Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-047
Appellant:	DRM Financial Services Pty Ltd
Respondent:	Toowoomba Regional Council
Site Address:	54 Hursley Road, Newtown, described as Lot 2 on SP141780 ─ the subject site

Appeal

Appeal under section 229 and Schedule 1, Table 1, Item 6 of the *Planning Act 2016* against the Toowoomba Regional Council's decision to give an enforcement notice dated 13 September 2019.

Date and time of hearing:	10 December 2019	
Place of hearing:	At the subject site	
Tribunal:	Michelle Pennicott	Chair
	Christopher Finch	Member
Present:	Doug McDougall	Appellant
	Matthew Whittaker	Toowoomba Regional Council
	Kevern Hay	Toowoomba Regional Council

Decision:

The appeal is allowed. The Development Tribunal, in accordance with section 254(2)(c) of the *Planning Act 2016*, replaces the decision to give the enforcement notice dated 13 September 2019 with a decision to not give the enforcement notice.

Background

1. The subject site is the Clifford Park Holiday Motor Inn.

2. On 28 June 2019, Toowoomba Regional Council ("the Council**"**) gave DRM Financial Services Pty Ltd ("DRM**"**) a show cause notice pursuant to section 167 of the *Planning Act 2016* (Qld). The show cause notice was in response to a customer service request raised on 20 June 2019, followed by an inspection on 26 June 2019.

3. Under the heading "Facts and circumstances [section 167(2)(b)]", the show cause notice stated:

> "An inspection conducted by Council's Coordinator of Building Compliance Officer Kevern Hay on 26 June 2019, revealed:
>
> - A sunroom established within the north-east ground floor, in accordance with BW/1978/43489 has been converted to establish Unit 10; and
> - Internal layout modifications have been undertaken converting unit 4 (ground floor) into units 2, 3 & 4 (Ref: BW/1978/43489); and
> - The office (First floor) has been converted into Unit 12 (Ref: BW/1978/43489); and
> - A landing has been installed between Unit 12 joining it to the reception area; and
> - Internal layout modifications have been undertaken converting unit 8 (First floor) into units 13, 14 & 15 (Ref: BW/1978143489); and
> - Roller doors have been installed within carports provided for units 4 and 5 converting them into / garages (Ref: BW/1978/43489); and
> - Wall heights increased (1650mm - 1350mm approved (Ref: BW/1978/43489)) on balcony's established over carports provided for units 4 and 5 and roofs installed; and
> - The internal layout within unit 2 has been modified (Ref: BW /1978/43489); and
> - Building work has been performed to increase the size of the approved tennis court shed from approximately 18.9m to 33m (Ref: BW/1986/56066); and
> - Internal layout (first floor) of the unit established in accordance with BW/1992/1294 has been atlered [sic] establishing two units (18 & 19); and
> - The open deck has been extended (Ref: BW/1992/1294); and
> - A garage has been installed under the extended open deck (Ref: BW/1992/1294); and
> - The front landing has been extended to join the open deck and adjoining unit balcony (Ref: BW/1992/1294); and
> - A storage/maintenance room has been established on the northern side of the carport (Ref: BW/1992/1294); and
> - The coffee shop has been converted into a reception and laundry area (Ref: BW/1997/145); and
> - The utility room has been converted into a reception area (Ref: BW/1997/145)."

4. By letter dated 24 July 2019, DRM responded to the show cause notice. DRM made the following representations:

   (a) it owned the Clifford Park Motor Inn since 2014;

   (b) the issues stated in the show cause notice related to matters that have been in play for over 20 years through several owners;

   (c) DRM had absolutely no knowledge of any noncompliance;

   (d) DRM's intention was to comply fully and find solutions to rectify;

(e) DRM contacted Council and has been supplied with plans related to works conducted on the site;

(f) the initial advice of a building certifier and planning consultant with whom DRM had met was that, given the extensive issues raised in the show cause notice, a meeting with Council to discuss and provide feedback would be advantageous.

5. On 21 August 2019, a meeting was held between DRM and the Council. DRM tabled a further response to the show cause notice and the Council agreed to undertake a full review of all available building approvals and plans and undertake a further inspection.

6. On 26 August 2019, the Council performed a re-inspection.

7. On 13 September 2019, the Council gave DRM an enforcement notice pursuant to section 168 of the *Planning Act 2016* ("the Enforcement Notice").

8. The Enforcement Notice identified that it was being given to DRM as owner of the subject site.

9. The Enforcement Notice alleged that DRM had committed or was committing a development offence under section 163 of the *Planning Act 2016* (A person must not carry out assessable development, unless all necessary development permits are in effect for the development). The Enforcement Notice stated:

> "Toowoomba Regional Council, as the enforcement authority, reasonably believes that you have committed or are committing a development offence under section 163 (Carrying out assessable development without permit of the *Planning Act 2016*, namely:

1 • Modification of the internal layout of unit 10 (sunroom); and

2 • The conversion of the office (First floor) into Unit 12; and

3 • The landing established between Unit 12 and adjoining reception area; and

4 • Building work associated with increased wall heights (1650mm - 1350mm) of balcony's established over carports provided for units 4 and 5 and the establishment of roofs over these balconies; and

5 • The Internal layout modification of unit 2; and

6 • Building work associated with increasing the size of the approved tennis court shed from approximately 19m to 33m; and

7 • The conversion of the General Store area/Cleaners Laundry (Ground Floor) into unit 1; and

8 • Modifications undertaken to convert unit 4 (ground floor) into units 2, 3 & 4; and

9 • Internal layout modifications undertaken to convert unit 8 (First floor) into units 13, 14 & 15; and

10 • Internal layout modification undertaken to convert the unit (first floor) established in accordance with BW /1991 /531 to establish two units (6 & 17); and

11 • Modification of the Internal layout (first floor) of the unit established in accordance with BW/1992/1294 creating two units (18 & 19); and

12 • The conversion of the coffee shop into a reception and laundry area; and

13 • The establishment of a garage under the open deck adjoining unit 19; and

14 • The conversion of the utility room into a reception area."

10. For ease of reference in the Tribunal's decision, the Tribunal has numbered the bullet point allegations above 1 to 14.

11. Under the heading "Requirements of this Notice [section 168(2)]", the Enforcement Notice stated:

> "You are required to refrain from committing a development offence by:
>
> 1. Obtaining a development approval for building work for:
>
> - Modification of the internal layout of unit 10 (sunroom); and
> - The conversion of the office (First floor) into Unit 12; and
> - The landing established between Unit 12 and adjoining reception area; and
> - Building work associated with increased wall heights (1650mm - 1350mm) of balcony's established over carports provided for units 4 and 5 and the establishment of roofs over these balconies; and
> - The Internal layout modification of unit 2; and
> - Building work associated with increasing the size of the approved tennis court shed from approximately 19m to 33m; and
> - The conversion of the General Store area/Cleaners Laundry (Ground Floor) into unit 1; and
> - Modifications undertaken to convert unit 4 (ground floor) into units 2, 3 & 4; and
> - Internal layout modifications undertaken to convert unit 8 (First floor) into units 13, 14 & 15; and
> - Internal layout modification undertaken to convert the unit (first floor) established in accordance with BW/1991/531 to establish two units (6 &17); and
> - Modification of the Internal layout (first floor} of the unit established in accordance with BW/1992/1294 creating two units (18 & 19); and
> - The conversion of the coffee shop into a reception and laundry area; and
> - The establishment of a garage under the open deck adjoining unit 19; and
> - The conversion of the utility room into a reception area; or
>
> 2. Demolishing and removing any unapproved building work for which a Development Approval for Building Work is not obtained and re-instating the buildings/structures, as near as practically possible, to their original condition as detailed within relevant approval plans.
>
> You must do this by 4.00pm on 16 October 2019."

12. By notice of appeal dated 11 October 2019, DRM appealed against the Enforcement Notice.

13. The grounds for appeal stated:

 (a) the show cause notice and enforcement notice relate to building approvals between 22 and 41 years old;

 (b) the construction or modifications all took place prior to DRM's ownership in 2014;

 (c) there are a multitude of approved plans, as well as existing structures in place prior to 1975;

 (d) DRM believes there is sufficient evidence to suggest that several items in the Enforcement Notice form part of previous approvals or are non-structural accepted development.

14. On 4 November 2019, the Registrar (at the Tribunal's request) asked the Council for all evidence that was before the Council in making the decision appealed against.

15. On 14 November 2019, the Council provided the Registrar with copies of development approvals referred to by Council officers when assessing the matter and the Council's written submissions ("Council's November submissions").

16. On 10 December 2019, a site inspection and hearing was conducted at the subject site. The hearing was conducted by a tribunal comprising Chairperson Pennicott, Member Finch and a third member.

17. At the end of the hearing the Chairperson expressed concerns about the validity of the Enforcement Notice (that the alleged offences were not *Planning Act 2016* offences and that the Enforcement Notice failed to state the nature of the alleged offences) and indicated that submissions on those matters would be invited.

18. On 11 December 2019, the Tribunal invited submissions from the parties. The notice to the parties stated:

> "…
>
> The Enforcement Notice which has been appealed against stated "Toowoomba Regional Council, as the enforcement authority, reasonably believes that you have committed or are committing a development offence undersection 163 (Carrying out assessable development without permit of the Planning Act 2016 namely [14 dot point items then follow]".
>
> From yesterday's detailed site inspection and oral submissions, the tribunal understands that:
>
> a. the 14 items the subject of the Enforcement Notice relate to modification/conversion of rooms and spaces;
>
> b. the matters to which the Enforcement Notice are directed relate to the extent to which the modifications/conversions comply with building requirements [there was some discussion about whether there were/are planning concerns as well];
>
> c. all modifications/conversions were carried out prior to the Appellant purchasing the premises in 2014 and in some cases may have been more than 20 years ago.
>
> Based on the above, the Chairperson expressed the following concerns about the enforcement notice:
>
> 1. the Enforcement Notice alleges the Appellant committed a development offence under section 163 of the Planning Act. The offence created by section 163 of the Planning Act only applies to the carrying out of assessable development after 3 July 2017. As indicated above, it is understood that all of the work in question was carried out prior to 3 July 2017.
>
> 2. the Enforcement Notice does not identify the nature of the alleged offence in respect of:
>
>   a. the type of development alleged to have been carried out (building work, material change of use, etc);
>
>   b. the period in time when that development is alleged to have been carried out; and
>
>   c. having regard to the above two matters, why that development was assessable development necessitating a development permit.
>
> The tribunal invites the Council to make a written submission as to why the appeal should not be allowed based on the concerns identified above. In doing so, the tribunal invites the Council to consider and address the relevance of the decision in

> Benfer v Sunshine Coast Regional Council [2019] QPEC 6:
> https://archive.sclqld.org.au/qjudgment/2019/QPEC19-006.pdf
>
> …
>
> Following receipt of the Council's submission, an opportunity will be provided for the Appellant to provide a written submission."

19. On 24 January 2020, the Council provided its submissions in response to the Tribunal's invitation of 11 December 2019 ("Council's January submissions").

20. On 31 January 2020, DRM provided its submissions in response to the Tribunal's invitation of 11 December 2019 ("DRM's January submissions").

21. On 31 March 2020, the parties were notified by the Registrar that pursuant to section 244(2)(b) of the *Planning Act 2016* the chief executive decided to suspend the proceedings and establish another tribunal, being the now constituted Tribunal, to re-hear the proceedings.

22. On 3 June 2020, the parties were invited to provide any further written submissions on any aspect of the grounds of appeal. The parties were informed that the Tribunal would make its decision taking into consideration any further submissions, as well as the hearing and written submissions received by the original tribunal (excluding any views or material of the third member of the tribunal).

23. On 11 June 2020, DRM provided further submissions ("DRM's June submissions").

24. In reaching the decision, the Tribunal has not relied on or had regard to any views or material of the third member of the original tribunal.

Jurisdiction

25. Section 229 of the *Planning Act 2016*, in combination with Schedule 1 sections 1(2)(g) and 1(2)(h) and Schedule 1 table 1 item 6, allows an appeal to be brought against a decision to give an enforcement notice to the extent it relates to the *Building Act 1975*, other than a matter under the *Building Act 1975* that may or must be decided by the Queensland Building and Construction Commission.

Decision framework

26. The appeal is by way of a reconsideration of the evidence that was before the person who made the decision appealed against.[1] However the tribunal may, but need not, consider other evidence presented by a party to the appeal with leave of the tribunal or any information provided under section 246 of the *Planning Act 2016.*[2]

27. The enforcement authority must establish the appeal should be dismissed.[3]

28. To succeed, the enforcement authority must prove, on the balance of probabilities,[4] the commission of the development offence alleged in the enforcement notice.

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1 *Planning Act 2016* s253(4) (Conduct of appeals)

2 *Planning Act 2016* s253(5) (Conduct of appeals)

3 *Planning Act 2016* s253(3) (Conduct of appeals)

4 In accordance with the sliding scale principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336

29. Where, as here, the development offence alleged is the carrying out of assessable development, in order to establish the commission of the development offence, the time when the work occurred must be established and that, as of that time, it was an offence.[5]

30. The Development Tribunal must decide the appeal by:

    (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.[6]

Enforcement notice requirements

31. An enforcement notice may be given under section 168 of the *Planning Act 2016* if an enforcement authority reasonably believes a person has committed, or is committing, a development offence. The enforcement notice may be given to:

    (a) the person; and

    (b) if the offence involves premises and the person is not the owner of the premises—the owner of the premises.[7]

32. An enforcement notice may require a person to refrain from committing and/or remedy the effect of a development offence.[8]

33. An enforcement notice may require demolition or removal of works if the enforcement notice reasonably believes it is not possible or practical to take steps to make the development accepted development, to make the works comply with a development approval or to remove the danger (if the works are dangerous).[9]

34. An enforcement notice under section 168 of the *Planning Act 2016* may be given for a development offence. A "development offence" means an offence under sections 162 to 165 of the *Planning Act 2016*.[10]

35. The offence in section 163 of the *Planning Act 2016* that a person must not "carry out" assessable development unless all necessary development permits are in effect for the development is committed only if a person carries out the assessable development after the commencement of the *Planning Act 2016* on 3 July 2017.[11]

36. Section 310 of the *Planning Act 2016* also allows an enforcement authority to give an enforcement notice under section 168 of the *Planning Act 2016* as if a reference to a development offence in the section included a reference to a development offence under the repealed *Sustainable Planning Act 2009*.

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5 *Gold Coast City Council v Bush & Anor* [2017] QPEC 29 at [2]

6 *Planning Act 2016* s254(2) (Deciding appeals to tribunal)

7 *Planning Act 2016* s168(1) (Enforcement notices)

8 *Planning Act 2016* s168(2) (Enforcement notices)

9 *Planning Act 2016* s168(4) (Enforcement notices)

10 *Planning Act 2016* schedule 2 (Dictionary) definition of "development offence" and s161 (What part is about)

11 *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6 at [36]

37. A development offence under the *Sustainable Planning Act 2009* was defined as an offence against section 574 to 582 of the *Sustainable Planning Act 2009*.[12]

38. The offence in section 578 of the *Sustainable Planning Act 2009*, that a person must not "carry out" assessable development unless there is an effective development permit for the development, only applies where a person carried out the assessable development during the currency of the *Sustainable Planning Act 2009*, namely between 18 December 2009 and 2 July 2017.

39. An enforcement notice must state "the nature of the alleged offence".[13] This requires the essential factual ingredients of the alleged offence to be identified. This is important for three reasons:

    (a) it informs the legitimacy of the actions that the enforcement notice requires the recipient to take (including whether it is possible or practical to take steps to make the works accepted development or to comply with a development approval);

    (b) it allows the recipient to understand what is alleged against him or her on the occasion when he or she is said to have committed the offence; and

    (c) non-compliance with an enforcement notice can result in the imposition of penalties.[14]

40. The importance of the above can be appreciated particularly in a case such as the present where the recipient of the enforcement notice was not the person who carried out the activities alleged to constitute the offences.

Material Considered

41. The material considered in arriving at this decision comprises:

    (a) Form 10 – Application for appeal/declaration and attachments;

    (b) the Council's written submissions and copies of development approvals provided by Council on 14 November 2019;

    (c) oral submissions of DRM and the Council made at the hearing on 10 December 2019;

    (d) the Council's written submissions provided on 24 January 2020;

    (e) DRM's written submissions provided on 31 January 2020;

    (f) DRM's written submissions provided on 11 June 2020;

    (g) *Planning Act 2016;*

    (h) *Planning Regulation 2017*;

    (i) *Building Act 1975*;

    (j) *Building Regulation 2006*;

    (k) *Sustainable Planning Act 2009*;

    (l) *Integrated Planning Act 1997*; and

    (m) *Integrated Planning Regulation 1998*.

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12 *Sustainable Planning Act 2009* schedule 3 (Dictionary) definition of "development offence"

13 *Planning Act 2016* s168(3)(a) (Enforcement notices)

14 *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6 at [90] – [95]

Findings of fact

42. DRM purchased the subject site in 2014.

43. A comparison of the website for the Clifford Park Holiday Motor Inn[15] shows that on 25 September 2004 the web page was different to the web page as it appeared on 2 September 2004:

    (a) on 25 September 2004, the web page stated that the Clifford Park Holiday Motor Inn had "a total of 21 suites and apartments" and "eight motel suites and thirteen self contained apartments";

    (b) on 2 September 2004 the web page did not mention the total number of suites or apartments. The web page on 2 September 2004 stated:

> "We offer 1, 2 and 3 bedroom fully self-contained budget, standard and executive apartments.
>
> There are also large Motel units that surround our sparkling in ground pool.
>
> Our self-contained units are huge. Some units sleep up to 9 very comfortably.
>
> 2 of the 2 bedroom and 2 of the 3 bedrooms are like houses".

44. Floor plans from the Clifford Park Motor Inn's website commencing 12 August 2015 show rooms marked #1 to #19.[16]

45. The landing which is the subject of allegation 3 of the Enforcement Notice is shown in a 1997 building plan.[17]

46. The enlarged tennis court shed which is the subject of allegation 6 of the Enforcement Notice is shown in a 1994 aerial image.[18]

47. The garage which is the subject of allegation 13 of the Enforcement Notice is shown in a 1991 building plan.[19]

48. There is no evidence that any of the activities the subject of the 14 allegations occurred after the commencement of the *Planning Act 2016* on 3 July 2017 (or for that matter after the commencement of the *Sustainable Planning Act 2009* on 18 December 2009).

Reasons for decision

49. The Tribunal allows the appeal and replaces the decision to issue the Enforcement Notice with a decision to not issue the enforcement notice for the following reasons:

    (a) the Enforcement Notice did not identify the dates or periods of time the 14 activities were alleged to have occurred;

    (b) the Enforcement Notice did not identify the basis for the 14 activities constituting assessable development at the relevant date or period;

    (c) contrary to the statement in the Enforcement Notice, there is no evidence that DRM committed or was committing a development offence under section 163 of the

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15 Council's January submissions, Annexure A

16 Council's January submissions, Annexure B

17 Council's January submissions, Annexure I

18 Council's January submissions, Annexure M

19 Council's January submissions, Annexure P

Planning Act 2016, namely, the carrying out of assessable development after 3 July 2017 without a development permit;

(d) although the Council has requested the Tribunal replace the Enforcement Notice with an amended enforcement notice for 7 of the 14 allegations on the basis that the Council now reasonably believes they were development offences under the repealed *Integrated Planning Act 1997*, the Tribunal is not satisfied it is appropriate to do so for the following reasons:

(i) the Tribunal is not satisfied that development offences under the repealed *Integrated Planning Act 1997* can be the subject of a *Planning Act 2016* enforcement notice;

(ii) even if the Enforcement Notice could be given in respect of *Integrated Planning Act 1997* offences, the Council has not discharged the onus of demonstrating that assessable development within the meaning of the repealed *Integrated Planning Act 1997* was carried out.

50. These reasons are explained in further detail in the following paragraphs.

Allegations 1, 8, 9, 10 and 11 – 'modifications'

51. Allegations 1, 8, 9, 10 and 11 in the Enforcement Notice, adopting the numbering applied by the Tribunal, refer to 'modification':

1	•	Modification of the internal layout of unit 10 (sunroom); and
8	•	Modifications undertaken to convert unit 4 (ground floor) into units 2, 3 & 4; and
9	•	Internal layout modifications undertaken to convert unit 8 (First floor) into units 13, 14 & 15; and
10	•	Internal layout modification undertaken to convert the unit (first floor) established in accordance with BW /1991 /531 to establish two units (6 & 17); and
11	•	Modification of the Internal layout (first floor) of the unit established in accordance with BW/1992/1294 creating two units (18 & 19)

52. The Enforcement Notice did not identify:

(a) the type of development the modifications comprised;

(b) the date or period when the modifications were alleged to have been carried out; and

(c) the basis for the modifications constituting assessable development under the *Planning Act 2016*.

53. In the Council's January submissions, the Council submits:

(a) the modifications referred to in allegations 1, 8, 9, 10 and 11 established additional sole occupancy units as identified within the Building Code of Australia;

(b) the Building Code of Australia requires that a doorway providing access from a sole-occupancy unit to another sole-occupancy unit must be protected by a self-closing, tight fitting solid core door, not less than 35mm thick;

(c) the Council's inspection confirmed that doors located between the established sole-occupancy units were not solid core;

(d) because the doors do not comply with the code it is deemed assessable development;

(e) based on the web page comparison, the Council reasonably believes the modifications were done during the period 2 September 2004 to 25 September 2004, when the *Integrated Planning Act 1997* was in effect.

54. The inclusion of even some of the above particulars may have been sufficient to ensure the Enforcement Notice adequately stated the nature of the alleged offence, but the absence of all of the above warrants the Enforcement Notice being set aside in respect of allegations 1, 8, 9, 10 and 11.

55. In the Council's January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice on the basis that the Council now reasonably believes that the offences were committed while the repealed *Integrated Planning Act 1997* was in effect. However the Tribunal is not satisfied it is appropriate in the exercise of its discretion to issue an amended enforcement notice for the following reasons:

(a) The Tribunal is not satisfied that development offences under the repealed *Integrated Planning Act 1997* can be the subject of a *Planning Act 2016* enforcement notice:

(i) As set out in paragraph 36 above, section 310 of the *Planning Act 2016* enables a *Planning Act 2016* enforcement notice to be issued for a development offence under the repealed *Sustainable Planning Act 2009*.

(ii) However, as set out in paragraph 37 above, a development offence under the *Sustainable Planning Act 2009* was defined as an offence against sections 574 to 582 of the *Sustainable Planning Act 2009*. An offence against those sections was one committed during the currency of the *Sustainable Planning Act 2009*, namely between 18 December 2009 and 2 July 2017.

(iii) While section 830(2) of the *Sustainable Planning Act 2009* enabled an enforcement notice under that Act to be given in respect of an *Integrated Planning Act 1997* development offence, what was transitioned was the ability to give an enforcement notice, not the development offence itself. An *Integrated Planning Act 1997* offence did not become a *Sustainable Planning Act 2009* offence.

(b) Even if a *Planning Act 2016* enforcement notice could be given for an *Integrated Planning Act 1997* development offence, the Tribunal is not satisfied in the exercise of its discretion that it is appropriate to do so:

(i) The Tribunal is not satisfied a change to the web page for the Clifford Park Holiday Motor Inn between 2 September 2004 and 25 September 2004 is evidence that the modifications were carried out in that period. The web page as at 2 September 2004 made no reference to the number of units. The comparison of web pages merely evidences that the web page changed between those two dates. In DRM's January submissions DRM indicates that the lessee of the motel from 9 May 2003 to 21 March 2006 advised that the motel was operating as a 21 unit motel during that time and no alterations were carried out during that time.

(ii) The Tribunal is not satisfied the activities in allegations 1, 8, 9, 10 and 11 constituted assessable development within the meaning of the repealed *Integrated Planning Act 1997*. In the Council's January submissions, the Council submits that the works were made assessable development by section 20 of the *Building Act 1975* and/or Schedule 1, Part 3, Table 1 of the *Integrated Planning Regulation 1998*. However, in September 2004 (the period in which the Council alleges the development offences were committed):

A. section 20 of the *Building Act 1975* dealt with appeals about swimming pool fencing;[20]

B. Schedule 1 of the *Integrated Planning Regulation 1998* did not contain a Part 3, Table 1.[21]

Further, no detail has been provided in respect of whether any exceptions to the assessable development trigger existed (and, if so, why they did not apply) and also why a reasonable belief can be formed[22] that it was not possible or practical to take steps to make the modifications not assessable development.

Allegation 5 – internal layout modification of unit 2

56. Allegation 5 in the Enforcement Notice, adopting the numbering applied by the Tribunal is:

5 • The Internal layout modification of unit 2

57. The Enforcement Notice did not identify:

(a) the type of development the modification comprised;

(b) the date or period when the modification was alleged to have been carried out; and

(c) the basis for the modification constituting assessable development under the *Planning Act 2016*.

58. These are material omissions which warrant the Enforcement Notice being set aside in respect of allegation 5.

59. In the Council's January submissions, the Council submits:

(a) an additional bedroom has been established within Unit 2;

(b) the Council believes the changes made within the unit exceeds 20% of the unit's gross floor area and is therefore assessable development in accordance with the *Building Regulation 2006 Schedule 1 Section 8 – Particular repairs, maintenance or alterations only affecting minor structural component*; and

(c) the Council cannot determine beyond reasonable doubt[23] when the building work was undertaken.

60. In the Council's January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice dealing with 7 of the 14 allegations on the basis that they were development offences under the repealed *Integrated Planning Act 1997*. Allegation 5 is not mentioned. Therefore the Tribunal understands that the Council no longer pursues that allegation.

61. If we were asked to deal with allegation 5, the Tribunal is not satisfied the allegation has been made out.

62. The Council has not discharged the onus of demonstrating that a development offence has been committed. It remains unclear what the building work was and why

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20 Reprint No. 4B revised edition as in force on 14 November 2003 and Reprint No. 4C revised edition as in force on 29 November 2004

21 Reprint No. 3P as in force on 9 July 2004, Reprint No. 3Q as in force on 20 September 2004 and Reprint No. 3R as in force on 4 October 2004

22 As required by section 168(4) of the *Planning Act 2016* (Enforcement notices)

23 As explained in paragraph 28 above, the requisite standard of proof is the balance of probabilities.

it was assessable development. The Council's January submissions cites the current *Building Regulation 2006*, but there is no evidence to suggest it was committed since the commencement of the current *Building Regulation 2006*.

Allegations 2, 7, 12 and 14 – 'conversions'

63. Allegations 2, 7, 12 and 14 in the Enforcement Notice, adopting the numbering applied by the Tribunal, refer to 'conversion':

2	•	The conversion of the office (First floor) into Unit 12; and
7	•	The conversion of the General Store area/Cleaners Laundry (Ground Floor) into unit 1; and
12	•	The conversion of the coffee shop into a reception and laundry area; and
14	•	The conversion of the utility room into a reception area.

64. The Enforcement Notice did not identify:

(a) the type of development the conversions comprised;

(b) the date or period when the conversions were alleged to have been carried out; and

(c) the basis for the conversions constituting assessable development under the *Planning Act 2016*.

65. In the Council's January submissions, the Council submits:

(a) in respect of allegations 2, 7 and 12:

(i) the conversions established sole occupancy units within non-habitable areas of the building;

(ii) the establishment of sole occupancy units is considered a use change that requires a development approval for building work for change of classification in accordance with section 109 of the *Building Act 1975*;

(iii) based on the internet comparison the Council now reasonably believes the conversions the subject of allegations 2 and 7 occurred during the period 2 September 2004 to 25 September 2004, when the *Integrated Planning Act 1997* was in effect; and

(iv) the Council cannot determine beyond reasonable doubt[24] when the use change the subject of allegation 12 commenced;

(b) in respect of allegation 14:

(i) the Council believes the building work performed to convert the utility room into a reception area which is the subject of allegation 14 required the removal of a section of fire rated wall affecting the building's fire safety system therefore requiring building approval in accordance with part 9 of Schedule 1 of the *Building Regulation 2006*;

(ii) the Council cannot determine beyond reasonable doubt[25] when the building work was performed.

66. In the Council's January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice in respect of allegations 2 and 7 as offences committed when the *Integrated Planning Act 1997* was in effect.

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[24] As explained in paragraph 28 above, the requisite standard of proof is the balance of probabilities.

[25] As explained in paragraph 28 above, the requisite standard of proof is the balance of probabilities.

Allegations 12 and 14 are not mentioned. Therefore the Tribunal understands that the Council no longer pursues allegations 12 and 14.

67. The Tribunal is not satisfied it is appropriate to issue an amended enforcement notice in respect of allegations 2 and 7 because:

    (a) for the reasons explained in paragraph 55(a) above, the Tribunal is not satisfied that development offences under the repealed *Integrated Planning Act 1997* can be the subject of a *Planning Act 2016* enforcement notice;

    (b) even if a *Planning Act 2016* enforcement notice could be given for an *Integrated Planning Act 1997* development offence, the Tribunal is not satisfied in the exercise of its discretion that it is appropriate to do so. This is because:

        (i) for the reasons explained in paragraph 55(b)(i) above, the Tribunal is not satisfied that a change to the web page between 2 September 2004 and 25 September 2004 is evidence that the conversions were carried out in that period;

        (ii) the Council relies on current section 109 of the *Building Act 1975* as basis for the conversions being assessable development. However, section 109 was not introduced into the *Building Act 1975* until 1 September 2006 and therefore it could not have been the legislative source of the conversions being assessable development between 2 September and 25 September 2004; and

        (iii) section 109 of the *Building Act 1975* defines a "BCA classification or use change". Section 110 of the *Building Act 1975* requires a BCA classification or use change to not be made unless it is approved. Section 111 of the *Building Act 1975* provides for an owner to apply to the local government for a section 110 approval. The approval which section 110 speaks of is not a development approval for assessable development. The failure to obtain such an approval is an offence under the *Building Act 1975*, but it is not a development offence under the *Planning Act 2016*.

Allegation 3 – landing

68. Allegation 3 in the Enforcement Notice, adopting the numbering applied by the Tribunal, refers to the establishment of a landing:

    3 • The landing established between Unit 12 and adjoining reception area.

69. The Enforcement Notice did not identify:

    (a) the type of development the establishment of the landing was alleged to constitute;

    (b) the date or period when the establishment of the landing was alleged to have been carried out; and

    (c) the basis for the establishment of the landing constituting assessable development under the *Planning Act 2016*.

70. In the Council's January submissions, the Council submits:

    (a) the landing is a deck greater than 1 metre high above ground level;

    (b) a 1994 building plan does not show the landing;

    (c) a 1997 building plan shows the landing, but with no detail or specification;

    (d) the Council reasonably believes the deck was established between 1992 and 1997;

(e) a deck higher than 1 metre above natural ground surface is assessable development in accordance with section 13 of Schedule 1 of the *Building Regulation 2006* – Building work that is accepted development if relevant provisions complied with.

71. In the Council's January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice dealing with 7 of the 14 allegations. Allegation 3 is not one of those allegations. Therefore the Tribunal understands that the Council no longer seeks relief in respect of allegation 3 as part of this proceeding.

72. As the only evidence put before the Tribunal suggests the landing was constructed prior to the repealed *Integrated Planning Act 1997*, it cannot be the subject of a *Planning Act 2016* enforcement notice.

Allegation 4 – balcony wall heights

73. Allegation 4 in the Enforcement Notice, adopting the numbering applied by the Tribunal, refers to the increase of balcony wall heights:

4	•	Building work associated with increased wall heights (1650mm - 1350mm) of balcony's established over carports provided for units 4 and 5 and the establishment of roofs over these balconies

74. In respect of allegation 4, the Enforcement Notice identifies that the type of development is building work, but the Enforcement Notice does not identify:

(a) the date or period when the building work was alleged to have been carried out; and

(b) the basis for the building work constituting assessable development under the *Planning Act 2016*.

75. In the Council's January submissions, the Council submits:

(a) the alterations result in a change to the building's height and is therefore assessable development in accordance with section 7 of Schedule 1 of the *Building Regulation 2006*;

(b) the Council believes it is likely the roof was established over the balcony of units 8 and 9 after 6 February 1980 but cannot determine beyond reasonable doubt[26] when the work was undertaken.

76. In the Council's January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice dealing with 7 of the 14 allegations. Allegation 4 is not one of those allegations. Therefore the Tribunal understands that the Council no longer seeks relief in respect of allegation 4 as part of this proceeding.

77. There is no evidence that the alterations were carried out after the commencement of the repealed *Sustainable Planning Act 2009* and therefore the alterations cannot be the subject of a *Planning Act 2016* enforcement notice.

Allegation 6 – increase in size of tennis court shed

78. Allegation 6 in the Enforcement Notice, adopting the numbering applied by the Tribunal, refers to increasing the size of a tennis court shed:

6	•	Building work associated with increasing the size of the approved tennis court shed from approximately 19m to 33m; and

[26] As explained in paragraph 28 above, the requisite standard of proof is the balance of probabilities.

79. In respect of allegation 6, the Enforcement Notice identifies that the type of development alleged is building work, but the Enforcement Notice does not identify:

(a) the date or period when the building work was alleged to have been carried out; and

(b) the basis for the building work constituting assessable development under the *Planning Act 2016*.

80. In the Council's January submissions, the Council submits:

(a) a 1986 building approval for the tennis shed showed the shed comprising 18.9m^2;

(b) during a site inspection it was determined that the tennis court shed had been subjected to building work which increased its floor area to approximately 33m^2;

(c) a review of available aerial and satellite images has failed to determine beyond reasonable doubt[27] when the building work was undertaken;

(d) building work is assessable development in accordance with section 8 of the *Building Regulation 2006*.

81. A 1994 aerial image of the tennis court shed provided as Annexure M of the Council's January submissions shows the tennis court shed with the increased floor area.

82. In the Council's January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice dealing with 7 of the 14 allegations. Allegation 6 is not one of the allegations. Therefore the Tribunal understands that the Council no longer seeks relief in respect of allegation 6 as part of this proceeding.

83. As the only evidence put before the Tribunal suggests the building work associated with the tennis court shed was constructed in or prior to 1994, the building work cannot be the subject of a *Planning Act 2016* enforcement notice.

Allegation 13 – establishment of a garage

84. Allegation 13 in the Enforcement Notice, adopting the numbering applied by the Tribunal, refers to the establishment of a garage under an open deck:

13 • The establishment of a garage under the open deck adjoining unit 19

85. The Enforcement Notice did not identify:

(a) the type of development the establishment of the garage was alleged to constitute;

(b) the date or period when the establishment of the garage was alleged to have been carried out; and

(c) the basis for the establishment of the garage constituting assessable development under the *Planning Act 2016*.

86. In the Council's January submissions, the Council submits:

(a) a review of the Council's records has failed to locate a development approval for building work for the garage established beneath the deck;

(b) a copy of a site plan (Plan No. 3U/89/278-1) showed only car parks in the area;

(c) another plan, Plan 3U/89/278-2 showed the area as "existing garage".

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[27] As explained in paragraph 28 above, the requisite standard of proof is the balance of probabilities.

87. The Tribunal notes the plan which shows the area as “existing garage” was dated 3 January 1991.

88. In the Council’s January submissions, the Council requests the Tribunal replace the Enforcement Notice with an amended enforcement notice dealing with 7 of the 14 allegations items. Allegation 13 is not one of those allegations. Therefore the Tribunal understands that the Council no longer seeks relief in respect of allegation 13 as part of this proceeding.

89. As the only evidence put before the Tribunal suggests the building work associated with the garages under the open deck was carried out prior to 3 January 1991, it cannot be the subject of a *Planning Act 2016* enforcement notice.

Tribunal’s decision to not issue the enforcement notice

90. The material omissions in the Enforcement Notice warrant it being set aside. The Tribunal is not satisfied that it is appropriate in the exercise of its discretion to replace the Enforcement Notice with an amended enforcement notice in the manner requested by the Council. The Council has not discharged the onus of demonstrating that development offences were carried out during the currency of the repealed *Integrated Planning Act 1997*. Even if that had been demonstrated the Tribunal is not satisfied that the offences can be the subject of a *Planning Act 2016* enforcement notice.

91. The Tribunal appreciates that the Council holds concerns about the fire safety of the motor inn and acted in the public interest. Following the tragic Childers backpacker fire in 2000 that is understandable. The Tribunal also notes that DRM, despite its appeal, has expressed a desire to ensure its premises are compliant. The Tribunal’s decision to allow the appeal in respect of the enforcement notice which was issued should not be taken as a general statement that the concerns of the Council are beyond redress. The Council should not be deterred in seeking to bring about appropriate fire safety at the subject site if an offence under the *Planning Act 2016* or the *Building Act 1975* can be established and properly grounded in an enforcement notice or other enforcement action.

Michelle Pennicott
Development Tribunal Chairperson
Date: 18 June 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.

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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