



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>20-036</b>
<b>Appellant:</b>	Aquaa Pty Ltd (ACN 167 305 311)
<b>Respondent (Enforcement Authority):</b>	Brisbane City Council ( <b>Council</b> )
<b>Site Address:</b>	21 Albert Street, Rocklea, in the State of Queensland being Lot 83 on RP37531 ( <b>Premises</b> )

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### **Appeal**

An 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 5 November 2020, requiring the use of the premises as Rooming Accommodation cease until such time all relevant approvals are in place for the Rooming Accommodation to be within the Flood Overlay.

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<b>Date and time of hearing:</b>	N/A (appeal decided on submissions)
<b>Place of hearing:</b>	N/A (appeal decided on submissions)
<b>Tribunal:</b>	Stafford Hopewell – Chair Murray Lane – Member
<b>Submissions provided by:</b>	Appellant – Brennan Brook Brisbane City Council – Morgan Pratt

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### **Decision:**

The Development Tribunal (**Tribunal**), in accordance with section 252 of the PA, decides that the Tribunal has no jurisdiction for the tribunal proceedings.

In accordance with section 252(3) of the PA, the period for starting proceedings in the Planning and Environment Court (**Court**) to appeal the decision to give the enforcement notice starts again when the Tribunal gives this decision notice to the Appellant.

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>

## Background

1. The Appellant is the owner of the Premises, upon which is constructed a Class 1b building that is being used for Rooming Accommodation as defined under Council's planning scheme, being the Brisbane City Plan 2014 (**City Plan**).
2. The Premises is located in the Low Density Residential Zone, subject to the Moorooka – Stephens District Neighbourhood Plan, Flood Overlay – Brisbane River Flood Planning area 2B sub-category and area 3 sub-category, and various other overlays under the City Plan.
3. There is a building on the Premises that has been constructed pursuant to an approval dated 10 September 2015 which is described as a "Development (Building) Approval A004175816" granted for a Class 1b dwelling for Rooming Accommodation (**Development (Building) Approval**). The Development (Building) Approval was given by a private certifier.
4. Council gave the Appellant a Show Cause Notice dated 27 August 2020 under section 167 of the PA alleging the following development offences under the PA:
  - (a) Section 163 – Carrying out assessable development without permit; and
  - (b) Section 165 – Unlawful use of premises.
5. Following the receipt and consideration of representations made by Gateway Survey & Planning Pty Ltd on 2 October 2020 in response to the Show Cause Notice, Council gave the Appellant an Enforcement Notice under section 168 of the PA dated 5 November 2020 with Council reference CA136159 (**Enforcement Notice**).
6. The Enforcement Notice states that Council reasonably believes the Appellant has committed, and is committing, the following development offence under the PA at the Premises:
  - (a) Section 163 – Carrying out assessable development without permit.
7. The Enforcement Notice cites a lengthy set of facts and circumstances which run to 47 paragraphs upon which the alleged offence is based.
8. In summary, Council states at paragraph 46 of the Enforcement Notice that assessable development being a material change of use and building work for a new premises (Rooming accommodation – Class 1b building) in a Flood overlay is assessable development requiring a Development (Planning) Approval.

## The Appeal

9. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 16 November 2020.
10. The Appellant's Form 10 sets out the Appellant's grounds of appeal. This states:

*"That [sic] basis for the Enforcement Notice is that a planning approval is required for Rooming Accommodation on a property that has a Flood Overlay on it. That in our opinion is not correct."*
11. The grounds for appeal go on to submit as to why the Appellant contends that a planning approval is not required to use the Premises for Rooming Accommodation.

## Jurisdictional issue

12. The Tribunal in its preliminary review of the appeal identified concerns about the jurisdiction of the Tribunal to decide the appeal.
13. By email dated 23 February 2021, the A/Registrar on behalf of the Tribunal sent an email to the parties requesting submissions as to the jurisdiction of the Tribunal to decide the appeal. This included the following:

### **"Background**

*The appeal is against the enforcement notice dated 5 November 2020 given by Brisbane City Council (Council reference CA136159) (**Enforcement Notice**). The Enforcement Notice states that it is considered that the recipient has committed a development offence under the Planning Act 2016 (PA) being "Section 163 – Carrying out assessable development without permit".*

### **Jurisdiction**

*The Tribunal's jurisdiction is established by section 229 and schedule 1 of the PA. In relation to appeals against an enforcement notice, the Tribunal's jurisdiction is subject to schedule 1 item 1(2)(h)(i) which requires the enforcement notice to be in relation to a matter under paragraphs 1(2)(a) to (g).*

### **Issues**

*The Enforcement Notice references a Development (Building) Approval A004175816 dated 10 September 2015 for a Class 1b dwelling for Rooming Accommodation and at paragraph 17 the Enforcement Notices states that the Council formed the reasonable belief that assessable development has occurred on the premises, in that Building Work for a Class 1b building in a Flood Overlay is assessable development requiring a Development (Planning) Approval. The Enforcement [Notice] goes on to consider the use of the premises and at paragraph 43 it is stated that the Council considered the use is Rooming accommodation.*

*At paragraph 46, the Enforcement Notice states "assessable development has occurred on the premises. Specifically, a Material change of use and Building work for new premises (Rooming accommodation – Class 1b building) in a Flood overlay is assessable development requiring a Development (Planning) Approval".*

*Under the Requirements of the Enforcement Notice, the recipient must "Cease use of the premises as Rooming Accommodation until such time all relevant approvals are in place for the Rooming Accommodation to be within the Flood Overlay".*

*Based on the Tribunal's preliminary consideration of the Enforcement Notice and grounds of appeal, it does not appear that the appeal relates to a matter within the scope of 1(2)(a) to (h) of schedule 1 of the PA and it is unclear as to whether the appeal is in relation to a matter in 1(2)(g) of schedule 1 of the PA as it is unclear as to whether the appeal against the enforcement notice relates to:*

- A) *the building work on the premises under the Building Act 1975; and/or*
- B) *the dispute that a development permit for material change of use of the premises is required under the PA.*

### **Directions**

1. The Appellant is to provide written submissions to [the] Registry and Respondent by **4.00pm on Tuesday 2 March 2021** addressing the Tribunal's jurisdiction to decide the appeal;
2. The Respondent is to provide written submissions to the Registry and Appellant by **4.00pm on Tuesday 9 March 2021** addressing the Tribunal's jurisdiction to decide the appeal."

### Submissions

14. By email dated 3 March 2021, Brennan Brook on behalf of the Appellant provided the following response:

*"The Development at 21 Albert St, Rocklea was for a building approval for new building work on this site. The city plan 2014 identifies works within this site as being effected [sic] by a Flood Overlay Code. Where works comply with all of the acceptable outcomes of this code in Section A of the Flood Overlay Code, the works become self assessable and do not require development approval from council. The certifier also provide [sic] approval for the material change of use from a class 1a dwelling to a class 1b dwelling which under the Flood Overlay Code is also self assessable and did not required [sic] a development approval from council.*

*There appears to be a dispute within council itself as to the procedures for carrying out these numerous [sic] approvals and what form and at what stage these should be carried out in order to remain compliant and self assessable. The certifier obtained planning advice both privately and from council itself at the time of the approvals and was instructed by council on how the approvals were to be carried out. Given the property has been completed and occupied for more than 5 years and there are other Rooming Accommodation dwellings in the same street that have been built and are about to be built the intention of the council seems that Rooming Accommodation is an acceptable outcome for this street. The only issue then is [sic] seems is that the CARS officers are looking to create an issue where there is not one, as part of their broader push to restrict Rooming Accommodation and Affordable housing from being constructed. The CARS team is attempting to call into question the validity of the approvals that have been issued by the certifier and if they are properly made applications and approvals some 5 years after the occupation of the dwelling for which council has been aware of the use for this entire time.*

*Given this I would state that this is a dispute about refusal of a development application for a material change of use for a classified building. This being one of the acceptable criteria for the tribunal to hear as stated at Schedule 1 (2)(a)(b)(i). It could also be said to be covered by 1(2)(f) where council is attempting to deem a refusal of a development application that is only for a material change of use of a classified building. It is further noted that had council wanted to appeal against the issuing of a development approval for building work to the extent that the building work would have required code assessment against the building assessment provisions by the private certifier, that matter could only have been heard by the tribunal only and not in any other forum [sic]. As per Table 3 (1). The time to do that would have been 5 years ago however. But if the council now is retrospectively [sic] refusing the private certifiers [sic] approval this provision would be in effect I believe.*

*..."*

[Tribunal's emphasis]

15. By email dated 9 March 2021 from Morgan Pratt, Council provided a written submission signed by Morgan Pratt as Council delegate.
16. In this submission, Council asserts that the Tribunal does not have jurisdiction to decide the appeal as the Enforcement Notice is alleging the carrying out of assessable development without a permit and this is not an issue on appeal that falls within any of the prescribed categories contained in Schedule 1, section 1(2)(a)-(g) of the PA.
17. Council further submits that with specific regard to Schedule 1, section 1(2)(b)(i) of the PA, the subject matter of the appeal does not relate to a development application for a material change of use for a classified building. Rather, in Council's submission, the appeal concerns an enforcement notice alleging assessable development to have been carried out without a permit.

### **Jurisdiction**

18. Schedule 1 of the PA states the matters that may be appealed to a tribunal.<sup>1</sup>
19. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves a matter set out in sub-section (2).
20. Section 1(2)(h)(i) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g) of section 1(2).

### **Decision framework**

21. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the Appeal is to be heard and determined under the PA.
22. The Appellant is the recipient of the Enforcement Notice and accordingly, Council, being the enforcement authority that gave the Enforcement Notice, must establish that the Appeal should be dismissed.<sup>2</sup>
23. The Tribunal is required to hear and decide the Appeal by way of a reconsideration of the evidence that was before Council when it decided to give the Enforcement Notice.<sup>3</sup>
24. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal<sup>4</sup>.
25. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person<sup>5</sup>.
26. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.<sup>6</sup>

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<sup>1</sup> Section 229(1)(a) of the PA.

<sup>2</sup> Section 253(3) of the PA.

<sup>3</sup> Section 253(4) of the PA.

<sup>4</sup> Section 253(5)(a) of the PA.

<sup>5</sup> Section 249 of the PA.

<sup>6</sup> Section 253 and section 246 of the PA.

27. The Tribunal may decide that the Tribunal has no jurisdiction to decide the tribunal proceedings.<sup>7</sup> Otherwise, the Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
- (a) *confirming the decision; or*
  - (b) *changing the decision; or*
  - (c) *replacing the decision with another decision; or*
  - (d) *setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or*
  - (e) *for a deemed refusal of an application:*
    - (i) *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*
    - (ii) *deciding the application.*

### **Material Considered**

28. The material considered in arriving at this decision comprises:
- (a) 'Form 10 – Appeal Notice', grounds for appeal and information accompanying the appeal lodged with the Development Tribunals Registrar on 16 November 2020;
  - (b) An email dated 23 February 2021 from the A/Registrar, Development Tribunals to the parties, requesting submissions from the parties on the jurisdiction of the Tribunal to hear the Appeal;
  - (c) An email dated 3 March 2021 from Brennan Brook to the A/Registrar, Development Tribunals providing the Appellant's submission in relation to jurisdiction;
  - (d) An email dated 9 March 2021 from Morgan Pratt of Council to the A/Registrar, Development Tribunals providing Council's submission in relation to jurisdiction;
  - (e) *Planning Act 2016*; and
  - (f) *Building Act 1975 (BA)*.

### **Findings of Fact**

29. The Enforcement Notice alleges that a development offence has been committed pursuant to section 163 of the PA in respect of carrying out assessable development without a permit.
30. The Tribunal considers that the Enforcement Notice is confusing and lacks clarity as Council has not clearly and succinctly identified the assessable development that is alleged to have been carried out without an effective development permit. However, the Tribunal understands Council's position as set out in the Enforcement Notice is that a development permit for a material change of use is required under the City Plan for the use of the Premises for Rooming Accommodation. This is consistent with the requirements imposed by Council to cease the use of Rooming Accommodation until all necessary permits are obtained.

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<sup>7</sup> Section 252(1) of the PA.

31. Council's submission of 9 March 2021 affirms that it considers that the Enforcement Notice is in relation to carrying out assessable development without a permit (although it does identify the alleged assessable development).<sup>8</sup>
32. Under section 1(2)(h) of Schedule 1 of the PA, the Tribunal has jurisdiction to hear the appeal if the Enforcement Notice is in relation to a matter under paragraphs (a) to (g) of section 1(2).
33. Having regard to each of paragraphs (a) to (g) in turn:
- (a) paragraph (a) applies to a refusal, or deemed refusal of a development application for a material change of use for a classified building, or certain operational work;
  - (b) paragraph (b) applies to a development approval for a material change of use for a classified building, or certain operational work associated with building work;
  - (c) paragraph (c) applies if a development permit was applied for—the decision to give a preliminary approval for—a material change of use for a classified building, or certain operation work;
  - (d) paragraph (d) applies to a development condition if the development approval is only for a material change of use that involves the use of a building classified under the Building Code as a class 2 building;
  - (e) paragraph (e) applies to a decision for, or a deemed refusal of, an extension application for a development approval that is only for a material change of use of a classified building;
  - (f) paragraph (f) applies to a decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use of a classified building;
  - (g) paragraph (g) applies to a matter under the PA, to the extent the matter relates to the Building Act, other than a matter that may or must be decided by the Queensland Building and Construction Commission (**QBCC**).
34. Section 248(5) of the BA provides that an enforcement notice given under that section is taken to be an enforcement notice given under section 168 of the PA. However, there is no indication that the Enforcement Notice has been given pursuant to section 248 of the BA or that any matter within the scope of section 248 of the BA has been engaged by the Enforcement Notice. The Tribunal therefore finds that the Enforcement Notice is not in respect of section 1(2)(g) of Schedule 1 of the PA.
35. In relation to the other matters, Council notes at paragraph 6 of the Enforcement Notice that the Premises has the benefit of the Development (Building) Approval and this approval is also referred to in the Appellant's grounds of appeal and submissions.
36. In the Appellant's submissions, this approval is described as a "building approval for new building work". There is also reference to the private certifier providing approval for the "material change of use from a class 1a dwelling to a class 1b dwelling".
37. In Council's submission's at paragraph [15] it is stated that the Development (Building) Approval given by the private certifier is for a class 1b dwelling for use as Rooming Accommodation. Council further states at paragraph [16] that following inspections at the Premises, Council formed the reasonable belief that use of the Premises is not in accordance with approved conditions. However, Council does not provide any details as to how the use of the Premises is not in accordance with the approved conditions.

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<sup>8</sup> See paragraph [5].

Furthermore, the Enforcement Notice is in relation to carrying out assessable development without a permit and is not given in relation to non-compliance with a development approval.

38. The Tribunal finds that the Development (Building) Approval applies to the Premises and is the only relevant development approval in respect of the Premises with no other approvals identified or referred to by the parties.
39. A copy of the Development (Building) Approval has not been provided by either party to the Tribunal.
40. While the Development (Building) Approval is described in different terms by the parties, the Tribunal understands that this approval is for building work and there is no evidence that this approval was for the change of classification of the building.
41. The Development (Building) Approval was approved by the private certifier, so section 1(2)(a) of Schedule 1 of the PA is not relevant as there has been no refusal or deemed refusal of a development application for a material change of use for a classified building.
42. In relation sections 1(2)(b) and 1(2)(c) of Schedule 1 of the PA, given the Tribunal's finding that the Development (Building) Approval is for building works and is not for a material change of use for a classified building, these sections are not engaged by the appeal.
43. The building on the Premises is a class 1b building, so section 1(2)(d) of Schedule 1 of the PA is not engaged.
44. With regard to sections 1(2)(e) and 1(2)(f) of Schedule 1 of the PA, there is no evidence of any extension application or change application for a development approval, so these sections are not engaged.
45. The Tribunal therefore finds the enforcement notice the subject of the appeal is not in relation to a matter within the scope of section 1(2)(h) of Schedule 1 of the PA and the Tribunal accordingly does not have jurisdiction for the tribunal proceedings.

### **Reasons for the Decision**

46. Council has submitted that the Enforcement Notice does not satisfy any of the criteria contained in paragraphs (a) to (g) of section 1(2) of Schedule 1 of the PA but has not provided detailed analysis or explanation in support of its view.
47. The Appellant, in contrast, has submitted that paragraphs (b) and/or (f) of section 1(2) of Schedule 1 of the PA are engaged.
48. In relation to section 1(2)(b) of Schedule 1, the Appellant has not referred to or identified any provision of a development approval for a material change of use for a classified building that is the subject of the Enforcement Notice.
49. In particular, the Appellant has not identified any provision the Development (Building) Approval that is the subject of the Enforcement Notice.
50. The Tribunal understands the Development (Building) Approval to be a development approval for building work for a Class 1b building. A Class 1 building is a "classified building".<sup>9</sup> However, the Tribunal understands the Development (Building) Approval is not for material change of use for a classified building.

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<sup>9</sup> See definition of 'classified building' in schedule 2 of the PA.



51. Alternatively, if this is a development approval for material change of use for a classified building, no provision of this development approval has been identified that is the subject of the Enforcement Notice.
52. Accordingly, the Tribunal finds that the Enforcement Notice is not in relation to section 1(2)(b)(i) of Schedule 1 of the PA.
53. With respect to section 1(2)(f) of Schedule 1 of the PA, the Tribunal has not been referred to any decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use for a classified building. As noted above, the only development approval identified in relation to the Premises is the Development (Building) Approval. There is no evidence of any change application having been made in relation to this development approval that is subject to a decision or deemed refusal.
54. The Tribunal therefore finds that section 1(2)(f) of Schedule 1 of the PA is not engaged by the appeal.
55. The Tribunal is not satisfied that the appeal is in relation to a matter under paragraphs 1(2)(a) to (g) of Schedule 1 of the PA and therefore does not satisfy section 1(2)(h) of Schedule 1 of the PA.
56. The Tribunal considers that the Enforcement Notice and the parties' submissions have a lack of detail and coherency as to the nature of the Development (Building) Approval and the alleged offence that is the subject of the Enforcement Notice. However, it appears to the Tribunal that the substance of the Enforcement Notice is that the use of the Premises for Rooming Accommodation is assessable development under the City Plan and that a development approval is required pursuant to the City Plan to authorise the use of the Premises for Rooming Accommodation.
57. The Tribunal's jurisdiction is defined by the terms of the PA and the Tribunal has no discretion to hear a matter that is not within the Tribunal's statutory jurisdiction. Having regard to the Enforcement Notice and the parties' submissions, the Tribunal is of the opinion that the appeal is not within the jurisdiction of the Tribunal as it does not concern a matter within the scope of section 1(2)(h) of Schedule 1 of the PA.
58. Accordingly, the Tribunal decides pursuant to section 252 of the PA that it has no jurisdiction for the tribunal proceedings and the appeal is required to be determined by the Planning and Environment Court.

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**Stafford Hopewell**

**Development Tribunal Chair**

**Date:** 12/05/2021