



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-070
Appellant:	Meridian Pacific Arms Pty Ltd ACN 168 176 592 (Meridian)
Respondent (Enforcement authority)	Brisbane City Council (Council)
Site address:	1456 and 1458 Wynnum Road Tingalpa Qld 4173 and described as Lots 4 and 5 on SP214661 (Land)

Appeal

Appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* (PA) against the decision of Council to give an enforcement notice under section 168 of the PA dated 15 December 2023 (**Enforcement Notice**), for carrying out assessable development without a permit.

Date and time of hearing:	10.00 am, 24 May 2024
Place of hearing:	Appeal held via Teams Meeting with the agreement of the parties
Tribunal:	John O'Dwyer – Chair Amelia Prokuda – Member Kym Barry – Member
Present:	Brennan Brook (on behalf of Meridian Pacific Arms Pty Ltd ACN 168 176 592, the Appellant) Ellen McDonough, Planner for the Appellant Nicholas Tucker, Council officer Eric Atkinson, Council officer Morgan Pratt, Council officer (on behalf of Council, the Respondent)

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2) of the *Planning Act 2016* (PA) confirms the decision by Council to issue the Enforcement Notice in respect of fill over Lots 4 and 5 on SP214661 at 1456-1458 Wynnum Road Tingalpa.

Background

1. This appeal is against the decision of Council to issue the Enforcement Notice following an inspection in response to a complaint. The Enforcement Notice was issued on the basis that filling had been undertaken in excess of 100mm over most of the Land. It alleged that such filling was operational work that required a development permit under the Brisbane City Plan (**City Plan**).
2. The Enforcement Notice was issued without a show cause notice on the basis that the development was considered to be significant and further work may not be able to be remedied if works were permitted to continue while representations in response to a show cause notice were considered.
3. The Appellant appealed the decision on the ground that filling is being done under a building permit issued by the Assessment Manager, Kwee Voon Ling, licence number A15071195.
4. The Appellant argues that the filling is not operational work as filling in excess of 100mm can be done as part of building work under the City Plan Flood overlay code. The Appellant claims the work is building work and compliant with the Flood overlay code.
5. The Council argues that the extent of filling allowed under a building permit is that necessary to support the building work, not any other filling of the site.
6. The Building Permit and supporting flood report for each lot both refer to the application being for a Class 1a dwelling on each of the two lots comprising the Land. There were different versions of the site plan for Lot 5 in the documentation in support of the appeal and the site plans were not fully dimensioned. As a result, the Tribunal issued a direction seeking the lodgement of a fully dimensioned site plan to be used by the Tribunal in its deliberations.
7. Although it is not a matter that the Tribunal has taken into account in deciding the appeal, the Tribunal is of the view that the buildings shown on the plans for the Land are class 1b buildings in the nature of a hostel or boarding house under the National Construction Code (NCC) section A6G2(2)(b), not a class 1a dwelling house. In particular, the Tribunal notes:
 - a. The Tribunal notes that the building approval for the proposed building on Lot 5 referred to a class 1a 2 storey dwelling house, but in fact the plan is for a single storey class 1b building.
 - b. Accordingly, the assessment of the development applications for the development permits for building work on Lots 4 and 5 against the City Plan, in particular the Flood overlay code should have been on the basis that the proposed buildings were not a class 1a dwelling house but a class 1b building.
8. The issues to be considered are:
 - a. Is the work that is the subject of the Enforcement Notice building work or operational work?
 - b. Does the City Plan Flood code permit the extent of filling that has been undertaken?
 - c. Is the Enforcement Notice valid?

Jurisdiction

9. The Tribunal has jurisdiction to hear this appeal under the PA Schedule 1, section 1(2)(h) and Table 1, item 6 of the PA, as it is an appeal against a decision to give an

enforcement notice in relation to operational work associated with building work under the *Building Act 1975* (Qld) (**BA**).

Decision framework

10. As the appeal is against the Enforcement Notice, the Council has the onus to establish that the appeal should be upheld.
11. The appeal is by way of a hearing anew. The Tribunal decides the appeal on the basis of the evidence before the Council at the time of the decision and the evidence provided during the hearing and in response to directions of the Tribunal.
12. Under section 168(1)(a) of the PA, an enforcement authority may give an enforcement notice to a person if it reasonably believes the person has committed a development offence.
13. The Enforcement Notice states that Council reasonably believes the Appellant is committing a development offence under section 163 of the PA, namely carrying out assessable development without a permit.
14. Any enforcement notice must state:
 - a. the nature of the alleged offence; and
 - b. relevant to this appeal, if the notice requires a person not to do an act:
 - i. the period for which the requirement applies; or
 - ii. that the requirement applies until further notice; and
 - c. that the person has an appeal right against the giving of the notice (section 168(3) of the PA).
15. During the hearing, the Council made it clear that it was of the view that the work the subject of the Enforcement Notice was operational work, not building work authorised by the existing development permits for building work.

Material considered

16. The material considered in arriving at this decision comprises:
 - a. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 19 December 2023
 - b. City Plan, version 28.00 in effect on 5 December 2023
 - c. the PA
 - d. the BA
 - e. Email dated 14 April 2024 - Response from Appellant to Direction issued on 26 March 2024, providing:
 - Site architectural plans 1458 Wynnum Road, Tingalpa
 - Storm Water Consulting Pty Ltd "Flood Overlay Assessment Report 1458 Wynnum Road, Tingalpa", dated 8 December 2023.
 - f. Email dated 14 June 2024 - Response from Appellant to address Council response to Direction issued on 26 March 2024, providing;
 - Summary Report
 - 1456 Wynnum Rd, Building Approval dated 12 October 2023
 - Storm Water Consulting Pty Ltd "Flood Overlay Code Assessment report 1456 Wynnum Road Tingalpa" dated 18 December 2023, report with Photos not included in copy of report lodged as part of the Appeal documents
 - AHC Earthworks Plans with 3 metre Rule Applied
 - QDC - NMP 1.1 Driveways
 - QDC NMP 1.7 – Retaining walls
 - QDC MP 1.8 – Stormwater
 - QDC MP 3.5 Buildings in Flood Hazards
 - NCC/BCA Building in Flood Hazard Areas

- Building Regulation Qld 2021
- g. Email dated 24 June 2024 - Response from Council to address Appellant's response to Direction issued on 17 June 2024, providing:
 - Response to Appellants comments and information provided above;
 - Attachment 1 – Table 5-10-11 Flood overlay
 - Attachment 2 - Flood overlay code Part A
 - Attachment 3 – Application details, 1458 Wynnum Road, Tingalpa
 - Attachment 4 – Building Approval Decision Notice A006423222 5/12/2023, 1458 Wynnum Road, Tingalpa
 - Attachment 5 – Approved Plans 5/12/2023, 1458 Wynnum Road, Tingalpa
 - Attachment 6 – Application details, 1456 Wynnum Road, Tingalpa
 - Attachment 7 – Building Approval Decision Notice A006384962 18/10/2023, 1456 Wynnum Road, Tingalpa
 - Attachment 8 – Approved Plans 18/10/2023, 1456 Wynnum Road, Tingalpa
 - Attachment 9 – Storm Water Consulting Pty Ltd “Flood Overlay Assessment Report 1456 Wynnum Road, Tingalpa”, dated 18/12/2023.
 - Attachment 10 - Site Plan 1456 Wynnum Road, Tingalpa
- h. Email dated 31 May 2023 - Response from Council to Direction issued on 27 May 2024 providing extent of area considered to be filling associated with building work at 1456 and 1458 Wynnum Road Tingalpa
- i. Speedy Building Certifier QBCC Search
- j. Conquest & Anor v Bundaberg Regional Council [2016] QCA 203
- k. Conquest v Bundaberg Regional Council; Conquest v Bundaberg Regional Council [2014] QDC 166
- l. Logan City Council v Brookes [2020] QDC 24
- m. Building Regulation 2021 (Qld) (BR)
- n. Planning Regulation 2017 (PR)
- o. National Construction Code (NCC)
- p. Submissions by the Parties at the Appeal Hearing.

Findings of fact

18. The Appellant alleged the appeal only related to Lot 5 on SP214661. The Tribunal rejects that argument as the Enforcement Notice referred to 1458 Wynnum Road Tingalpa more particularly described as Lot 4/5 on SP214661 as the property is listed as such in the Council records. The appeal relates to both Lot 4 and to Lot 5 on SP214661.
19. The work the subject of the Enforcement Notice is operational work, not building work. The operational work is assessable development under the City Plan and there is no effective development permit for the work.
20. The Enforcement Notice complies with the requirements of section 168 of the PA.
21. Given the conclusion that the work the subject of the Enforcement Notice is operational work, not building work, it is not necessary for the Tribunal to determine the validity of the development permits for building work.

Reasons for the decision

Is the work that is the subject of the Enforcement Notice building work or operational work?

22. Under the PA, 'building work':

(a) *means—*

- (i) *building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or*
 - (ii) *works regulated under the building assessment provisions; or*
 - (iii) *excavating or filling for, or incidental to, the activities stated in subparagraph (i); or*
 - (iv) *excavating or filling that may adversely affect the stability of a building or other structure, whether on the premises on which the building or other structure is situated or on adjacent premises; or*
 - (v) *supporting (vertically or laterally) premises for activities stated in subparagraph (a).*
 - (b) (...)
 - (c) *does not include undertaking:*
 - (i) *operations of any type and all things constructed or installed that allow taking or interfering with water under the Water Act 2000; or*
 - (ii) *tidal works; or*
 - (iii) *works for reconfiguring a lot.*
23. 'Operational work' means work, other than building work or plumbing or drainage work, in, on, over or under premises that materially affects premises or the use of premises.
24. Relevantly to the appeal, 'building work' only includes excavating or filling for, or incidental to the building work identified in paragraph (a)(i) above, or excavating or filling that may adversely affect the stability of the building or other structure.
25. The Appellant submitted that all of the filling the subject of the Enforcement Notice was for building work and therefore fell within the definition of 'building work' and was authorised by the existing development permits for building work.
26. Council eventually conceded that some of the filling may be building work on the basis it was incidental to the building work the subject of the development permits. The Tribunal issued a direction seeking Council's indication of the extent of fill that was associated with building work.
27. In response to the direction, Council provided a sketch showing a 3m wide zone around the building for the rooming accommodation on each lot as being the extent of the acceptable fill considered by Council to fall within the definition of 'building work'.
28. While the Tribunal was sympathetic to the Appellant's submission that some of the fill was building work, the Tribunal does not accept that filling related to car parking or utility lines is building work. Further, whether some of the filling around the building may be permissible as building work under the building permits, may also be dependent on whether the building permits are lawful. In the appeal, the Tribunal is not required to determine whether the development permits are in fact lawful so it has not made any finding as to whether some of the filling may in fact be authorised by the development permits. That is presumably a matter that would be determined by the Council during the development application process for the filling that is operational work.

Is the operational work assessable development under the City Plan?

29. The building permit for each lot was premised on the land already being filled to a level of 3.300 mAHD below the proposed building works, as the permits did not have any specific

requirements relating to filling other than a requirement for a Form 12 certification of engineering footing inspection.

30. Engineering reports by Cyber Engineering for Lot 4 and for Lot 5 incorporated in the relevant building permits for those lots had notes indicating extra requirements for footings in fill and for compaction of fill. No evidence of compliance with the compaction requirements has been provided.
31. In response to a Direction the Appellant provided a statement regarding 1458 Wynnum Road Tingalpa including the following statement:

‘BCC updated to Flood Overlay Code and Tingalpa Flood Mapping updated and Signed into Legislation by Council – 10th December 2023’
32. This statement is incorrect as the update of the Bulimba Creek Flood Mapping had come into effect on 1 September 2023 in the Amendment creating City Plan version 28 and upgraded the Flood Planning Area over most of the site from Flood Planning Area 4 to Flood Planning Area 3. This was before either building permit was considered.
33. The Flood assessment reports for Lot 4 and Lot 5 both state the land was filled prior to the site inspection undertaken by the flood engineering consultant.
34. Therefore, at the time of the filling, the requirements for compliance with the Flood overlay code Table 8.2.11.3.A Section A had not been assessed and so the self-assessment requirements for a dwelling house had not been met. Therefore, it is more likely than not that all the filling is operational work.
35. The BCP Flood overlay code at Table 8.2.11.3.A Section C Acceptable Outcome AO8 allows up to 100mm of fill in the Creek/waterway flood planning area categories 1, 2 and 3, if contained in the 5% AEP flood extent of any Creek/waterway flood planning area sub-category for which no waterway corridor has been mapped in the Waterway corridors overlay.
36. No waterway corridor has been mapped in the Waterway corridors overlay over the land.
37. The majority of the land is mapped in the Creek/waterway flood planning area category 3 and includes a small area of category 4 adjacent to Wynnum Road and is in an area where the AEP 5% depth is 2.6mAHD (Refer to Flood assessment report for 1458 Wynnum Road Figure 2.2 which shows the flood categories over both lots of the subject site and Appendix 5 Floodwise Property Report which shows the 5% AEP flood level as 2.6mAHD), the fill being over 100mm in depth does not comply with the acceptable outcome in Section C AO8.
38. Therefore, the development on each lot cannot be accepted development for a dwelling house and so each development becomes code assessable development for filling and excavation.
39. For the reasons set out above, the Tribunal decides the appeal by confirming the Council’s decision to issue the Enforcement Notice. In accordance with the Enforcement Notice, the Appellant must cease all operational work at the premises until notified by the Council delegate.

John O’Dwyer
Development Tribunal Chair
Date: 27 September 2024

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, Local Government, Planning and Public Works
GPO Box 2457
Brisbane Qld 4001

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