or a Class 3 having regard to the following:

    (a) the purpose stated by the Appellant, namely "5 guest rooms, a shared area and a 2 bedroom section that will be used for the long term residents";[10] and

    (b) the design shown on the plans, namely 5 guest rooms, block party wall separation and no internal connection to each other nor any connection to the 2 bedroom section (and the living, dining and kitchen area of that 2 bedroom section). The design is such that those staying in the 5 guest rooms may not form a household with each other or with the long term residents in the 2 bedroom section.

89. The purpose of the building meets that of a Class 3 building, namely a residential building providing long-term or transient accommodation for a number of unrelated persons. If the total area of all floors are not more than 300m^2 (measured over the enclosing walls of the building), then the concessional Class 1b classification would apply.

90. The Ground Floor Plan Drawing 2 of 12 shows the areas of the building as follows:

    GND FLR – 142.5m2
    UPP FLR – 142.5m2
    BALCONY – 20.3m2
    STAIRS – 7.6m2

    TOTAL – 312.9m2

91. The balcony and the stairs are shown on the Elevations Drawing 5 of 12 and Elevations & Sections Drawing 6 of 12 as being open structures with an aluminium handrail and balustrade. Excluding those areas (as not being within the 'enclosing walls of the building') the Ground Floor and Upper Floor area combined is 285m^2. This would bring the building within the 300m^2 floor area (measured over the enclosing walls of the building) of a Class 1b building.

92. While the Tribunal agrees with the Council that the building is not a Class 1a building as the Appellant contends, it does not follow that Question 16(g) was answered incorrectly.

93. Question 16(g), which asks "New building use/classification" invites either the use or classification to be stated.

94. Question 16(g) is part of a group of questions within Question 16 headed, "Provide details about the proposed building work".

95. The Appellant's answer to Question 16(d) describes the use in further detail as, "*Dwelling with guest rooms that may be used as a home based business*".

96. Although the classification does not have to be provided in answer to Question 16(g), that is not to say that the classification is not important. The importance of the building's classification is apparent from Part 7, which is the part of DA Form 2 which the assessment manager must complete. A section of that part must be specifically answered by the building certifier and requires the building certifier to identify the classification of the approved building work. The fact that it is the building certifier who must identify the classification supports what Mr Ribinsky also stated at the hearing –

[10] Email Appellant to the Council dated 1 March 2023

that ultimately it is the building certifier who is responsible for determining the appropriate classification.

97. For the purpose of Question 16(g) however the absence of the classification in the answer does not render the application not properly made.

Question 19

98. Question 19 is headed "Development application checklist".

99. The prescribed version of *DA Form 2—Building work* has check boxes next to each item for the applicant to check:

PART 6 – CHECKLIST AND APPLICANT DECLARATION

19) Development application checklist	
The relevant parts of *Form 2 – Building work details* have been completed	☐ Yes
This development application includes a material change of use, reconfiguring a lot or operational work and is accompanied by a completed *Form 1 – Development application details*	☐ Yes ☐ Not applicable
Relevant plans of the development are attached to this development application ***Note**: Relevant plans are required to be submitted for all aspects of this development application. For further information, see DA Forms Guide: Relevant plans.*	☐ Yes
The portable long service leave levy for QLeave has been paid, or will be paid before a development permit is issued *(see 9)*	☐ Yes ☐ Not applicable

100. The form lodged by the Appellant is missing the check boxes:

19) Development application checklist
The relevant parts of *Form 2 – Building work details* have been completed
This development application includes a material change of use, reconfiguring a lot or operational work and is accompanied by a completed *Form 1 – Development application details*
Relevant plans of the development are attached to this development application ***Note**: Relevant plans are required to be submitted for all aspects of this development application. For further information, see DA Forms Guide: Relevant plans.*
The portable long service leave levy for QLeave has been paid, or will be paid before a development permit is issued *(see 9)*

101. The Council contends that the application was not properly made because the checkboxes have been cut off and therefore were not completed.

102. The Council points out that DA Form 2 states at the top, "*Unless stated otherwise, all parts of this form must be completed in full and all required supporting information must accompany the development application*".

103. The checkboxes serve as a prompt for the applicant to check that the four stated items have been attended to. Although the checkboxes are not visible as being checked, the four items which they prompt the applicant to confirm have been elsewhere responded to by the Appellant:

(a) the relevant parts of Form 2 have otherwise been completed;

(b) the Appellant earlier at Question 4 ticked that the application was only for building work;

(c) the Appellant earlier at Question 16(h) ticked that the relevant plans of the proposed works were attached to the development application;

(d) the Appellant earlier at Question 9 ticked that evidence that the portable long service leave levy has been paid would be provided before the assessment manager decides the development application.

104. This would be in instance where section 48A of the *Acts Interpretation Act 1954* (Compliance with forms) would come to aid, which provides that if a form is prescribed or approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient. "Substantial compliance" is a matter of degree and concerns the practical effect of what has been done, compared with the practical effect the relevant provision which has not been complied with seeks to achieve.[11]

105. Having regard to the responses elsewhere provided, the Tribunal is satisfied that there has been substantial compliance with the approved form. The development application can still be considered to be "made in the approved form" for the purpose of section 51(1)(a) of the *Planning Act 2016*.

Complies with any requirements under chapter 3 applying to the application

106. The second limb to the definition of "properly made application" under the *Building Act 1975* is that the building development application "*complies with any requirements under chapter 3 of the Building Act 1975 applying to the application*".

107. Chapter 3 of the *Building Act 1975* contains two parts – Part 1 which is Requirements for supporting documents and Part 2 which is Other requirements. The Council contends that the application does not comply with Part 1.

108. Part 1 comprises four sections:

(a) Section 23 (Operation of pt 1);

(b) Section 24 (Required information for supporting documents);

(c) Section 25 (General requirements for supporting documents); and

(d) Section 26 (Requirements if performance solution used).

109. The operation of Part 1—Requirements for supporting documents is stated in section 23 (Operation of pt 1). Section 23 states:

> "This part imposes requirements for documents (supporting documents) that under the Planning Act are given or required to be given for a building development application".

110. The Council, in its 5 May 2023 submissions, contends that the application does not comply with the requirements under Chapter 3 of the *Building Act 1975* for the following reasons:

> "Chapter 3 of the BA contains additional requirements for building development applications. Part 1 imposes requirements for documents (supporting documents) that under the PA are given or required to be given for a building development application.
>
> Of relevance is section 25 of the BA. Mr Vandervaere's application does not comply with the general requirements for supporting documents set out in section 25, such as provision of required certificates to demonstrate compliance with the building assessment provisions.
>
> It is Council's view that Mr Vandervaere would require a development permit (a material change of use) to facilitate his bed and breakfast proposal if he intends to rely on the building plans submitted in support of his application.

---

11 *Re Asset Risk Management Ltd* (1995) 59 FCR 254

> The Form 2 specifically states that, for development applications involving any other type of assessable development (including a material change of use), a Form 1 and Form 2 (parts 4 to 6) are required to be submitted."

111. The two requirements for supporting documents in section 25 of the *Building Act 1975* which are raised by the Council's submission are:

    (a) section 25(1), which requires that each supporting document must on its face demonstrate that the carrying out of building work will comply with the building assessment provisions; and

    (b) section 25(2)(a)(ii), which requires that each supporting document must state whether a development permit, PDA development permit, preliminary approval or referral agency's response mentioned in section 83(1) is necessary for the application.

Section 25(1)

112. Section 25(1) of the *Building Act 1975* states as follows:

> "(1) Each supporting document must on its face demonstrate that the carrying out of the building work will comply with the building assessment provisions."

113. 'Supporting document' is defined in section 23 to mean documents that under the Planning Act are given or required to be given for a building development application.

114. The documents which were required to be given with the building development application are identified by DA Form 2 at Question 16(g) (Relevant plans) which states that the relevant plans are required to be submitted for all aspects of this development application and refers to the *DA Forms Guide: Relevant Plans* for further information.

115. The *DA Forms Guide: Relevant Plans*, which is stated to be a "guide", states that the types of relevant plans that may need to be provided with a development application will vary depending in the nature and circumstances of each development application. It provides, "as a general guide" that for a building work application a site plan, location plan and building plan will most often need to be provided. It further states that the assessment benchmarks may also require more specific plans to be provided to demonstrate how particular elements of the proposed development may meet the assessment benchmarks.

116. The Appellant lodged with the Council a set of plans comprising 12 sheets.

Sheet 1 of 12:	Site Plan
Sheet 2 of 12:	Ground floor plan
Sheet 3 of 12:	Upper floor plan
Sheet 4 of 12:	Slab plan
Sheet 5 of 12:	Elevations
Sheet 6 of 12:	Elevations and sections
Sheet 7 of 12:	Suspended slab plan
Sheet 8 of 12:	Roof plan
Sheet 9 of 12:	Upper floor framing plan
Sheet 10 of 12:	Electrical plan

Sheet 11 of 12: Gazebo

Sheet 12 of 12: Building and W,H&S Notes.

117. When asked at the hearing for how the plans lodged by the Appellant failed to comply, Mr Ribinsky for the Council explained that the engineering detail appeared preliminary only and did not have RPEQ details on the plans.

118. Mr Ribinsky referred to section 24(2) of the *Building Act 1975*, which refers to a "designated person", which includes a registered professional engineer under the *Professional Engineers Act 2002*. The operative requirement in section 24 is not that the supporting documents must be prepared by a designated person; rather than if a supporting document is prepared by a designated person then it must state their registration details or be accompanied by another document that identifies that information.

119. Mr Ribinsky indicated that there was also the need for documents such as those relating to soil tests, energy efficiency, QBCC insurance and QLeave to be supplied. He indicated however that those items were not "deal breakers" as had the application progressed, those matters could have been requested at the information request stage.

120. Ms Morotti for the Council indicated that those items were not catalogued and communicated to the Appellant because of the more fundamental difficulties identified with the building development application – that it was not a Class 1a building and that a development permit for material change of use was required.

Section 25(2)(a)(ii)

121. Whether or not the Appellant needs a material change of use development approval was at the heart of the impasse between the parties.

122. Relevant to whether the development application was properly made, the Council in its 5 May 2023 submissions stated:

> "It is Council's view that Mr Vandervaere would require a development permit (a material change of use) to facilitate his bed and breakfast proposal if he intends to rely on the building plans submitted in support of his application.
>
> The Form 2 specifically states that, for development applications involving any other type of assessable development (including a material change of use), a Form 1 and Form 2 (parts 4 to 6) are required to be submitted."

123. The statement in DA Form 2 which the Council refers to can be found at the top of the form, in the third paragraph:

> DA Form 2 – Building work details
> ***Approved form (version 1.2 effective 7 February 2020) made under Section 282 of the Planning Act 2016.***
>
> This form **must** be used to make a development application **involving building work**.
>
> For a development application involving **building work only**, use this form (*DA Form 2*) only. The DA Forms Guide provides advice about how to complete this form.
>
> For a development application involving **building work associated and any other type of assessable development** (i.e. material change of use, operational work or reconfiguring a lot), use *DA Form 1 – Development application details* **and** parts 4 to 6 of this form (*DA Form 2*).

124. The third paragraph is to be contrasted with the second paragraph – for a development application involving building work only, then only DA Form 2 is to be used. That is the form that the Appellant correctly used.

125. The requirement to also submit a Form 1 is only if the applicant is applying for building work and material change of use in the same application. It does not have the effect of deeming a building work only application to include material change of use, even if a material change of use development permit is necessary.

126. The timing of a material change of use development application and its effect on a building work development application is however a matter provided for in section 83 of the *Building Act 1975*.

127. In the Council's response of 14 March 2023 one of the other reasons it gave as to why it had been unable to progress the building development application was that the Council considered the proposed use would likely be Short term accommodation requiring a material change of use before building development approval could be granted. The Council indicated that the guest accommodation was not "subordinate" to the dwelling and therefore as a matter of definition could not be a Home-based business:

> "A HBB means the use of a dwelling or domestic outbuilding on premises for a business activity that is ***subordinate*** to the residential use of the premises (Emphasis added). The word 'subordinate' is not defined in City Plan, however when considering the term in relation to secondary dwellings, the Court referred to the Macquarie Dictionary definition of "subordinate" (including placed in or belonging to a lower order or rank; of lesser importance; secondary") and "subordinate to" (including "to make secondary to; to make subject to or subservient to") …
>
> The scale of the bed and breakfast (B&B) component of the use is significantly greater than that of the 'dwelling house' use, evident by the percentage of the building to be used for the business activity. From what you have described to date, the proposed use would likely constitute 'short-term accommodation'."

128. There is force to the Council's argument.

129. At the hearing, the Council representatives were asked whether section 83 of the *Building Act 1975* was a legal basis for not progressing the application until a material change of use approval first takes effect. The Council representatives indicated that they did not consider section 83 applied when the Council was the assessment manager but the parties were both given the opportunity to make any further written submissions on the point.

130. The Council provided written submissions on 14 August 2023 addressing section 83 in further detail, concluding that section 83 did not apply.

131. Section 83 of the *Building Act 1975* (General restrictions on granting building development approval) has the following effect:

    (a) it restricts a private certifier from approving building work until other necessary development approvals, one of which is a necessary development permit for the building to be lawfully used, are in effect;

    (b) if a private certifier receives a building development application before a necessary development application is decided, the building development application is taken not to have been received by the private certifier until that other application is decided.

132. The application of section 83 is however controlled by section 82. Section 82 says that 83 applies if, "*under section 48, a private certifier (class A) is assessing a building development application or deciding and issuing the decision notice*".

133. The Council's submissions, correctly in the Tribunal's view, conclude that section 83 has no application to where a local government is assessing and deciding the development application. It also does not apply to the private certifier appointed or employed by the local government under section 51.

134. Section 82 limits section 83 to where it is the private certifier who is assessing and deciding the development application under section 48.

135. This is reinforced by the note to section 51 which states that the private certifier appointed by the local government under section 51 is not carrying out private certifying functions that are not building certifying functions. The private certifier's role under section 51 is limited to building certifying functions, that is, the assessment of compliance against the building assessment provisions.

136. That outcome is somewhat surprising given the clear hold point that operates to ensure use requirements are first attended to when an application is made to a private certifier.

137. As the Council's representative Ms Morotti indicated at the hearing, the Council was concerned to ensure the Appellant was not put to unnecessary expense if matters that may affect the use of the building were not first resolved. That seems to be the very purpose of section 83 and therefore it is surprising that a similar hold point does not exist for where the application is made to a local government. There is no equivalent to the statutory obligation which local governments previously had under the *Building Act 1975* to refuse a building application if a necessary planning application was not first made.[12]

138. Therefore, on the present state of the law, even if the Appellant does require a material change of use development permit, it is not an impediment to the building development application being progressed where the Council is the assessment manager.

139. The effect of this legislative gap is that the risk and expense rests with the Appellant in progressing a building development application that may be futile if a necessary material change of use approval affects the form or location of the building or the use of the building. Despite the Council encouraging the Appellant to seek pre-lodgement advice about the material change of use, the Appellant has persistently rejected the need to do so.

140. The Council submits that while section 83 does not apply to the Appellant's application directly, whether a development permit stated in section 83 is necessary is still something that must be stated in the supporting documents for a building work development application.

141. Section 25(2)(a)(ii) of the *Building Act 1975* requires the supporting documents given or required to be given with a building work development application to state "*whether a development permit, PDA development permit, preliminary approval or referral agency's response mentioned in section 83(1) is necessary for the application*".

142. In the Tribunal's view, the preferrable interpretation of that requirement is one that takes in the context of section 83, such that a development permit mentioned in section 83(1) is necessary *for the application* only where section 83 is engaged by section 82, which is if a private certifier is assessing the building development

---

[12] Former section 30BA (Local government to tell applicant of planning law requirements) and section 30BC (When application for approval to the carrying out of building work to be refused)

application. As section 83 does not apply to a local government assessment manager, the answer to whether a development permit mentioned in section 83(1) is necessary for the application is no.

143. If the statutory context of section 83 is ignored and the requirement is for supporting documents to state whether a development permit is necessary, the Appellant has, in various documents given to the Council relating to the application, stated the Appellant's view that no use approval was required. The correctness of the Appellant's statement is a separate matter, but an incorrect answer does not have the consequence of making the application not properly made.

144. In *Trinity Park Investments Pty Ltd & Another v Cairns Regional Council & Another* [2019] QPEC 68, the Planning & Environment Court considered a question where the assessment manager was concerned with the level of assessment. The Court concluded:

> "[52] …The approach adopted by the Council misconstrues what constitutes a properly made development application…….As to what is required to make a properly made development application is set out in s. 51 of the Planning Act 2016. That section requires that a development application must be in the approved form to the assessment manager, be accompanied by the required documents, or given with, the application, and the payment of the required fee. …
>
> [53] Pursuant to s. 51(4)(a), an assessment manager must accept an application that he is satisfied complies with subsections (1), (2) and (3) and pursuant to subsection (4)(b), must not accept an application unless satisfied that the application complies with subsections (2) and (3). Provided subsections (2) and (3) are complied with, s. 5(4)(c) and (d) provides him a limited discretion to accept an otherwise non-compliant application. Pursuant to s. 51(5), an application that complies with subsections (1), (2) and (3) or, where the discretion is exercised to accept a non-compliant application, it is to be treated as being properly made.

145. This is to be contrasted with the repealed *Integrated Planning Act 1997*, section 3.2.1(7)(c) which, in addition to a requirement that the application be made in the approved form required that, to be a properly made application:

> "(c) *the mandatory requirements part of the approved form is correctly completed*".

146. There is no equivalent in the *Planning Act 2016* or the *Building Act 1975*.

147. The Tribunal concludes that the pre-condition for the Council's obligation to receive, assess and decide the Appellant's application under section 51 of the *Building Act 1975* was satisfied. The matters raised by the Council do not stand in the way of the application being a properly made application.

Has the application reached the decision stage and has the due date passed?

148. The Tribunal finds that the application was properly made on the date the Appellant paid the required fee, which occurred on 27 January 2023.

149. Under the Development Assessment Rules the decision period is 35 business days from 27 January 2023 where there are no referral agencies and the assessment manager does not make an information request.

150. As a decision was not made by 17 March 2023, being 35 business days from 27 January 2023, the application was taken to be refused on that date.

Decision in relation to the Council's deemed refusal

151. The Council's correspondence of 1 March 2023 set out the private certifier's reservations about the application:

> "I have major reservations with the plans as submitted as this is not a class 1a dwelling. The building certifier ultimately determines the classification and not the applicant.
>
> You can't provide a set of plans that show for example an industrial shed and claim that it is going to be used as shops because that is how you want it, but that's not how it is designed to be used. The NCC (building Code of Australia) groups buildings and structures by the purpose for which they are designed, constructed or adapted to be used, rather than by the function or use they are put to, assigning each type of building or structure with a classification.
>
> These plans show a structure which is all concrete and blockwork with blockwork party walls separating the rooms into self-contained individual sole occupancy units.
>
> The plans show the building's design purpose would likely be either a class 2 or class 3 building where basically each room is designed to exclude the other sole occupancy units with separate external access to each room. There are no stairs internally to any of the rooms and no interconnection which is highly unusual in a family dwelling house and clearly shows these are designed to be kept separate. This could possibly even be adapted for use as a boarding house or hostel type facility.
>
> A dwelling house on the other hand is for the use of a single household and won't contain fire separating walls between floors and bedrooms and will generally have common use areas and shared facilities . The purpose of a fire separating wall (party wall as shown) is a wall to separate adjoining dwellings, or in this case individual rooms so if you see what I am saying the purpose of the building design for classification as per the NCC definitions is to create a structure that is not for a single household irrespective of what the owner may say or claim.
>
> This would also bring in the issue of any town planning requirements that may apply on the ultimate use this is intended for.
>
> I have also peer reviewed my comments with another Private Certifier that acts as expert witness for the courts generally and he agrees this cannot be considered a class 1a residence.
>
> If the applicant still wants to pursue a class 1a dwelling, then I recommend to Council that I would be refusing it on the basis that it is not the appropriate classification. Other certifiers should come to the same conclusion. My job is to act in the public interest and to protect Council's as well. You don't want to approve an inappropriate development and I certainly won't be approving anything that is unlawful.
>
> That also brings into the question whether or not there is a planning implication and if that structure is suitable for the area. I suspect that is why the applicant is not going to private certifiers because they should again be getting the same answers."

152. The private certifier being concerned about possible planning implications is understandable because where the private certifier is acting as the assessment manager section 83 would indeed prevent him from progressing an application until a necessary material change of use approval was in effect. However, for the reasons explained in paragraph 133 above, that does not operate where the local government is the assessment manager.

153. For a deemed refusal appeal, the Tribunal must decide the appeal by either:

(a) ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or

(b) deciding the application.[13]

154. In the Council's email to the Appellant on 1 March 2023, there is an intimation that if the application were pursued as a Class 1a dwelling, then the certifier would be recommending refusal on the basis that the building is not a Class 1a building.

155. Differences in building assessment provisions between a Class 1a and Class 1b include provisions relating to fire safety and disability access for a Class 1b. If the premises also constitutes a "residential service", then the additional provisions of QDC MP5.7 – Residential Services Building Standard would also apply.[14]

156. As noted in paragraph 120 above, the Council had not yet catalogued all of the requirements of the building assessment provisions that would need to be demonstrated as being complied with.

157. Based on the Tribunal's finding that the application was properly made and the date for decision has passed, it is appropriate that the Council as the entity responsible for deciding the application proceed to do so.

158. If the application does not comply, and cannot be conditioned to comply with the building assessment provisions applicable to the classification determined by the certifier, then those non-compliances will no doubt be recorded in the Council's decision.

159. The Tribunal orders the Council to decide the application by 8 November 2024.

Michelle Pennicott
Development Tribunal Chairperson

---

13 *Planning Act 2016*, section 254(2)(e) (Deciding appeals to tribunal)

14 In the Appellant's email to the Council dated 1 March 2023, the Appellant indicated the guest rooms are not self contained as they do not have full kitchen facilities and are dependent on the shared area to access full kitchen facilities.

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:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833
Email: registrar@epw.qld.gov.au