



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 20-004

Appellant: Leonard Charles Eaton Taplin and James Leonard Eaton Taplin

**Respondent:
(Enforcement Authority)** Brisbane City Council

Site Address: 189 Birdwood Terrace, Toowong, Qld 4066 and described as Lot 21 on RP 20541 – the subject site

Appeal

Appeal under the *Planning Act 2016* (PA), section 229 and Schedule 1, section 1(2)(h)(ii) in relation to an Enforcement Notice given under the *Plumbing and Drainage Act 2018* regarding non-compliant sanitary plumbing and drainage.

Date and time of hearing: Friday 3 July 2020 at 10.30am.

Place of hearing: 41 George Street, Brisbane, Qld.

Tribunal: Mr Chris Harris - Chair
Mr Stafford Hopewell - Referee

Present: Mr Leonard Taplin - Appellant
Mr James Taplin - Appellant representative
Mr David Taplin - Appellant representative
Mr Anthony Tabe - Principal Plumbing Officer, Brisbane City Council
Mr Aiden Winton - Plumbing Officer, Brisbane City Council
Mr Raymond Leatch - Investigation Team Leader, Brisbane City Council
Mr Glenn Davidson - Principal Officer Built Environment, Brisbane City Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) upholds the appeal and **replaces** the decision to issue an Enforcement Notice with a decision not to issue the Enforcement Notice.

Background:

1. This appeal is against an enforcement notice dated 23 January 2020 issued by Brisbane City Council (Council) to the owners of 189 Birdwood Terrace, Toowong being Lot 21 on RP 20541 for alleged offences under the *Plumbing and Drainage Act 2018 (Act)* (Enforcement Notice).
2. The Enforcement Notice has been given by the Council on the basis it believes that two (2) offences have been committed by the owners of the subject site, being:
 - a) an offence against section 69 of the Act being that a person must not use plumbing or drainage work that is the result of permit work unless an inspection certificate or final inspection certificate has been issued and the work is compliant;
 - b) an offence against section 70 of the Act being that if a permit has been issued for plumbing or drainage work, the owner of the premises must ensure the plumbing or drainage work is operated and maintained in compliance with the conditions of the permit.
3. Council approved compliance assessment of regulated work under section 86 of the *Plumbing and Drainage Act 2002* in respect of the subject site on 21 May 2007 with Council reference DP02187325407 (Plumbing Permit). The Plumbing Permit was subject to a number of conditions.
4. The Plumbing Permit was given in connection to the relocation of the then existing dwelling house that was located across the common boundary of the subject site (Lot 21) and adjoining premises at 48 Harwood Road, Toowong being Lot 20 on RP 20541, which were at the time in common ownership and occupied as a single property holding.
5. Subsequent to the relocation of the original house wholly onto the subject site and its renovation and extension, the adjoining Lot 20 was sold and later separately developed for a new dwelling house.
6. In 2017, Council commenced an investigation of plumbing and drainage work carried out at the subject site. Based on this investigation, the Council is of the belief that the Plumbing Permit required that a new interconnection be made to the sewer which has not been done. Council further believes that because the Plumbing Permit has not been complied with, it is unable to issue a compliance certificate and the use of the plumbing and drainage work is unlawful.

History

7. Based on information provided by the parties, it appears that by 1926, Lots 20 and 21 were existing and in common ownership with a dwelling house built over the common boundary of the lots (Council has been unable to identify when the lots were originally created or the house built on the land although this is likely to predate the establishment of the Council in 1925). The location of a single dwelling house built over the common boundary of Lots 20 and 21 is confirmed by Council's aerial imagery from 1946 and 2007.
8. In the 1950s, Council installed a sanitary sewer through the rear of these properties and provided a connection point to the then existing dwelling house. Although the land comprised two separate land titles, Council did not provide a connection point to each individual lot and Council's as-constructed plans appear to show Lots 20 and 21 as one large corner lot.

9. In about 1991, the Appellants purchased the land being Lots 20 and 21 and in May 2007 obtained building and plumbing approvals to move the dwelling house onto Lot 21 leaving Lot 20 vacant.

Lot 21

10. Council issued the Plumbing Permit in May 2007, relating to the relocation of the original dwelling. The permit contained a condition advising the applicant that the property did not have a sanitary house drain connection to Council's sewer. The condition was listed as a standard condition and at the Tribunal hearing Council expressed the view that the existing sewer connection point was in Lot 20 and not Lot 21.
11. Inspection records show that Council undertook a drain inspection, connecting a new drain to the existing drain, just short of the new retaining wall within the allotment. It was also noted on the inspection record that it was considered a temporary connection and that a new connection to Council's sewer would be required.

Lot 20

12. Council issued a plumbing permit in July 2013 and a builder commenced construction of a new dwelling the following year. Council's plumbing records show that in July 2015 a drain inspection was undertaken and the Plumbing Inspector advised the plumber that he could not connect to the sewer connection point, as it would make a "Combined Drain".
13. The drain from the dwelling on Lot 21 was still connected to the Council sewer at this location. (Although some combined drains exist within the Council area, it is a requirement that each individual lot has its own separate connection point to the sewer system). The Tribunal was advised during the hearing that the builder of the dwelling went into liquidation and the works were completed under the Queensland Building and Construction Commission (QBCC) housing insurance scheme.
14. In April 2018, nearly 3 years later, a final plumbing inspection was undertaken and the inspector noted that the drain had been connected to the sewer via the neighbouring drain of Lot 21 creating a combined drain.

Discussions with the owners of the subject site

15. Between June 2018 and December 2019 a number of meetings were held between Council representatives and the owners of the subject site to resolve the matter. Council officers were of the opinion the sewer connection point was within Lot 20 and that as per the Plumbing Permit condition the owner of Lot 21 was required to apply for a new connection point to be established for Lot 21.
16. The owner of Lot 21 did not agree with Council and maintains that the connection point to the sewer system is in fact in Lot 21.
17. Following the issuing of a Show Cause Notice, Council issued an Enforcement Notice on 23 January 2020, effectively requiring the owner of Lot 21 to install a new sewer connection point within Lot 21.

Jurisdiction:

1. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.¹ 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 one of a list of matters set out in sub-section (2).
2. Section 1(2)(h)(ii) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice under the *Plumbing and Drainage Act 2018*. So, Table 1 of Schedule 1 of the PA applies to the Tribunal.
3. Under item 6 of table 1 of Schedule 1 of the PA, an appeal may be made against the decision to give an enforcement notice. The appeal is to be made by the person given the enforcement notice, who in this case is the Appellant.
4. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision Framework:

1. The enforcement notice the subject of this appeal was issued by the Council on or about 23 January 2020 under section 143 of the Act.
2. The Appellant filed a Form 10 – Notice of Appeal which was received by the Registrar on 2 March 2020.
3. Under section 253(3), for an appeal by the recipient of an enforcement notice, the enforcement authority that gave the notice must establish that the appeal should be dismissed. The Council therefore has the onus to establish that the appeal should be dismissed.
4. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Council when the enforcement notice was given.² The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal³. The Tribunal may also consider other information that the Registrar asks a person to give to the Tribunal.⁴
5. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting tribunal proceedings and may seek the views of any person⁵.
6. At the request of the Tribunal Chairperson, information was sought from the Council and Queensland Urban Utilities (QUU) by the Registrar. Further submissions were also received from the Appellant following the Tribunal's hearing.

¹ Section 229(1)(a) of the PA.

² Section 253(4) of the PA.

³ Section 253(5)(a) of the PA.

⁴ Section 253 and section 246 of the PA.

⁵ Section 249 of the PA.

7. 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;*

Material Considered:

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 2 March 2020.
2. Documentation provided at the Tribunal hearing by the Council on 3 July 2020.
3. Verbal representations at the Tribunal hearing on 3 July 2020.
4. Planning Act 2016.
5. Plumbing and Drainage Act 2018.
6. The Enforcement Notice issued by council on the 23 January 2020.
7. Documents provided by Council by email dated 30 June 2020 from Mr Glenn Davidson to the Registrar.
8. Documents provided by Council by email dated 2 July 2020 from Mr Glenn Davidson to the Registrar.
9. Submissions from Appellants dated 2 July 2020 made to the Registrar.
10. Correspondence between the Registry and QUU.

Findings of Fact:

The Tribunal makes the following findings of fact:

1. At the time of the installation of the Council sanitary sewer in the 1950s, the subject site and adjoining Lot 20 were in common ownership and occupied as a single property holding with a single dwelling house constructed across the common boundary of the lots.
2. The Council provided a single sewer connection to service the house on the property when the sewer was installed.
3. In about 2007, the current owners of the subject site caused the dwelling house to be relocated wholly onto the subject site and obtained the Plumbing Permit to facilitate the relocation and renovation of the original dwelling house.

4. When the Plumbing Permit was issued by the Council in 2007, the sewer interconnection was located on the subject site (Lot 21) and not on the adjoining Lot 20.
5. At all relevant times, the sewer interconnection for the subject site has been located within the boundaries of the subject site.

Reasons for the Decision:

1. Council had made the determination that the existing connection point branch pipe was within Lot 20 and that Lot 21 needed to have installed a new sewer connection point. The as-constructed drainage drawings, when the original dwelling was connected to the new sanitary sewer system, does not provide any detailed information of the location of the connection point branch pipe. It merely shows a dotted line highlighting the direction of the drain from near the left hand corner of the combined lots to the existing dwelling (Council reference Plumbing Application no 0135928).
2. Council's decision to issue the Enforcement Notice is based upon the condition stated in the Plumbing Permit, the inspection record notes and the GIS overlay maps showing the sewer location and connection point branch pipe. This map provided by and used by Council shows a connection point branch pipe from the main sewer traversing the corner of Lot 21, at approximately 45 degrees, into Lot 20. The GIS sewer map also does not have detailed information or measurements confirming the exact location of the connection point branch pipe or its distance either from or within the boundaries of Lots 20 or 21.
3. However Council does have a "Certificate of Microfilming" showing the original as-constructed sewer system for these lots. This plan, Detailed Plan number 819, is certified as a permanent record of the original and was microfilmed in 1998. It is clear from this as-constructed plan that the connection point branch pipe enters the combined Lots 20 and 21 significantly different to the GIS plans relied upon by Council.
4. The direction of the connection point branch pipe on this detailed plan appears to mirror the actual location of the connection point branch pipe on the land within Lot 21. A recent survey plan of Lot 20 confirming the location of the boundary coupled with on site photographs of the connection point provided to the Tribunal supports this view. Although this plan, like the GIS version, does not have distances or measurements from the boundaries it is the Tribunal's decision that, without any further detailed as-constructed plans, the microfilmed original must be relied upon over the GIS overlay map. Although claims were made that the original connection point branch pipe may have been altered by persons unknown there was no evidence provided that could confirm that the connection point branch pipe had been altered to favour Lot 21. The only clear evidence was that upon completing the new dwelling on Lot 20 the existing connection had been altered creating a combined drain.
5. Having regard to all of the evidence before the Tribunal, on the balance of probabilities, the Tribunal is satisfied that the sewer connection is located within the boundaries of the subject site. On this basis, the Tribunal considers that the Enforcement Notice has been given in error because the subject site does in fact have a sewer connection within it's own lot boundaries.
6. Based on this factual finding, it follows that the Council has erred in giving the Enforcement Notice on the ground that an unauthorised interconnection of sanitary drainage had occurred at the premises (paragraph 3 of the Enforcement Notice).

7. Further, despite the standard condition on the Plumbing Permit requiring a new connection, the subject site in fact enjoyed an existing connection to the sewer and was not required to obtain a new connection (this condition potentially representing a mistaken belief that the existing connection was located on Lot 20).
8. In relation to the failure to obtain a compliance certificate, as evidenced at paragraph 13 of the Enforcement Notice, the reason why the Council declined to give a compliance certificate was at least in part due to the Council's belief that the owners are required to install an authorised and compliant sewer connection.
9. Having regard to the material available to the Tribunal, the Tribunal is not satisfied that the owners of the subject site are required to install a new sewer connection or are responsible for the alleged unauthorised and non-compliant combined sewer drain in relation to the works carried out in connection with Lot 20.
10. In the circumstances, the Tribunal is not satisfied that the Council has discharged its onus to establish that the Appeal should be dismissed.

Chris Harris
Development Tribunal Chair

Date: 15 September 2020

Appeal Rights:

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

Enquiries:

All correspondence should be addressed to:

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

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