Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-001
Appellants:	John Michael Owen and Jessica Hanne Owen
Respondent:	Brisbane City Council
Site Address:	70 Vivian Street, Tennyson, described as Lot 380 on RP37716 ─ the subject site

Appeal

Appeal under section 229 and Schedule 1, Table 1, Item 6 of the *Planning Act 2016* against the Brisbane City Council's decision to give an enforcement notice.

Date of decision:	2 February 2022
Date and time of hearing:	24 September 2021 (with written submissions received on 8 October and 18 October 2021)
Place of hearing:	Development Tribunal, Brisbane
Tribunal:	Michelle Pennicott Chair Michael Moran Member
Present:	**Representatives for the Appellants:** Brennan Brook, Affordable Housing Company Brisbane Ellen McDonogh, Town Planner, Gateway Survey & Planning Oscar Christensen, Town Planner, Gateway Survey & Planning **Representatives for the Council:** Glenn Davidson, Principal Officer, Built Environment Morgan Pratt, Built Environment Supervisor Ellen Makaryan, Built Environment Officer

Decision:

The appeal is allowed. Pursuant to section 254(2)(c) of the *Planning Act 2016*, the Tribunal replaces the decision to give the Enforcement Notice dated 9 December 2020 with a decision to not give the Enforcement Notice.

Background

1. The appeal is against the Council's decision to give an enforcement notice dated 9 December 2020, reference CA136225 ('Enforcement Notice').

2. The Enforcement Notice identifies that under Brisbane City Plan 2014 ('City Plan'), the site is in:

   (a) the Low Density Residential Zone;

   (b) the Sherwood-Graceville District Neighbourhood Plan; and

   (c) the 'Brisbane River flood planning area 2a' in the Flood overlay.

3. The Enforcement Notice, under Grounds, states:

   > "1. Based on the following facts and circumstances, Council reasonably believes John Michael Owen & Jessica Hanne Owen has committed, and/or is committing, the following development offences under the Act on land located at the premises:
   >
   > a. Section 163 - Carrying out assessable development without permit".

4. It is not clear from these grounds exactly what type of development is alleged to have been carried out.

5. The Enforcement Notice sets out, under 'Facts and Circumstances', the basis for the Council forming the reasonable belief that it was appropriate to issue the Appellants with the Enforcement Notice. The Facts and Circumstances sets out a chronology of investigations carried out by the Council following a complaint regarding an unlawful use:

   (a) title search and search of applications/approvals;

   (b) two site inspections;

   (c) a show cause notice;

   (d) consideration of representations in response to the show cause notice;

   (e) a further site inspection;

   (f) explaining to the Appellants' representative "the offences identified during the further external inspection";

   (g) a further search of applications/approvals.

6. The Facts and Circumstances concludes with the following:

   > "42. As a result of the inspections and consideration of representations made by Gateway Survey & Planning Pty Ltd, Council still considers it appropriate to issue an Enforcement Notice, in that assessable development has occurred on the premises. Specifically, Rooming accommodation - (Class 1b building) in a Flood Overlay is assessable development requiring a Development (Planning) Approval from Council."

7. It is not clear from this paragraph whether the assessable development alleged to have occurred is a material change of use or building work, or both.

8. The Tribunal understands the expression 'Development (Planning) Approval' is used by the Council to denote an approval required by the planning scheme, in contrast to an approval given by a building certifier (which the Council refers to as a 'Development (Building) Approval'). However, the expression itself does identify the type of development (of the five types under the *Planning Act 2016*) alleged to be carried out without approval.

9. Under ‘Requirements’, the Enforcement Notice states:

> “1. Cease use of the premises as Rooming Accomodation [sic] until such time all relevant approvals are in place for the Roaming Acomodation [sic] to be within the Flood Overlay.”

10. As the requirement is to cease use of the premises as Rooming Accommodation, that would tend to suggest that the assessable development that is alleged to have been carried out without approval is a material change of use.

11. The requirement for there to be in place “all relevant approvals” also does not assist as it is not clear whether that is a reference to a development approval for material change of use or a development approval for building work, or both (or another form of approval).

Material considered

12. The following material has been considered in arriving at this decision:

    (a) Form 10—Notice of Appeal and attachments;

    (b) Electronic folder of documents provided by the Council of the evidence before the person who made the decision appealed against;

    (c) Council’s submissions dated 3 June 2021;

    (d) Appellants’ submissions dated 21 June 2021;

    (e) Appellants’ email of 8 October 2021 attaching various class 1a and class 1b documents and a letter containing further submissions;

    (f) Council’s two emails of 18 October 2021 in reply to the Appellants’ email of 8 October 2021, attaching various building forms, real estate websites and Flood overlay table of assessment and code;

    (g) Appellants’ email of 20 October 2021 proposing the issuing of an exemption certificate and attaching an example of an exemption certificate and flood information for the site.

Jurisdiction

13. The Tribunal has jurisdiction for an appeal against a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g) of section 1(2) of Schedule 1 of the *Planning Act 2016*.

14. The Tribunal is of the view it has jurisdiction to decide this appeal. In short, the Tribunal is of the view that:

    (a) “a material change of use of a classified building”’ is one of the matters under paragraphs (a) to (g); and

    (b) although the Enforcement Notice lacks precision, it would appear to be in relation to the carrying out of a material change of use of a class 1b building, which is “in relation to a material change of use of a classified building”’.

15. The detailed reasons for this view are set out in the Appendix to this decision.

Decision framework

16. 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]

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

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

19. 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.[5]

20. A tribunal may, at any time during tribunal proceedings, make any direction or order that the tribunal considers appropriate.[6]

Enforcement notice requirements

21. 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]

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

Grounds of appeal

23. The Appellants contend in their grounds of appeal that the basis on which the Enforcement Notice was issued was incorrect. The Appellants say that the Enforcement Notice was issued by the Council on the basis that the issuing of a development approval by the private certifier "*for a MCU from a Dwelling House – Class 1a dwelling to a*

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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(2) (Conduct of appeals)

4 At the higher end of the civil standard, in accordance with the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336

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

6 *Planning Act 2016* s250 (Tribunal directions or orders)

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

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

Rooming Accomidation [sic] Dwelling – Class 1b was assessable building work requiring a planning approval".

24. The grounds of appeal state this is incorrect because:

    (a) there was an existing building at the time of the MCU;

    (b) [the MCU approval] was not for new building work;

    (c) the MCU approval was to change the classification of the existing building from a class 1a to a class 1b without any building work being required.

25. On that basis, the Appellants contend that:

    (a) as there was no building work, the building work trigger in the Flood overlay table of assessment did not apply;

    (b) instead the MCU trigger in the Flood overlay table of assessment applied;

    (c) MCU is accepted development where complying with the Flood overlay code;

    (d) the application was assessed and found to be compliant and a development approval was issued for the MCU by the private certifier.

26. It would appear from how the Appellants have articulated the basis on which the Council issued the Enforcement Notice that the Appellants have not fully engaged with what the Council was in fact contending which relate to events which occurred in 2017. This may have stemmed from the Enforcement Notice not identifying the specific type of development which was the subject of the Enforcement Notice.

27. Despite the Appellants referring to an MCU approval, their references to it being issued by the private certifier would suggest that what the Appellants are referring to is not a material change of use in the Planning Act/planning scheme sense in which the Council meant it, but an approval by a building certifier of a BCA classification or use change under section 109 of the *Building Act 1975* (What is a BCA classification or use change to a building).

28. The Tribunal was assisted by the representatives for both parties explaining their positions at the hearing.

The Council's submissions

29. At the hearing, the Council's representatives explained the Council's case as being:

    (a) a building work approval was issued in 2017 for a class 1b building (for Rooming accommodation);

    (b) the approved building work plans show 5 bedrooms;

    (c) aerial photographs show the building work was carried out in 2017;

    (d) site inspections in 2020 confirm that the building has 5 bedrooms and is operating as Rooming accommodation;

    (e) under City Plan in 2017, a material change of use to Rooming accommodation was code assessable in the Flood overlay;

    (f) no material change of use approval for Rooming accommodation has been applied for or given.

The Appellants' submissions

30. At the hearing, the Appellants' representatives explained the Appellants' case as being:

    (a) the building work carried out in 2017 was not for a class 1b building for Rooming accommodation;

    (b) the class 1b approval for Rooming accommodation was issued in error and was corrected in 2017 to being an approval for a class 1a Dwelling house;

    (c) in 2019, the building classification was changed from class 1a (for a dwelling house use) to class 1b (for Rooming accommodation);

    (d) under the table of assessment for the Flood overlay, as the building was not 'new premises' in 2019 but was 'existing premises', the Rooming accommodation use was accepted development, not code assessable development.

31. A class 1b building is defined in the Building Code as being:

> "A boarding house, guest house, hostel or the like with a total area of all floors not exceeding 300m^2, and where not more than 12 reside, and is not located above or below another dwelling or another Class of building other than a private garage".

32. In contrast, a class 1a building is defined in the Building Code as being:

> "A single dwelling being a detached house, or one or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit".

33. The Council's representatives were taken by surprise by the Appellants' assertion that the class 1b approval (for Rooming accommodation) was issued in error. The Council's records apparently had no indication of that.

34. The Appellants' representatives were not able to produce the class 1a building approval at the hearing. They invited the Tribunal to give a direction to the private certifier that the certifier rectify the approval records. The Tribunal made clear to the parties that it was neither within the Tribunal's jurisdiction in this appeal to make such a direction nor was it appropriate to do so.

35. The Tribunal issued the following direction to the parties after the hearing:

> "1. At the hearing on 24 September 2021, it was submitted on behalf of the Appellants that there is a Form 21—Final inspection certificate dated 13 November 2017 by Yan Ho Leung, Building Certifier Licence No. A 74587, for Building certifier reference number/approval number "3100" which describes the Class of Building as "Class 1a".
>
> 2. The representatives for the Council indicated that for the subject site:
>
> a. the Council has no record of a class 1a building development approval by Yan Ho Leung;
>
> b. the Council's records show that Approval reference "3100" lodged with Council by Yan Ho Leung is for a 'Class 1b' 'New rooming accommodation building' dated 2 April 2017.
>
> 3. If the Appellants maintain that Yan Ho Leung, Building Certifier Licence No. A 74587 issued a building development approval for a Class 1a, then the Appellants are to provide a copy of that building development approval to the Registry by Friday 8 October 2021.
>
> 4. If a copy is provided, the Tribunal will carefully consider it before determining the next step. This is because:

a. The consideration of further evidence (that was not before the person who made the decision under appeal) is only with the leave of the Tribunal;

b. It is an offence under the Building Act for a building certifier to fail to lodge approval documents with the local government. Mr Yan Ho Leung is not a party to the proceeding and has not appeared before the Tribunal.

5. At the hearing, the Tribunal did indicate they would also be assisted by written submissions from the Council on Table 5.10.11—Flood overlay and in particular for MCU the applicability of the 3rd vs the 5th trigger and in the 5th trigger sub-paragraph (d), 'for accommodation activities (activity group), other than a dwelling house or caretaker's accommodation, in a part of a premises not previously approved for accommodation activities (activity group)'. Given the important implications set out in paragraph 4 above, the Tribunal will await making directions for such submissions until the matters in paragraph 4 have been considered."

36. On 8 October 2021, the Appellants provided a bundle of further documents to the Tribunal and the Council. The covering email stated:

> "Please find attached documents-
>
> Appeal Letter 1
>
> **Class 1a Documents**
> Class 1a building approval – dated 02/04/2017– BCC reference A004616372
> Class 1a plumbing approval – dated 09/03/2017 – BCC Reference 1266323
> Class 1a driveway approval – dated 22/08/2017
> Form 21 – class 1a building final – dated 13/11/2017
>
> **Class 1b Documents**
> Class 1b conversion from class 1a – date 27/09/2019 – BCC reference A004616372
> Class 1b – plumbing approval – dated 03/10/2017 – BCC Reference 1344043
> Form 11 – class 1b building final – dated 27/09/2019".

37. The documents included two approvals, both bearing the same date of 2 April 2017 issued by private certifier Yan Ho Leung. One approval describes the development as New rooming accommodation building Class 1b and the other approval describes the development as New dwelling class 1a.

38. Both approvals refer to the same Local Government Application number, A004616372, and the same building certifier file reference number, 3100.

39. Both approvals also refer to the same plans and specifications, including "*Site and architectural plans by Affordable Housing Company, job no:. N70V, total 10 pages*".

40. The Form 21 provided by the Appellants is a Final inspection certificate dated 13 November 2017 which described the building as 'New dwelling class 1a' and referred to the building certifier's reference number as 3100. The certificate lists the inspection dates of each stage, including the foundation and excavation stage as 6 July 2017 and the final stage as 13 November 2017.

41. The Form 11 provided by the Appellants is a Certificate of classification dated 27 September 2019 which described the building and its classification as 'New rooming accommodation building 1b' and the building certifier's approval reference number as 3100.

42. The Appellants' representatives also provided the Tribunal with a document which explained:

> "…
>
> The certifier has said he uploaded the 1b documents onto the same file as the class 1a documents mixing them in the council's system, I [sic] he also says he accidently uploaded a class 1b approval originally and then replaced it with the class 1a documents as he mistakenly thought this was a class 1b project from the start as we build some many [sic] of them. We can only assume this is leading to some confusion on council's portal, but the original intent is clear by the other supporting documentation including the different plumbing approvals, building final certificates, and separate invoices form [sic] the certifier for the different approvals.
>
> …
>
> The certifier PBJ Building Certification was engaged as a separate professional entity for the establishment of a detached dwelling classed as 1a and later for the 1a to 1b conversion. The documentation supports the initial intent for a 1a property, in association with the work that was carried out and a decision notice received from BCC stating a 1a dwelling.
>
> …".

43. The Appellants' representatives also made submissions about how the issue could be corrected on the papers:

> "While we feel this issue is almost irrelevant given that we could start the approvals from scratch starting with a class 1a approval followed by a class 1b approval after it to resolved [sic] this issue without planning approvals, we are still happy to provide documents in the hope to resolved [sic] this issue here and now.
>
> …
>
> The premises is currently being used as a rooming accommodation for multiple occupants. Even if a procedural error is found on the certifiers behalf this should be easy to correct using additional paperwork supplied by him rather than necessitating expensive and time-consuming development approvals which will obviously reach the same point we are already at now. There is legal precedent for this where a certifier uploaded documentation to a portal that didn't match what was issued to the clients, in that case the court found that what the certifier issued to the client could be relied upon."

44. The Tribunal notes that the private certifier is not a party to the appeal and therefore what the private certifier is alleged to have done or not done and to have said cannot be tested.

The Council's further evidence and submissions in reply

45. Following the production of a class 1a building approval by the Appellants, the Council was afforded the opportunity to reply. The Council made the following submissions:

    (a) both the class 1a and class 1b approvals were issued on the same date by the certifier and reference the same local government application number;

    (b) there are discrepancies in the building work documentation lodged with the Council, including inspection certificates by the building certifier – some refer to the building as a class 1a and some refer to it as a class 1b;

    (c) the conduct of the building certifier is being investigated by the Council;

    (d) the Council believes that despite the class 1a approval being produced by the Appellants, the premises were never used as a class 1a dwelling house – the Council's preliminary interrogation of real estate websites identified two websites which referred to December 2017 and January 2018 listings for the rental of the rooms;

(e) if the building was approved as a class 1a dwelling house, the material submitted by the Appellants do not clearly indicate how the building certifier was able to ensure that the dwelling house met the Flood overlay code accepted development requirements.

46. The Council provided the Tribunal with copies of the inspection certificates and the real estate websites.

The Appellants' further submissions

47. In response to the Council's reply, the Appellants' representatives suggested there were two ways forward, indicating "*there was obviously confusion regarding the proposed classification of the building*":

(a) give notice to the current (Rooming accommodation) tenants to leave, rent it out as a dwelling to a single family thus complying with class 1a requirements and if the owner wishes to re-establish the class 1b use, when it is converted at that time it would not trigger any assessment; or

(b) issue an exemption certificate for the Rooming accommodation from the Flood overlay on the basis that it is an existing building which complied with the flood immunity requirement at the time of construction. The Appellants' representatives implored Council to consider this option.

48. Although it is not within the Tribunal's jurisdiction to make orders or directions for either course of action, some comment should be made about the City Plan interpretation which underpins them.

49. In these proceedings, the Appellants have focussed on limb (b) of the following MCU trigger in the table of assessment for the Flood overlay, Table 5.10.11:[9]

MCU for: a. a park; or b. other use, not a dwelling house, within an existing premises and not involving building work exceeding 25m^2 in Brisbane River flood planning area 1, Brisbane River flood planning area 2a, Brisbane River flood planning area 2b, Brisbane River flood planning area 3 or Brisbane River flood planning area 4 sub-categories, or in Creek/waterway flood planning area 1, Creek/waterway flood planning area 2, Creek/waterway flood planning area 3 or Creek/waterway flood planning area 4 sub-categories, if accepted development subject to compliance with identified requirements in the zone or neighbourhood plan	**Accepted development, subject to compliance with identified requirements**	
	If complying with all acceptable outcomes in section B of the Flood overlay code	Not applicable
	Assessable development—Code assessment	
	If not complying with all acceptable outcomes in section B of the Flood overlay code	Flood overlay code—purpose, overall outcome and outcomes in section B

50. The Appellants contend that when the MCU for Rooming accommodation occurred (they say in 2019) it satisfied paragraph (b) of this MCU trigger because it was "*within an existing premises and not involving building work exceeding 25m^2*" and therefore it was Accepted development subject to compliance with identified requirements (which they say were complied with). That would seem to be the position under this trigger.

51. However, there is another MCU trigger in the same table of assessment for the Flood overlay, Table 5.10.11, which would appear to lead to the same MCU also being assessable development—code assessment:[10]

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9 Wording of Table 5.10.11 in both 2019 and current

10 Wording of Table 5.10.11 in both 2019 and current

MCU, other than for a dwelling house, in Brisbane River flood planning area 1, Brisbane River flood planning area 2a, Brisbane River flood planning area 2b, Brisbane River flood planning area 3 or Brisbane River flood planning area 4 sub-categories, or in Creek/waterway flood planning area 1, Creek/waterway flood planning area 2, Creek/waterway flood planning area 3 or Creek/waterway flood planning area 4 sub-categories: a. for a new premises; or b. for an existing premises and involving building work exceeding 25m^2; or c. an assembly use (activity group); or d. for a dwelling unit, hotel where including short-term accommodation, nature-based tourism or a resort complex, or for accommodation activities (activity group), other than a dwelling house or caretaker's accommodation, in a part of a premises not previously approved for accommodation activities (activity group); or e. involving the handling or storage of hazardous chemicals identified in Table 8.2.11.3.M in the Flood overlay code	**Assessable development—Code assessment**	
	- Note—If the MCU is impact assessable in the zone or neighbourhood plan, then the category of assessment is not lowered to code assessment.	Flood overlay code—purpose, overall outcomes and outcomes in sections B and C

52. Under this second MCU trigger, under paragraph (d), an MCU in the Brisbane River flood planning area 2a for accommodation activities (activity group), other than a dwelling house or caretaker's accommodation, in part of a premises not previously approved for accommodation activities (activity group) is Assessable development—Code assessment. The assessment benchmarks are more extensive than for the other MCU triggers, being the Flood overlay code's purpose, overall outcomes and outcomes in sections B and C.

53. Rooming accommodation is within the accommodation activities (activity group): City Plan Table SC1.1.2.B—Defined activity groups.

54. Because paragraphs (a) to (e) under this second MCU trigger are each separated by an 'or', they are each in the alternative. This means that even if the MCU is in an existing building and does not involve building work exceeding 25m^2, it is assessable development—code assessment if it is for Rooming accommodation and the premises have not previously been approved for an accommodation activity. Presumably (although it is not clear) not having been previously approved for an accommodation activity means an approval under City Plan that was assessed against the Flood overlay code.

55. It is confusing that the one table of assessment produces two different categories of assessment for the same MCU. The rules in section 5.3.2 of City Plan provide for code assessment prevailing over accepted development but not squarely in the scenario of where the different categories are under the same overlay, but rather where the different category is under a zone than under a neighbourhood plan or an overlay. However, the code assessment trigger cannot simply be ignored. Flood hazard is a serious issue and the site is within metres of the Brisbane River. City Plan clearly intends that accommodation uses other than a dwelling house meet additional outcomes.

56. A development offence under section 163 of the *Planning Act 2016* does not arise if the development is carried out in accordance with an exemption certificate under section 46 of the *Planning Act 2016*.

57. Section 46(1) of the *Planning Act 2016* provides that a development approval is not required for assessable development on premises if there is an exemption certificate for the development. Where the local government would be the assessment manager, it is the local government (only) who may give an exemption certificate: section 46(2) of the *Planning Act 2016*.

58. One of the bases on which the local government may give an exemption certificate is if the effects of the development would be minor or inconsequential, considering the

circumstances under which the development was categorised as assessable development: section 46(3)(b)(i) of the *Planning Act 2016.*

59. There is no exemption certificate presently in existence and the Tribunal does not have jurisdiction to give an exemption certificate. It is entirely a matter for the Council outside of these proceedings. Looking at the outcomes in both Sections B and C of the Flood overlay code, the Council's consideration of any such request to issue an exemption certificate would clearly involve matters beyond just the finished floor level of the building.

Findings of fact

60. As indicated at paragraph 16 above, the appeal is by way of a reconsideration of the evidence that was before the person who made the decision appealed against.[11] However the tribunal may, but need not, consider other evidence presented by a party to the appeal with leave of the tribunal.

61. If view of the seriousness of the assertion by the Appellants' representatives at the hearing that the building approval on which Council had based its enforcement action had been issued in error,[12] the Tribunal allowed and has considered the additional evidence presented by both parties.

62. Despite this further evidence there remains uncertainty about what was actually constructed (class 1a or class 1b) and when the Rooming accommodation use started.

63. Simply because the Appellants have produced a certificate of classification for a class 1b building which is dated 27 September 2019 is not decisive of the Rooming accommodation use not starting before that date. It is not uncommon for buildings to be used as a particular class of building without a certificate of classification for that class of building.

64. One would expect there to be some identifiable difference between a class 1a and class 1b building (for example fire safety installations or access) that would be an indicator of what class of building has actually been built (assuming it has been lawfully constructed).

65. This is made difficult here because both the class 1a building approval and class 1b building approval are both of the same date and both refer to plans of the same description.

66. The records before the decision maker which were provided to the Tribunal contain only one set of approved plans and the Appellants did not provide a copy of the plans approved by the class 1a approval. A comparison of both sets of plans against what was physically constructed may point one way or another. That is not something the Tribunal is in a position to do.

67. The Council has indicated that it is investigating the actions of the private certifier and it may be that investigation reveals the true position.

68. Despite the Appellants' representatives producing what, on its face, is a class 1a building approval dated 2 April 2017, the Council submitted that it was never used as a class 1a dwelling house. The Council has done some preliminary interrogation of real estate websites which reveal references to rooms being rented in 2017 and 2018. That may support that it has been operating as Rooming accommodation since that time.

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11 *Planning Act 2016* s253(4) (Conduct of appeals).

12 Appreciating that under section 54 of the *Building Act 1975* a local government may rely on documents a private certifier gives for the purpose of making the documents publicly available.

Reasons for decision

69. If the Council is correct that the Rooming accommodation use has been operating since 2017 or 2018, then the records of the decision maker include a title search which shows that the Appellants, John and Jessica Owen, were not the owners in 2017 or 2018. According to the title search, the Appellants became the registered owners on 30 October 2019.

70. There is no evidence in the decision maker's records to suggest that John Owen or Jessica Owen were involved with the premises in 2017 or 2018.

71. As set out in paragraph 3 above, the Enforcement Notice was issued to John and Jessica Owen on the basis that they had committed and/or were committing the development offence of carrying out assessable development without a permit. Which type of development exactly was not properly particularised in the Enforcement Notice. But whether the development was the carrying out of building work or the making of a material change of use of premises, there is no evidence that it was carried out by either Appellant. The allegation which the Enforcement Notice makes against the Appellants cannot be sustained.

72. The Appellants may have inherited an unlawful use when they purchased the site in 2019 (and if so their continuation of it may be a development offence under section 165 of the *Planning Act 2016*), but that is not the basis on which the Enforcement Notice was given to the Appellants.

73. The Tribunal will therefore allow the appeal and decide not to give the Enforcement Notice.

74. While the Tribunal has the power to change the Enforcement Notice or set the decision aside and order the original decision maker to remake the decision, the Tribunal does not consider either is appropriate.

75. Which development offence, what type of development, why it is assessable by reference to the specific limb of the City Plan trigger and who committed the offence are essential elements that any amended or new enforcement notice would need to particularise. They are not minor corrections to the present Enforcement Notice and it is apparent that there is more than one way this matter could be viewed.

76. The Council's investigations into the private certifier's work and further details of how the building was used/occupied between 2017 and 2019 may inform those considerations.

77. Under the *Planning Act 2016*, there is no impediment on the Council issuing a new enforcement notice, provided it holds the belief required by section 168(1) of the *Planning Act 2016*.[13]

Michelle Pennicott
Development Tribunal Chairperson

Date: 2 February 2022

[13] *Serratore & Anor v Noosa Shire Council* [2021] QPEC 21 at [140].

Appeal Rights

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

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

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

The following link outlines the steps required to lodge an appeal with the Court.
http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court

Enquiries

All correspondence should be addressed to:

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

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

Appendix

78. The Tribunal's jurisdiction is established by the *Planning Act 2016*, section 229 and Schedule 1.

79. Section 229(1) provides that Schedule 1 states the matters that may be appealed to a tribunal or the P&E Court.

80. Schedule 1, section 1(1) provides that Table 1 states the matters that may be appealed to the P&E Court or a tribunal.

81. In Table 1, one of the matters that may be appealed against is a decision to give an enforcement notice.

82. However, Schedule 1, section 1(2) states that Table 1 applies to a tribunal only if the matter involves a matter listed in paragraphs (a) to (l).

83. One of those listed matters, in paragraph (h) is a decision to give an enforcement notice:

    (a) in relation to a matter under paragraphs (a) to (g); or

    (b) under the *Plumbing and Drainage Act 2018*.

84. The decision to give the Enforcement Notice was not under the *Plumbing and Drainage Act 2018*.

85. Therefore, for the appeal to be within the Tribunal's jurisdiction, the decision to give the Enforcement Notice must be "in relation to a matter under paragraphs (a) to (g)".

86. This cross-referencing back to other paragraphs as a shorthand description of the limitations of a tribunal's jurisdiction is not easy to interpret (which is unfortunate given it is the gateway to a dispute resolution jurisdiction which is intended to be quick, simple and free of legal representation) but it requires two questions to be answered:

    (a) What is a 'matter' under paragraphs (a) to (g) that a decision to give an enforcement notice must involve?

    (b) Is the decision to give an enforcement notice in this appeal in relation to a matter under paragraphs (a) to (g)?

87. The Council submits that the Tribunal does not have jurisdiction as an enforcement notice alleging the carrying out of assessable development without a permit is not an issue that falls in paragraphs (a) to (g).[14]

88. The Appellants submit that the Tribunal does have jurisdiction as the Enforcement Notice, in substance, pertains to aspects covered by the building work approval, not the use itself.[15]

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14 Council's submissions dated 3 June 2021, paragraph 23.

15 Appellant's submissions dated 21 June 2021.

What is 'a matter' under paragraphs (a) to (g) that a decision to give an enforcement notice must involve?

89. Paragraphs (a) to (g) are reproduced below in the full context in which they appear in section 1 of Schedule 1:

"Schedule 1 Appeals

1 Appeal rights and parties to appeals

(1) Table 1 states the matters that may be appealed to—

(a) the P&E court; or

(b) a tribunal.

(2) However, table 1 applies to a tribunal only if the matter involves—

(a) the refusal, or deemed refusal of a development application, for—

(i) a material change of use for a classified building; or

(ii) operational work associated with building work, a retaining wall, or a tennis court; or

(b) a provision of a development approval for—

(i) a material change of use for a classified building; or

(ii) operational work associated with building work, a retaining wall, or a tennis court; or

(c) if a development permit was applied for—the decision to give a preliminary approval for—

(i) a material change of use for a classified building; or

(ii) operational work associated with building work, a retaining wall, or a tennis court; or

(d) a development condition if—

(i) 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; and

(ii) the building is, or is proposed to be, not more than 3 storeys; and

(iii) the proposed development is for not more than 60 sole-occupancy units; or

(e) 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; or

(f) 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; or

(g) a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission; or

(h) a decision to give an enforcement notice—

(i) in relation to a matter under paragraphs (a) to (g); or

(ii) under the *Plumbing and Drainage Act 2018*; or

(i) an infrastructure charges notice; or

(j) the refusal, or deemed refusal, of a conversion application; or

(l) a matter prescribed by regulation."

90. It can be observed that the leading words in paragraphs (a) to (f) concern various decisions or aspects of decisions e.g. refusal, deemed refusal, preliminary approval, a provision and condition.

91. Each of these decisions being a 'matter' is consistent with sub-section 1(1) which states that Table 1 states the 'matters' that may be appealed against. Table 1 lists six items, which are also expressed as decisions or aspects of decisions.

92. Ordinarily, grammatical forms of a word have a corresponding meaning, such that 'matter' would have a meaning consistent with the meaning of 'matters' in sub-section 1(1). That would then lead to paragraph (h) being interpreted to require that a decision to give an enforcement notice must involve a decision or aspect of decision in paragraphs (a) to (f). Paragraph (g) is expressed differently, referring itself to "a matter under this Act".

93. However, does that meaning (a matter being the decision or aspect of decision in the leading words in each of paragraphs (a) to (f)) sit comfortably with what an enforcement notice can be given for?

What an enforcement notice can be given for

94. 'Enforcement notice' is defined in section 168(2) of the *Planning Act 2016* as a notice that requires a person to do either or both of the following:

(a) to refrain from committing a development offence;

(b) to remedy the effect of a development offence in a stated way.[16]

95. 'Development offence' is defined in section 161 of the *Planning Act 2016* as being an offence created under Chapter 5, Part 2. Those offences are:

(a) a person must not carry out prohibited development (s162);

(b) a person must not carry out assessable development, unless all necessary development permits are in effect for the development (s163);

(c) a person must not contravene a development approval (s164);

(d) a person must not use premises unless the use is a lawful use or, for designated premises, complies with any requirements about the use of premises in the designation (s165); and

(e) a person whose development application for [an emergency activity] is refused must restore, as far as practicable, premises to the condition the premises were in immediately before the activity was carried out (s166(7)).

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[16] There are also enforcement notices under the *Building Act 1975* and the *Plumbing and Drainage Act 2018* which are specifically provided for in sub-section (1).

Can an enforcement notice involve each of the matters in paragraphs (a) to (g)?

96. When the leading words of paragraphs (a) to (g) are read together with paragraph (h), and with an understanding of what an enforcement notice can be given for:

    (a) It does not seem possible for there to be a decision to give an enforcement notice specifically in relation to the "refusal, or deemed refusal, of a development application". Paragraph (h) cannot be given effect if that is the meaning of "a matter under paragraph (a)";

    (b) It is possible for there to be a decision to give an enforcement notice in relation to "a provision of a development approval". This is because an enforcement notice can be given for the development offence of contravening a development approval and a 'provision' of a development approval means all words or matters forming part of the approval.[17] Paragraph (h) can therefore be given effect when read together with the leading words of paragraph (b);

    (c) It does not seem possible for there to be a decision to give an enforcement notice specifically in relation to "if a development permit was applied for—the decision to give a preliminary approval". Paragraph (h) cannot be given effect if that is the meaning of "a matter under paragraph (c)";

    (d) It is possible for there to be a decision to give an enforcement notice in relation to a "condition of a development approval". This is because an enforcement notice can be given for the development offence of contravening a development approval and a development approval includes a condition.[18] Paragraph (h) can therefore be given effect when read together with the leading words of paragraph (d);

    (e) It does not seem possible for there to be a decision to give an enforcement notice specifically in relation to "a decision for, or a deemed refusal of, an extension application". Paragraph (h) cannot be given effect if that is the meaning of "a matter under paragraph (e)";

    (f) It does not seem possible for there to be a decision to give an enforcement notice specifically in relation to "a decision for, or a deemed refusal of, a change application". Paragraph (h) cannot be given effect if that is the meaning of "a matter under paragraph (f)";

    (g) It is possible for there to be a decision to give an enforcement notice in relation to a matter under the *Planning Act 2016* to the extent the matter relates to the *Building Act 1975*. This is because an enforcement notice can be given for various issues relating to a building, structure or building work under the *Building Act 1975* and the enforcement notice is taken to be one given under the *Planning Act 2016*.[19] Paragraph (h) can therefore be given effect when read together with paragraph (g).

97. In summary, if 'matter' is read as meaning the decision or aspect of decision in the leading words of each paragraph, it produces a nonsensical outcome when paragraphs (a), (c), (e) and (f) are read back with paragraph (h).

Ordinary meaning of 'a matter' under paragraph (a) to (g)

98. An interpretation which results in paragraphs (a), (c), (e) and (f) having no work to do for the purpose of paragraph (h) warrants consideration being given to whether another

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17 *Planning Act 2016*, Schedule 2, definition of 'provision'.

18 *Planning Act 2016*, s49(5).

19 *Building Act 1975*, s 248.

interpretation of 'a matter' for paragraph (h) is available. This is particularly so given that paragraph (h) expressly calls-up each of paragraphs (a) to (g).

99. In the Tribunal's view an alternative interpretation of 'matter' is available when the natural and ordinary meaning of the word 'matter' is used. The Macquarie Dictionary definition of 'matter' includes "a thing, affair or business".[20] The Australian Oxford Dictionary 2nd Edition definition of matter includes "a thing or things of a specified kind (printed matter, reading matter)".

Specified types of development under paragraph (a) to (g)

100. Reading 'matter' in this way reveals that a decision to give an enforcement notice can be appealed to a tribunal if it is in relation to one of the specified types of development in paragraphs (a) to (g),[21] namely:

(a) a material change of use for a classified building (paragraphs (a), (b) and (c)) or a material change of use of a classified building (paragraphs (e) and (f));

(b) operational work associated with building work (paragraphs (a), (b) and (c));

(c) operational work associated with a retaining wall (paragraphs (a), (b) and (c));

(d) operational work associated with a tennis court (paragraphs (a), (b) and (c));

(e) a material change of use that involves a class 2 building no more than 3 storeys and for not more than 60 sole-occupancy units (paragraph (d)).

101. In the Tribunal's view, this interpretation is to be preferred because it enables all of paragraphs (a) to (g) to be given effect, particularly as they are specifically called-up by paragraph (h). It is a sensible interpretation of 'matter' that gives the paragraphs practical operation and ensures no paragraph is rendered "superfluous, void or insignificant".[22]

102. It also sits more comfortably with the focus of enforcement notices being development activity by persons, rather than decisions by assessing authorities.

103. The intention of the legislature is sufficiently evident from paragraphs (a) to (g) – that in respect of certain limited types of *development*, appeals against various decisions are within the tribunal's jurisdiction. A decision to give an enforcement notice in respect of those types of *development* is a decision that sits comfortably within that range.

104. The Explanatory Notes do not speak specifically to the intention with respect of enforcement notices. However, they confirm a focus on types of development being within the jurisdiction of a tribunal:

> "Schedule 1 Appeals
>
> Appeal rights and parties to appeals
>
> Clause 1 sets out appeal rights under the Bill, including the appellants, respondents, co-respondents and co-respondents by election for each appeal.
>
> Table 1 sets out appeals that may be made either to the development tribunal or the P&E court. However for the matters in table 1, appeals may only be made to the development tribunal under certain circumstances, which are identified in this clause.

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20 *Macquarie Dictionary* (online at 20 December 2021) 'matter' (def 8).

21 As well as in relation to a matter under the *Planning Act 2016* relating to the *Building Act 1975* (paragraph (g)) and under the *Plumbing and Drainage Act 2018* (paragraph (h)).

22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] citing *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ.

> For example, table 1, item 1 provides for appeals by applicants about aspects of decisions about development applications.
>
> An appeal may be made to the P&E court in relation to any such application. However an appeal may be made to the development tribunal about applications only to the extent they relate to the Building Act, or are for some material changes of use for classified buildings, or in relation to conditions imposed on development approvals for particular class 2 buildings."

105. The Tribunal is aware that the *Planning Regulation 2017*, in setting out the fees for an appeal to a tribunal, expresses the jurisdiction as, "*Appeal about an enforcement notice, **if the notice relates to a material change of use for a classified building***". While this is consistent with the interpretation the Tribunal has arrived at, the *Planning Regulation 2017* cannot be used as extrinsic material to assist in the interpretation of Schedule 1 of the *Planning Act 2016* as it was not in existence at the time the *Planning Act 2016* was made.

106. The Tribunal therefore interprets paragraph (h)(i) to mean that a decision to give an enforcement notice can be appealed to a tribunal if it is in relation to:

    (a) a material change of use for a classified building;

    (b) operational work associated with building work;

    (c) operational work associated with a retaining wall;

    (d) operational work associated with a tennis court;

    (e) a material change of use that involves a class 2 building no more than 3 storeys and for not more than 60 sole-occupancy units; or

    (f) a matter under the *Planning Act 2016* to the extent the matter relates to the *Building Act 1975*, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.

Is the decision the subject of this appeal in relation to a matter under paragraph (a) to (g)?

107. The Enforcement Notice which is the subject of this appeal alleges that the Appellants have committed and/or are committing a development offence under section 163 of the *Planning Act 2016* (Carrying out assessable development without permit).

108. Section 163(1) provides that a person must not carry out assessable development, unless all necessary development permits are in effect for the development.

109. As indicated in paragraphs 4 to 11 of this decision, it is not exactly clear whether the assessable development the subject of the allegation is building work or a material change of use. The Enforcement Notice requirement to "cease use of the premises as Rooming Accomodation [sic]" would tend to suggest the alleged assessable development is a material change of use of premises.

110. The Tribunal is satisfied the Enforcement Notice is in relation to a material change of use.

111. If the Enforcement Notice was instead or additionally alleging that building work assessable under City Plan was carried out, the jurisdiction is less clear. Under paragraph (g), a tribunal has jurisdiction for "*a matter under this Act, to the extent **the matter relates to the Building Act**, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission*". There is no doubt that building work assessable against the building assessment provisions of the *Building Act* by a building certifier would a matter that relates to the *Building Act*. However, building work assessable under a planning scheme is a matter that the drafters of the *Planning Act 2016* appear to have not given specification to. It would be a curious result if a material change

of use of a classified building is within a tribunal's jurisdiction, but not building work for a classified building. It may be that the expression 'relates to the *Building Act*', which is a broad relational phrase, is sufficient to make the connection (that is, building work assessable under a planning scheme relates to the *Building Act* because it deals with building work).

Is the Enforcement Notice in relation to a material change of use of, or for, a classified building?

112. The remaining question is whether the Enforcement Notice is in relation to a material change of use *of, or for, a classified building*.

113. 'Classified building' is defined to mean a building classified under the Building Code as a class 1 building or a class 10 building incidental or subordinate to [a class 1 building].[23]

114. Under the Building Code of Australia, both a class 1a and class 1b constitute a class 1 building.

115. The Enforcement Notice alleges the premises are a class 1b building.[24]

116. The premises are therefore a 'classified building'.

117. In paragraphs (a) to (c) of section 1(2) of Schedule 1 of the *Planning Act 2016* the expression is a material change of use '*for*' a classified building, whereas in paragraphs (e) and (f) the expression is a material change of use '*of*' a classified building.[25]

118. Despite difference in prepositions, the Tribunal considers that all paragraphs are to be read as a material change of use '*of*' a classified building.

119. When the phrase 'material change of use' is used in a sentence about premises, then sensibly it must be read as a material change of use *of* those premises. That accords with the definition of material change of use referring to a material change of use 'of premises'.[26]

Conclusion on jurisdiction

120. The Tribunal concludes that it has jurisdiction to hear this appeal. The appeal is against a decision to give an enforcement notice in relation to a matter under paragraph (a) to (g), specifically a material change of use of a classified building.

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23 *Planning Act 2016*, Schedule 2.

24 Paragraph 42 of the Enforcement Notice states that the building is a class 1b building.

25 Confusingly, paragraph (d) uses a different expression again in referring to a material change of use "that involves the use of" [a class 2 building].

26 In contrast, material change of use 'for' is used when referring to the use purpose eg. material change of use *for* a party house and material change of use *for* a use that was accepted development.