



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-063
Appellant:	Pengelly Developments Pty Ltd
Respondent:	Mackay Regional Council
Site Address:	1 Gateway Drive, Paget and described as Lot 9 on SP264501

Appeal

Appeal under section 229 and Schedule 1, Table 1, Item 4 of the *Planning Act 2016* against an infrastructure charges notice given by the Mackay Regional Council on the ground the notice involved an error relating to the application of the relevant adopted charge.

Date and time of hearing:	Appeal by written submissions
Place of hearing:	N/A
Tribunal:	Travis Schmitt – Chair Bryan Payne – Member

Decision:

The Development Tribunal, in accordance with section 254(2)(a) of the *Planning Act 2016* confirms the negotiated infrastructure charges notice given by the Mackay Regional Council.

Background

1. This appeal concerns a negotiated infrastructure charges notice issued by the Mackay Regional Council (**the Council**) to the Appellant on 22 October 2021 (**the NICN**).
2. The NICN was issued following approval of a minor change application made by the Appellant in respect of an existing Transport Depot use at 1 Gateway Drive, Paget (**the site**). Relevantly, the minor change included an extension to an existing vehicle wash bay.
3. The dispute concerns the application of the relevant Adopted Charges Resolution in the calculation of the levied charge. In particular, the treatment of the gross floor area (**GFA**) of the wash bay extension.
4. While the amount of the levied charge in the NICN is \$18,068.40, only \$17,766.00 is in dispute.
5. The Appellant seeks that the NICN be changed such that the levied charge is \$302.40 only. The Council opposes the relief sought and says the NICN should be confirmed.

Conduct of appeal

6. The Tribunal finds it has jurisdiction to hear the appeal pursuant to section 229 of the *Planning Act 2016*.¹ That the Tribunal has jurisdiction is conceded by the Council.²
7. The appeal is by way of a reconsideration of the evidence that was before the Council.³ It is for the Appellant to establish that the appeal should be upheld.⁴
8. At the request of the parties, the Tribunal has directed that the appeal be decided on the papers and written submissions have been filed. The Tribunal has considered the following material in determining the appeal:
 - a. Form 10 – Notice of Appeal and attachments:
 - (i) Letter from Revolution Town Planning dated 15 November 2021
 - (ii) Letter from the Council to the Appellant dated 9 September 2021
 - (iii) Letter from the Council to the Appellant dated 22 October 2021
 - b. Written submissions by the Appellant dated 22 March 2022 and attachments.⁵
 - c. Written submissions by the Council dated 29 March 2022 and attachments:
 - (i) Mackay Regional Council - *Adopted Charges Resolution* dated December 2020
 - (ii) *Mackay Region Planning Scheme v 3.1* extracts - 1.3.1 – Definitions, and SC1.2 – Administrative terms
 - (iii) *Apex Car Rental Pty Ltd v Brisbane City Council* – Building and Development Dispute Resolution Committee Appeal no. 33-12 dated 15 October 2012

Ground of appeal

9. By its notice of appeal, the Appellant alleges that:

The Infrastructure Charges Notice includes an error relating to the application of the relevant adopted charge. Council has incorrectly applied the Charges Resolution when calculating the levied charge. In particular, it is considered Council has incorrectly applied the definition of 'Gross Floor Area'. Refer Attachment 1.

10. That ground was expanded upon by the Appellant in written submissions:

It is considered that part of the change application relating to the building does not constitute Gross Floor Area as defined by the Regulation and Charges Resolution because:

- The extension to the vehicle wash bay is external to the building and is not enclosed by walls; and
- The vehicle wash bay area is necessarily used for the manoeuvring of vehicles.

Infrastructure charges regime

11. To best understand the parties' rival contentions, it is convenient to start with the infrastructure charges regime applicable in this matter.

¹ See also *Planning Act 2016*, Schedule 1, Table 1, Item 4.

² Council's written submissions, [6].

³ *Planning Act 2016*, s.253(4).

⁴ *Planning Act 2016*, s.253(5).

⁵ Which comprised the Form 10 Notice of appeal and attachments listed at paragraph 8.a herein.

12. It is uncontroversial that the Council has adopted charges for providing infrastructure for development by its *Adopted Charges Resolution 2020 (the ACR)* and that the Council was empowered to give the NICN.⁶ A levied charge may only be for the extra demand to trunk infrastructure that will be generated by the development.⁷
13. In calculating the extra demand the minor change will generate, the NICN adopts a total number of demand units (which includes the extensions to the use approved by the minor change) before applying a credit for the number of existing demand units. Relevantly, the demand unit is measured in 'M² Gross Floor Area'. When the existing demand is subtracted from the total demand there is a difference of 235m².
14. The Council says the difference is the GFA of the wash bay extension.⁸ Some support for that GFA can be found in the approved site plan⁹ which shows:



15. The significance of the wash bay's GFA becomes clear when regard is had to section 5.1.1 of the ACR:

5.1.1. Material change of use

- (a) For development that is a material change of use, the adopted infrastructure charge will be determined based on the following calculation method:

- (i) $ACMCU = \text{sum}(\text{GFA} \times \text{UR}) + (\text{IA} \times \text{IR})$, where:

ACMCU = Adopted charge for the sum of all uses

GFA = Gross floor area for each applicable use (m²)

UR = Applicable use rate shown in Schedule 1, column 3 (\$/m²) for each

⁶ *Planning Act 2016*, s.119(6).

⁷ *Planning Act 2016*, s.120(1).

⁸ Council's written submissions, [33].

⁹ Letter from the Council to Appellant dated 9 September 2021 (Minor change approval), see approved Site Plan and Crossover Layout.

applicable use in Schedule 1, column 2, or as determined by council where not specified.

IA = Impervious area for the total development (m²)

IR = Applicable impervious rate shown in Schedule 1, column 3 (\$/m²)

for each applicable use, or as determined by council where not specified.

16. In dispute is the interpretation to be given to the variable 'GFA' in that formula.
17. The term 'gross floor area' is not defined in the ACR. As both parties submitted, section 10(a) of the ACR therefore applies:

Where words and terms used in this resolution have the meaning given in the PA [*Planning Act 2016*] or the Minister's Guidelines and Rules or the Mackay Region Planning Scheme. [sic]

18. While GFA is not defined in the *Planning Act 2016* nor in the Minister's Guidelines and Rules,¹⁰ that term is defined in identical terms in the *Planning Regulation 2017*¹¹ and the *Mackay Region Planning Scheme 2017 (the Planning Scheme)*¹²:

gross floor area, for a building, means the total floor area of all storeys of the building, measured from the outside of the external walls and the centre of any common walls of the building, other than areas used for—

- (a) building services, plant or equipment; or
- (b) access between levels; or
- (c) a ground floor public lobby; or
- (d) a mall; or
- (e) parking, loading or manoeuvring vehicles; or
- (f) unenclosed private balconies, whether roofed or not.

19. The parties are agreed to that point.¹³ From there, the parties disagree as to how that definition is to be applied.

Parties' contentions

The Appellant

20. The Appellant makes two main arguments in support of its contention that the wash bay extension's floor area should not be used to calculate the levied charge. First, the wash bay extension is external to the building and is not enclosed by walls (**the Enclosure point**). Second, the wash bay is necessarily used for the manoeuvring of vehicles (**the Use point**).

Enclosure point

21. The Appellant's argument on this point is an interesting one and bears repeating in full:

In this respect it is noted that the definition of Gross Floor Area in the Regulation includes the words '*the total floor area of all storeys of the building, measured from the outside of the*

¹⁰ Applicable version 1.1.

¹¹ *Planning Regulation 2017*, Schedule 24.

¹² Applicable version 3.1.

¹³ Appellant's written submissions, 2; Council's written submissions, [14].

external walls and the centre of any common walls of the building, noting that Gross Floor area is measured in square metres (m²). When calculating square metres, the metre value on the x axis and the metre value on the y axis are multiplied to provide a total value in square metres. In circumstances where there is no x or y value, a square unit cannot be calculated.

With regard to the definition of Gross Floor Area in the Regulation and in the context of calculating Gross Floor Area for a building, the point of reference for measurement of Gross Floor Area within the definition is *'the outside of the external walls and the centre of any common walls of the building'*. Where either one or both x or y values are absent in this measurement (i.e no wall to determine the point of reference or point of termination), a square metre cannot be calculated. This applies to the approved development as shown in Figure 1 below:

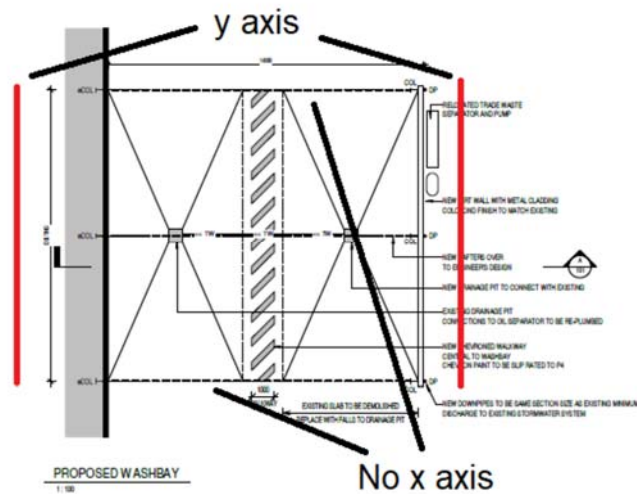


Figure 1 – Washbay Floor Plan (Source: StruXi Design 2021).

Where a square metre value cannot be calculated in accordance with the definition of Gross Floor Area, the definition of Gross Floor Area cannot be applied. As such, it is considered the approved Washbay Extension does not constitute Gross Floor Area as defined by the Regulation and the charges levied in relation to Gross Floor Area in the NICN have been levied in error. It is acknowledged the Approved Site Plan incorrectly notes the additional building area as Gross Floor Area in one location on the plan, however, the Site Plan also clearly states in the area schedule the additional building area as not being Gross Floor Area.

22. As the Tribunal understands the argument, it is contended that where a building is not fully enclosed on all sides (or at least three sides) to provide an x and a y axis, the definition of GFA cannot apply, as a measurement of the 'outside of the external walls and the centre of any common walls of the building' is not possible.

Use point

23. The Appellant also argues that as vehicles must manoeuvre into the wash bay before they are parked and then washed, the wash bay is excluded from the definition of GFA as an area 'used for parking, loading or manoeuvring vehicles'.

The Council

Enclosure point

24. In interpreting the definition of GFA, the Council argues that specific regard must be had to the word 'building'. As 'building' is not defined in the Planning Scheme, it takes its meaning

from the *Planning Act 2016*.¹⁴ Relevantly, a building is defined as ‘a fixed structure that is wholly or partly enclosed by walls and is roofed’.¹⁵

25. To aid in interpretation, the Council relied upon well-settled principles of statutory construction¹⁶ and, while acknowledging the calculation of GFA is not always easy,¹⁷ urged the Tribunal to adopt a ‘sensible outcome’.¹⁸
26. The Council argued that as the wash bay was a fixed structure, was partly enclosed by two walls (the existing workshop wall and the eastern wall), and was roofed, it comfortably fit within the definition of a ‘building’ and, therefore, its GFA could be calculated.

Use point

27. The Council argues that the Appellant has overlooked the words ‘used for’ in the definition of GFA when attempting to fall within the exclusionary provision at (e). The Council argues that the wash bay ‘is not used for parking, loading and manoeuvring vehicles...but is to be used for washing vehicles. It has a specifically designed purpose associated with the overall use of the site (being a transport depot)’.¹⁹
28. The Council cited *Apex Car Rental Pty Ltd v Brisbane City Council*²⁰ and urged the Tribunal to adopt similar reasoning to reject the Use point.

Findings & Reasons

Enclosure point

29. Determination of this point turns upon the proper interpretation to be given to the definition of GFA contained in the Planning Scheme and the *Planning Regulation 2017*. Where that definition uses the word ‘building’ it takes its meaning from the *Planning Act 2016*.²¹ The Tribunal agrees with the Council’s submissions in that regard.
30. In the premise that the ‘building’ referred to in the definition of GFA is ‘a fixed structure that is wholly or partly enclosed by walls and is roofed’, the arguments advanced by the Appellant cannot be supported.
31. To provide further context to the above diagram relied upon by the Appellant (see [21] herein), the Tribunal has had regard to the below plan which shows the south elevation of the wash bay. Relevantly, it depicts a lean-to structure fixed to the existing workshop wall, enclosed by a new wall to the east, and open at the southern and northern ends.²²

¹⁴ Council’s written submissions, [15]-[17]; Planning Scheme, s.1.3.1(1).

¹⁵ *Planning Act 2016*, Schedule 2.

¹⁶ The Council cited *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; *Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82.

¹⁷ For example, see *Bon Accord Pty Ltd v Brisbane City Council* (2008) 163 LGERA 288, [95].

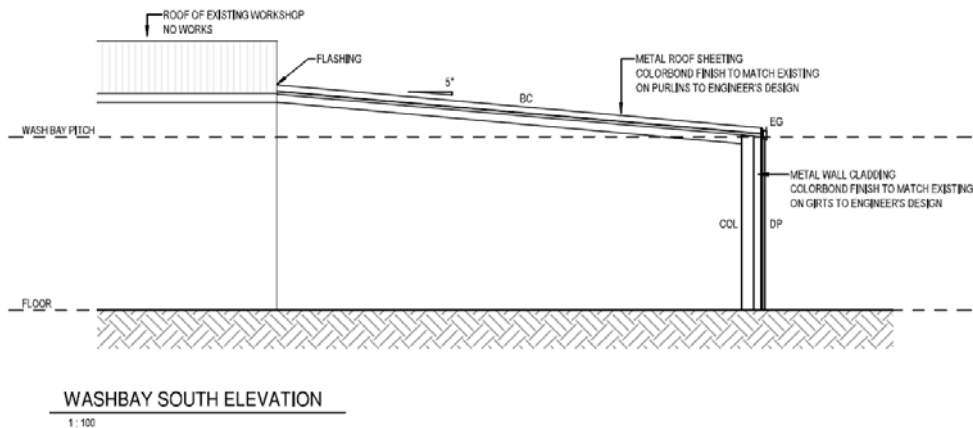
¹⁸ Council’s written submissions, [34]-[37]. The Council also referred to the ‘practical common sense’ approach adopted in *Des Forges v Brisbane City Council* (2002) 121 LGERA 349, [41].

¹⁹ Council’s written submissions, [42]-[43].

²⁰ Building and Development Dispute Resolution Committee No 33-12

²¹ Planning Scheme, s.1.3.1(1); *Statutory Instruments Act 1992*, s.37.

²² Letter from Council to Appellant dated 9 September 2021 (Minor change approval), see approved Preliminary plan.



32. The Tribunal finds that the wash bay is a fixed structure (fixed both to the existing warehouse and the ground), it is partly enclosed (by the common wall it shares with the existing warehouse and the eastern wall) and is roofed.
33. That the wash bay is not enclosed on its southern and northern ends is of no consequence. The definition of 'building' contemplates that a building may be 'partly enclosed'. Contrary to the Appellant's argument as to the lack of an 'x axis', the GFA of the wash bay can be properly calculated by reference to the area under roof (that being a constituent element of the definition of a building).
34. Using the Appellant's reasoning, the 'y axis' is the length of the common wall as it adjoins the roof and the 'x axis' is the span of the roof as it adjoins the new eastern wall. Such interpretation is consistent with the definition's prescription that the measurement of GFA be 'from the outside of the external walls and the centre of any common walls of the building'.
35. No other challenge has been made as to the accuracy of the number of demand units (235m²) used to calculate the levied charge. As noted above, there is some support for that GFA in the approved site plan, but it is not necessary that the Tribunal make any finding in that regard.

Use point

36. To accept the Appellant's argument, the Tribunal must be satisfied that the wash bay is to be 'used for' parking, loading or manoeuvring of vehicles. The Tribunal is not so satisfied.
37. While it is accepted that vehicles must manoeuvre into the wash bay and park therein, its use is one ancillary²³ to the Transport Depot use; i.e., the washing of vehicles. As the Appellant made clear in its submissions (emphasis added):²⁴

...the Vehicle Washbay extension...is necessarily used for vehicle manoeuvring. Vehicles utilising the approved Transport Depot are generally required to be cleaned on a regular basis, whether for bio-security, for preventing the track of mud and/or silt on external roads or for appearance. **To undertake cleaning and washdown in accordance with environmental standards and comply with conditions of development approval and other regulations**, vehicles are required to manoeuvre into the Washbay, stand while undergoing cleaning and exit the Washbay to the external driveway areas. [sic]

²³ See definition of 'use' – *Planning Act 2016*, Schedule 2; Planning Scheme, s.1.3.1(1).

²⁴ Appellant's written submissions, 3-4.

38. The reasoning in *Apex Car Rental Pty Ltd v Brisbane City Council* is apposite here:²⁵

Essential activities of a vehicle hire operation are secure storage of vehicles, along with vehicle inspection, light maintenance and cleaning, odometer reading and other activities. Exclusion of space used for parking, loading and manoeuvring from GFA does not exclude that space where it is used for other essential activities, regardless of the nature of the vehicles in question, where they be cars, trucks, cranes, agricultural equipment or trailers. Hence, the entire floor area of Unit 1B is GFA for the purposes of infrastructure charging.

39. The Tribunal finds the wash bay is not 'an area used for...parking, loading and manoeuvring of vehicles' and, in that premise, is not excluded from the definition of a 'building' under the *Planning Act 2016*.

Disposition

40. The Appellant has not satisfied the Tribunal that the appeal should be upheld.

41. The NICN is confirmed.

Travis Schmitt

Development Tribunal Chair

Date: 10 May 2022

²⁵ Building and Development Dispute Resolution Committee No 33-12, 3.

Appeal Rights

Schedule 1, Table 2, item 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:

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