Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**24-016**
Appellant:	Mohammed Iqbal Hossain
Respondent (Enforcement Authority):	City of Gold Coast (**Council**)
Site Address:	51 Allied Drive, Arundel in the State of Queensland and described as Lot 734 on RP225110 (**Premises**)

Appeal

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* (**Planning Act**) against the decision of the Council to give an Enforcement Notice under section 168(1)(b) of the Planning Act dated 8 April 2024, requiring the Appellant to cease the use of the Premises for Rooming accommodation with more than 5 bedrooms and more than 5 unrelated persons and the restoration of the Premises to a state that complies with the *Gold Coast City Plan 2016 version 11* (**City Plan**).

Date and time of hearing:	10.00am, 19 July 2024
Place of hearing:	City of Gold Coast Chambers, Bundall
Tribunal:	Samantha Hall – Chair Martyn Shedd – Member Chris Finch - Member
Present:	**Appellant** Mohammed Iqbal Hossain – Appellant Steve Morton – Director, Zone Planning Group **Respondent** Lauren Campbell – Senor Planner, Council Sophie Chivas – Supervising Planner, Council Roxanne Hansen – Line Leader Planning (North), Development Compliance, Council Greg Betts – Development Compliance Officer, Council Blake Johnston – Line Leader Planning Compliance (south), Development Compliance, Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the Planning Act decides to **change** the decision of the Council to give the Appellant the Enforcement Notice dated 8 April 2024, by changing the "When you are required to comply" to the following:

When you are required to comply
You are required to comply with this notice by no later than 5.00pm on 26 August 2024.

Background

1. The Appellant is the owner of the Premises, upon which is constructed a large single storey dwelling. Following building work carried out pursuant to a development approval for Carport Conversion, House Additions, Master bedroom and Ensuite given on 14 December 2012, the dwelling comprised 7 bedrooms.

2. On 18 July 2024, the Council provided a written submission to the Tribunal's Registry prior to the hearing providing the history of the matter leading to this appeal (**Council's Submission**).

3. The Council's Submission was supported by Annexures containing file notes and photographs taken during inspections of the Premises, as well as copies of emails exchanged between the parties, copies of the Show Cause Notice, the representations made by the Appellant in response to the Show Cause Notice and the Enforcement Notice (**Council Submission Annexures**).

4. At the hearing of the appeal, the Appellant acknowledged having read and understood the Council's Submissions, including the Council Submission Annexures, and confirmed that he had no concerns with the content of the Council's Submissions.

5. The Council's Submission and Council Submission Annexures can be summarised as follows:

   (a) On 21 November 2023, the Council received an email complaint raising concerns about the number of people living at the Premises, which could comprise as many as 14 students.

   (b) On 27 November 2023, Council Development Compliance Officer Greg Betts, inspected the Premises. A Queensland Fire and Emergency Services (**QFES**) Officer also attended the inspection of the Premises to check compliance with fire regulations. During the inspection, Mr Betts spoke with a resident of the Premises who advised that 8 to 10 people were living at the Premises. Mr Betts sighted 8 persons and was advised that another 2 persons were in a bedroom that was unable to be accessed during the inspection. Mr Betts' file note identified there were potentially 13 people residing at the Premises based upon the bedding in each bedroom as follows:

      (i) Bedroom 1: 2 people (advised by the resident);

      (ii) Bedroom 2: 1 person;

      (iii) Bedroom 3: 1 person;

      (iv) Bedroom 4: 4 people (with ensuite);

      (v) Bedroom 5: 1 person;

      (vi) Bedroom 6: 2 people;

      (vii) Bedroom 7: 2 people.

   (c) On 30 November 2023, the Appellant telephoned Mr Betts and advised there were generally 6 to 10 people living at the Premises. Mr Betts advised the Appellant

that he would need to reduce the number of people living at the Premises or obtain a town planning approval.

(d) On 4 January 2024, a desktop investigation was carried out by Mr Betts in which he identified that:

(i) The Premises was located in the Low Density residential zone of the City Plan;

(ii) The use, "Rooming Accommodation", within that zone was accepted development, subject to requirements if being established in an existing building and:

1. accommodating no more than four unrelated people; and

2. either involving no building work or involving minor building work.

There was no associated building work proposed for the Premises but there were more than 4 unrelated people living there;

(iii) The *Planning Regulation 2017*[1] (**PR**) overrides the City Plan provisions with respect to Rooming Accommodation and allows for up to 5 unrelated people to be accommodated within a house without requiring a development approval. However, there was evidence that up to 13 known residents were residing in the Premises.

(e) On 9 January 2024, a show cause notice was given by the Council to the Appellant (**Show Cause Notice**). The content of the Show Cause Notice can be summarised as follows:

(i) The Council reasonably believed the Appellant had committed or was committing a development offence of contravening section 163(1) and 165 of the Planning Act;

(ii) Council reasonably believed the Premises was being used for the purpose of Rooming Accommodation;

(iii) Pursuant to the City Plan, Rooming Accommodation could be carried out without a development approval where it accommodated no more than four unrelated people;

(iv) Pursuant to amendments made to the PR which came into effect on 2 December 2022, Rooming Accommodation could be carried out without a development permit in a house that had up to 5 bedrooms and was occupied by no more than 5 persons with a manager's residence;

(v) Given the total number of bedrooms and persons exceeded 5, the use of the Premises for Rooming Accommodation required an impact assessable development approval;

(vi) Council records did not identify that any such development application had been lodged nor approval given for the Premises to be used for Rooming Accommodation;

[1] See Schedule 6, Part 2, section 2(4) of the PR.

(vii) Pursuant to section 163(1) of the Planning Act, a person must not carry out assessable development unless all necessary development permits are in effect for the development;

(viii) Pursuant to section 165 of the Planning Act, a person must not use premises unless the use is a lawful use;

(ix) Council was of the belief that an enforcement notice should be given to the Appellant, pursuant to section 168 of the Planning Act and required the Appellant to:

1. cease using the premises for the purpose of Rooming Accommodation with more than 5 bedrooms or persons; and

2. restore the premises to a state that complied with the City Plan;

(x) The Appellant could submit a development application to the Council seeking approval to use the Premises for the purpose of Rooming Accommodation.

(f) On 22 January 2024, a further inspection of the Premises was carried by Mr Betts and another Council officer, as well as a QFES officer. Mr Betts observed 6 bedrooms with one occupant in each and a seventh bedroom that contained a bed, bedside table, clothing and other personal effects in a cupboard. There was also a storage area containing mattresses. The Appellant was present during the inspection of the Premises and advised that he would make a development application for a material change of use for Rooming Accommodation for 6 or 7 people.

(g) On 31 January 2024, Mr Betts sent an email to the Appellant about the Show Cause Notice.

(h) On 6 February 2024, Development Compliance Officer Roxanne Hansen inspected the Premises with QFES officers. During that inspection, several bedrooms were inaccessible and the mattresses that had been previously observed as stored within the Premises, were instead being stored in the garden shed. The Appellant was present during the inspection of the Premises and advised that only 5 people were residing in the Premises at that time.

(i) On 14 February 2024, Steve Morton of Zone Planning Group, on behalf of the Appellant, provided written representations to the Council in response to the Show Cause Notice (**Appellant's Representations**), which can be summarised as follows:

(i) The Appellant was not aware that a development approval was required to use the Premises for Rooming Accommodation;

(ii) More than 5 unrelated persons were residing in the Premises;

(iii) The Premises was a large detached dwelling that could easily accommodate more than 5 unrelated persons comfortably;

(iv) The Premises offered an affordable rental opportunity during a time when rental vacancy rates in the City were at an all-time low;

(v) The Appellant intended to lodge with the Council an impact assessable development application for a material change of use for Rooming Accommodation for 8 persons;

(vi) Zone Planning Group had been engaged to prepare and lodge the development application;

(vii) The Appellant had installed all required fire safety measures which had been inspected by QFES officers and QFES had determined there was no fire risk associated with the Premises accommodating more than 5 occupants;

(viii) It would take approximately 6 weeks to prepare and lodge the development application;

(ix) Lease agreements with the current tenants would be difficult to cancel and removal of the tenants could result in those tenants becoming homeless;

(x) The Appellant requested the Council not take further enforcement action pending lodgement of a development application which would occur no later than 26 March 2024.

(j) On 28 February 2024, Mr Betts sent an email to Steve Morton of Zone Planning Group advising the following:

(i) The Council would not permit an extension of time to allow the Appellant to lodge a development application, due to the safety concerns about the number of people living in the Premises, specifically due to fire safety;

(ii) QFES advised the Council that their matter was closed because the Appellant had informed the QFES that there were only 5 people living in the Premises;

(iii) The trigger for the QFES initial involvement was that more than 5 people were living in the Premises;

(iv) The fact that 8 people were residing in the Premises at that time, would be a trigger for the involvement of the QFES;

(v) The Council would require written confirmation from the QFES by 7 March 2024 that it has no concerns with this, otherwise the Council would proceed with enforcement action.

(k) Between 28 February 2024 and 2 April 2024, numerous emails passed between Mr Betts and Mr Morton with respect to the fire safety of the Premises and the QFES involvement. The content of these emails is repetitive and not directly relevant to the issues in dispute in this appeal, however, the email of 26 March 2024 from Mr Betts to Mr Morton, provides a summary of the position between the parties. This email can be summarised as follows:

(i) The Council and QFES inspections of the Premises identified that the Premises was being used for Rooming Accommodation and the number of occupants living in the Premises triggered a material change of use application. For that reason the Show Cause Notice was issued;

(ii) The Appellant's Representations identified that the Appellant intended to lodge a material change of use application which if approved, would resolve the matter;

(iii) QFES raised safety concerns during the site inspections, so the Council asked for evidence that QFES did not have safety concerns about the operation of the Premises;

(iv) In the absence of confirmation from the QFES about the fire safety of the Premises with the existing number of occupants, the Council would proceed with the enforcement process.

(l) On 2 April 2024 and 4 April 2024, the Appellant sent emails to Mr Betts advising that QFES would not provide written confirmation and offering to engage a third-party fire safety expert to provide that comfort to the Council.

(m) On 8 April 2024, Mr Betts responded to the Appellant's email, relevantly advising the following:

(i) The QFES did not have concerns about the Premises based on 5 people or less living there;

(ii) The Appellant had confirmed an intention to keep 8 people there while lodging a development application for Rooming Accommodation;

(iii) That was not acceptable to Council due to the fire safety risk of having more than 5 people reside in the Premises;

(iv) The Appellant needs to reduce the number of occupants to 5 while undertaking the process of applying for approval for more occupants.

(n) On 8 April 2024, the Council issued an enforcement notice (**Enforcement Notice**) which reiterated the content of the Show Cause Notice and required the Appellant to:

(A) ***"cease using the premises*** *for the purpose of Rooming accommodation with more than 5 bedrooms or persons and remove all materials, equipment and furniture associated with the operation of Rooming accommodation; and*

(B) ***restore the premises*** *to a state that complies with the City Plan.*

In particular, you are required to take the following actions:

i. Reduce the number of occupants at the premises to be no more than 5, under the amendments made to the Planning Regulation 2017 which came into effect on Friday 2 December 2022.

When you are required to comply

You are required to comply with this notice by no later than 5.00pm on Monday 22 April 2024.

If you wish to seek approval

You may seek to obtain approval to use the premises for the purpose of Rooming accommodation by submitting to Council an application for a development permit for a material change of use."

(o) On 15 July 2024, Mr Betts undertook a further inspection of the Premises. Mr Betts' inspection identified at least 6 persons residing in the Premises, which was confirmed by the resident who accompanied Mr Betts' inspection. Two additional rooms had mattresses standing up against the wall and Mr Betts was advised they were storage rooms. Three of the rooms were unable to be inspected.

The appeal

6. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 22 April 2024.

7. The Appellant's Form 10 identified the Appellant's grounds of appeal which can be summarised as follows:

   (a) The Show Cause Notice was given to the Appellant;

   (b) Due to the shortage of housing on the Gold Coast and the intake of international students at the Griffith University Gold Coast Campus, he felt almost obliged to increase the number of students residing in the Premises;

   (c) The Appellant was not aware of the City Plan requirements with respect to Rooming Accommodation nor those in the PR;

   (d) The Appellant had decided to lodge a development application with the Council for Rooming Accommodation for an approval to accommodate more than 5 unrelated people;

   (e) The Appellant engaged Zone Planning Group which provided the Appellant's Representations and would prepare the development application;

   (f) The Appellant's Representations asked the Council to grant an extension of time to allow for the preparation and lodgement of a development application;

   (g) On 28 February 2024, Mr Betts' wrote an email advising "*while we would normally support the request for the extension to allow for the DA to be lodged, in this case we have safety concerns about the number of people living in the house, specifically due to fire safety…before we can allow this many people to continue living in the house during the application process, we require the owner to provide us with written confirmation from QFES that they have no concerns with this*.";

   (h) In response to a QFES requisition that was triggered by more than 5 unrelated people living in the Premises, the Appellant installed additional fire safety measures and was dealing with QFES about this separately[2];

   (i) The Appellant asked QFES to provide the fire safety certification required by the Council but the QFES refused stating it did not provide such certification for any property;

   (j) The Appellant offered to engage an independent fire safety expert to provide an assessment which the Council declined;

   (k) The Enforcement Notice was not fair nor justified given:

      (i) The Appellant had installed all fire safety measures to meet the Budget Accommodation requirements in the Queensland Development Code MP2.1;

      (ii) The Appellant offered to engage an independent fire safety expert to assess the fire safety risk at the Premises;

      (iii) It is the Council's standard practice to allow a reasonable time to rectify a development offence and apply for an approval. The Appellant is prepared

[2] The Appellant references a QCAT appeal in respect of the QFES requisition (QCAT Reference GAR 874-2023), however the issues in that matter are not relevant to this appeal.

to lodge a development application and had engaged a town planner for that purpose but the Council withdrew that option;

(iv) The Appellant seeks the cancellation of the enforcement notice to allow the Appellant time to rectify the breach by lodging a development application and obtaining approval for 8 – 10 people to continue living in the Premises.

8. By email dated 15 July 2024, the Tribunal's Registrar communicated the following directions to the parties:

"Pursuant to section 246 of the Planning Act 2016, would the Council please provide all evidence that was before the person who made the decision to issue the enforcement notice under appeal.

Please provide that material to the Registry by 4.00pm Tuesday 16 July 2024 and copy the Appellant into that correspondence."

9. By email dated 16 July 2024, Sophie Chivas on behalf of the Council apologised for not providing the information that afternoon but noted it would be provided the following day.

10. By email dated 17 July 2024, Ms Chivas provided a link to a bundle of documents comprising the material to be provided pursuant to the directions.

11. There was no site inspection by the Tribunal and the hearing of the appeal at the Council's chambers took place at 10am on 19 July 2024.

Subsequent emails

12. By email dated 29 July 2024 to the Tribunal's Registrar, the Appellant provided further commentary which can be summarised as follows (**the Appellant's email**):

(a) He had had some confusion with respect to what the Council was asking of him;

(b) The hearing clarified that confusion;

(c) Prior to the hearing, it had been his understanding that the Council only wanted certification from QFES but he now understands the Council wanted him to lodge a development application to "legalise the issue" as soon as possible; and

(d) He had instructed Mr Morton to prepare a development application as soon as possible and anticipated it could be lodged within 3 to 4 weeks.

13. By email dated 31 July 2024 to the Tribunal's Registrar, Ms Chivas provided a response to the Appellant's email which can be summarised as follows:

(a) The Council understood the Appellant's email to indicate the Premises would continue to be used for Rooming Accommodation in the absence of a necessary development approval;

(b) It was a development offence for the Premises to continue to be used for Rooming Accommodation until any development application for a development permit for a material change of use for Rooming Accommodation could be approved by the Council; and

(c) Council requested the Tribunal to order the Appellant to cease using the Premises for Rooming Accommodation until a development approval is in effect.

14. By email dated 1 August 2024, the Tribunal's Registrar sent the following response from the Tribunal to the parties:

"The Tribunal thanks both the parties for their follow up emails in this appeal.

The Tribunal acknowledges the Appellant's intent to lodge a development application in the terms identified in his email.

With respect to the Council's email, the Tribunal understands the Council's intent, however, notes that pursuant to section 171 of the Planning Act 2016, an appeal against an enforcement notice stays the operation of the notice until the appeal has been decided. The Tribunal has decided that the order requested by the Council would offend that provision.

The Tribunal observes that both parties are keen for the appeal to be decided and has asked the Registry to advise you that the Tribunal members will be expediting delivery of the decision in this appeal."

15. By email dated 8 August 2024 to the Tribunal's Registrar, the Appellant requested the Tribunal "*to undertake a third party investigation about the existing fire safety of the property and the residents prior to finalize the case*."

Jurisdiction

16. Schedule 1 of the Planning Act states the matters that may be appealed to the Tribunal.[3]

17. Section 1(1) of Schedule 1 of the Planning Act provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the Planning Act, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in paragraphs (a) to (g) of sub-section (2).

18. Section 1(2)(h)(i) of Schedule 1 of the Planning Act relevantly provides:

"*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*".

19. The Council's decision to give the Enforcement Notice was not made under the *Plumbing and Drainage Act 2018*.

20. Thus, the question arises whether the Council's decision to give the Enforcement Notice was "*in relation to a matter under paragraphs (a) to (g)*".

21. The Enforcement Notice alleged that the Appellant had committed or was committing a development offence against sections 163(1) and 165 of the Planning Act.

22. Section 163(1) of the Planning Act relevantly provided that "*a person must not carry out assessable development, unless all necessary development permits are in effect for the development.*"

23. Section 165 of the Planning Act relevantly provided that "*a person must not use premises unless the use … is a lawful use".*

24. The specific allegation in the Enforcement Notice was that the Premises had been or was being used for a Rooming Accommodation use without a development permit.

[3] Section 229(1)(a) of the Planning Act.

25. So, was the allegation that the Premises had been or was being used for a Rooming Accommodation use without a development permit, "*in relation to a matter under paragraphs (a) to (g)*" of section 1(2) of Schedule 1 of the Planning Act?

26. Paragraphs (a) to (g) of section 1(2) of Schedule 1 of the Planning Act are lengthy and contain leading words that refer specifically to aspects of a development approval, a development permit, a development condition, a development application and even a refusal of a development application.

27. When considering the leading words in isolation, the issue that is the subject of the Enforcement Notice, being the absence of a development permit authorising the Premises to be used for Rooming Accommodation, would not fit.

28. However, this question has been considered by the Planning and Environment Court in the case of *Brisbane City Council v Tina and Tony Pty Ltd* [2022] QPEC 36.

29. In that case, the Court took a broad view to the interpretation of section 1(2)(h)(i) of Schedule 1 of the Planning Act.

30. The case was an appeal from a decision of the Development Tribunal and the Court accepted the Tribunal's findings, which included a broad interpretation of both the meaning of the words "in relation to" and "matter".

31. In accepting the Tribunal's interpretation, the Court accepted that an enforcement notice could be appealed to a tribunal if it had a relationship to one of the specified types of development listed in paragraphs (a) to (g) of section 1(2) of Schedule 1 of the Planning Act.

32. For the present appeal, this would mean that the Tribunal does have jurisdiction to hear the appeal, because the Enforcement Notice alleged the development offence of carrying out an assessable material change of use, being Rooming Accommodation, without a development permit. The Tribunal is of the view that this would clearly be "in relation to a material change of use for a classified building" (paragraphs (a), (b), (c), (e) and (f) of section 1(2) of Schedule 1 of the Planning Act).

33. The Tribunal notes that the Council's Submission addresses jurisdiction and conveys the Council's acceptance of the Tribunal's jurisdiction to hear the appeal based on the interpretation of section 1 of Schedule 1 of the Planning Act by the Planning and Environment Court in the case *Brisbane City Council v Tina and Tony Pty Ltd* [2022] QPEC 36.

34. Accordingly, the Tribunal is satisfied that Table 1 of Schedule 1 of the Planning Act applies to the hearing of this appeal.

35. Under item 6 of Table 1 of Schedule 1 of the Planning Act, an appeal may be made against a decision to give an enforcement notice. The appeal is to be made by the person given the enforcement notice, who in this case was the Appellant and the respondent to the appeal is the enforcement authority, who in this case is the Council.

36. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision framework

37. The Enforcement Notice the subject of this appeal was issued by the Council on or about 8 April 2024.

38. The Appellant filed a Form 10 – Appeal Notice on 22 April 2024.

39. The appeal is a Planning Act appeal, commenced after 3 July 2017 under section 229 of the Planning Act. As such, the appeal is to be heard and determined under the Planning Act.

40. This is an appeal by the Appellant, the recipient of the Enforcement Notice and accordingly, the Council, being the enforcement authority that gave the Enforcement Notice, must establish that the appeal should be dismissed.[4]

41. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Council which decided to give the Enforcement Notice the subject of this appeal.[5]

42. The Planning Act provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceedings and may seek the views of any person[6].

43. Pursuant to these provisions, the Tribunal, by way of the email dated 15 July 2024 sent by the Tribunal's Registrar to the parties, requested from the Council a copy of "*all the evidence that was before the person who made the decision to issue the enforcement notice under appeal.*"

44. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal[7].

45. On or about 18 July 2024, the Council provided the Council Submission, including the Council Submission Annexure, to the Tribunal's Registry.

46. The Tribunal grants the Council leave to present the Council Submission, including the Council Submission Annexure, in this appeal and the Tribunal has considered the Council Submission.

47. The Tribunal notes the following with respect to the Council Submission:

    (a) The Tribunal's Registry provided the Council Submission to the Tribunal members on the afternoon of 19 July 2024.

    (b) The Tribunal members had not had the benefit of receiving the Council Submission in time for the hearing on the morning of 19 July 2024, however, the Appellant had been copied into the email sending the Council Submission to the Tribunal's Registry on 18 July 2024, prior to the hearing.

    (c) The Appellant confirmed at the hearing that the Appellant had read the Council's Submission and required no further response in addition to the Appellant's verbal evidence provided at the hearing.

48. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the Planning Act:

    (a) *confirming the decision; or*

    (b) *changing the decision; or*

    (c) *replacing the decision with another decision; or*

[4] Section 253(3) of the Planning Act.
[5] Section 253(4) of the Planning Act.
[6] Section 249 of the Planning Act.
[7] Section 253(5)(a) of the Planning Act.

(d) *setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or*

(e) *for a deemed refusal of an application:*

(i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*

(ii) *deciding the application.*

Material Considered

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

(a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 22 April 2024.

(b) A bundle of documents comprising the evidence that was before the person who made the decision to issue the enforcement notice provided to the Registry by the Council under cover of email dated 17 July 2024.

(c) The Council Submission, including the Council Submission Annexure, dated 18 July 2024.

(d) *Planning Act 2016* (**Planning Act**).

(e) *Planning Regulation 2017* (**PR**).

Findings of Fact

50. The Tribunal finds that the Premises had more than 5 bedrooms and that it had been and continued to be used as the place of residence for more than 5 unrelated persons.

51. The exact number of persons residing at the Premises was difficult to ascertain however the evidence provided to the Tribunal clearly indicates the number has exceeded and continued to exceed 5 persons.

52. The Council's evidence suggested that there had been as many as 13 unrelated persons residing in the Premises at the one time but that at the most recent inspection conducted by the Council, there were either 5 or 6 persons living there.

53. The Appellant has not disputed that there has been and continues to be more than 5 unrelated persons living in the Premises. This was acknowledged in the Appellant's Representations and in the Appellant's grounds for this appeal. The Appellant also acknowledged at the hearing that there were more than 5 people living in the Premises. The Appellant's email of 29 July 2024, which identified the Appellant's intent to lodge a development application, indicates that the development application would be seeking approval from the Council for the use of "Rooming Accommodation for 8 people".

Reasons for the Decision

<u>What use is being made of the Premises?</u>

54. It is not in dispute between the parties that the Premises contains more than 5 bedrooms and that more than 5 unrelated people have been living and continue to live in the Premises.

55. The lawful use of the Premises is for a "dwelling house" as defined in the City Plan.

56. Schedule 1 (Definitions) of the City Plan defines a "dwelling house" as:

"A residential use of premises involving:

(a) *one dwelling for a single household and any domestic outbuildings associated with the dwelling; or*
(b) *one dwelling for a single household, a secondary dwelling and any domestic outbuildings associated with either dwelling.*

Does not include the following examples:

Caretaker's accommodation, dual occupancy, rooming accommodation, short-term accommodation, student accommodation, multiple dwelling."

57. Schedule 1 (Definitions) of the City Plan defines "rooming accommodation" as:

"The use of premises for:

a. residential accommodation, if each resident:
  i. has a right to occupy one or more rooms on the premises; and
  ii. does not have a right to occupy the whole of the premises; and
  iii. does not occupy a self-contained unit, as defined under the Residential Tenancies and Rooming Accommodation Act 2008, schedule 2, or has only limited facilities available for private use; and
  iv. shares other rooms, facilities, furniture or equipment outside of the resident's room with one or more other residents, whether or not the rooms, facilities, furniture or equipment are on the same or different premises; or
b. a manager's residence, an office or providing food or other services to residents, if the use is ancillary to the use in (a).

Examples include:
Boarding house, hostel, monastery, off-site student accommodation
Does not include the following examples:
Hospice, community residence, dwelling house, short-term accommodation, multiple dwelling."

58. It is not in dispute that the Premises is one dwelling that contains 7 bedrooms that are used by students from the nearby University which occupy one bedroom each or in some cases the bedrooms are shared. The living facilities and bathrooms in the Premises are shared by the students. These facts are set out clearly in Mr Betts' inspection notes in the Council Submission Annexures.

59. The Tribunal is satisfied that the use of the Premises does not meet the definition of Dwelling House in the City Plan but does meet the definition of Rooming Accommodation. Accordingly, despite the lawful use of the Premises being a Dwelling House, it is actually being used as Rooming Accommodation.

<u>Is the use of the Premises lawful?</u>

60. In Table 5.5.1 in Part 5 (Tables of Assessment) of the City Plan, a material change of use for Rooming Accommodation in the Low density residential zone, is "Accepted subject to requirements", if the use is establishing in an existing building and:

(a) accommodating no more than four unrelated people; and

(b) either involving no building work or involving minor building work.

61. However, Schedule 6 of the PR identifies development that a local categorising instrument is prohibited from stating is assessable development. "Local categorising instrument" is defined in section 43 of the Planning Act to include a planning scheme.

62. Schedule 6, Part 2, section 2(4) of the PR relevantly includes a material change of use of premises for a class 1 building for rooming accommodation if:

    (a) *"the premises has no more than 5 bedrooms, including any bedroom used as part of a manager's residence; and*

    (b) *are occupied by no more than 5 persons."*

63. "Rooming Accommodation" is defined in Schedule 24 of the PR and is the same definition as is used in the City Plan.

64. The PR prevails over the provisions of the City Plan, which means that the threshold in the City Plan for Rooming Accommodation to be "Accepted subject to requirements" of no more than 4 unrelated persons, is replaced by the PR threshold of no more than 5 bedrooms and 5 persons.

65. Table 5.5.1 in Part 5 (Tables of Assessment) of the City Plan, identifies that development for a material change of use for Rooming Accommodation in the Low density residential zone is impact assessable development requiring a development permit, where the use does not meet the description of the use in the City Plan.

66. It is not in dispute that the Premises has 7 bedrooms and that is has been and is currently being occupied by more than 5 unrelated persons. This exceeds the thresholds identified in both the City Plan and the PR and so the Tribunal is satisfied that pursuant to Table 5.5.1 in Part 5 (Tables of Assessment) of the City Plan, the use of the Premises for Rooming Accommodation requires an impact assessable development permit.

67. The Council's Submissions and the Appellant's evidence, given as recently as in his email of 29 July 2024, both agree that no development application for a development permit for a material change of use for Rooming Accommodation has been lodged with the Council.

68. The Enforcement Notice alleged that in carrying out Rooming Accommodation on the premises, the Appellant had committed or was committing a development offence pursuant to sections 163(1) and 165 of the Planning Act.

69. Section 163(1) of the Planning Act relevantly provided that "*a person must not carry out assessable development, unless all necessary development permits are in effect for the development.*"

70. Section 165 of the Planning Act provided that "*a person must not use premises unless the use … is a lawful use".*

71. The Tribunal agrees with the specific allegation in the Enforcement Notice that the Premises had been or was being used for a Rooming Accommodation use without a development permit. The use of the Premises to accommodate up to 13 students at one time in the 7 bedroom house, required a development permit for Rooming Accommodation which has not been obtained by the Appellant.

<u>The fire safety issue</u>

72. One matter that should be addressed in this decision for completeness is what the Tribunal will call, the fire safety issue.

73. Much of the Appellant's evidence turned on work that he had done to try to satisfy the Council with respect to the fire safety compliance of the Premises for the use that was being made of it for more than 5 unrelated persons.

74. This was not a requirement of the Show Cause Notice, nor of the Enforcement Notice, neither of which raise fire safety as an issue nor as a matter to be done.

75. The source of this appears to have been communications between Council officers and the Appellant after the issue of the Show Cause Notice to the Appellant.

76. Mr Betts identified in an email to the Appellant dated 28 February 2024 that:

"While we would normally support the request for the extension to allow for the DA to be lodged, in this case we have safety concerns about the number of people living in the house, specifically due to fire safety. Roxanne understands from a call to QFES that they have closed this matter as the owner informed them that there was only five people living in the house. The fact that eight people live there will trigger the involvement of QFES. Before we can allow this many people to continue living in the house during the application process, we require the owner to provide us with written confirmation from QFES that they have no concerns with this.

As such, we request this confirmation to be provided to Council within five business days (ie, by 7 March). If the confirmation is not provided within this time frame, Council will continue to the next stage of enforcement action."

77. This offer by the Council with respect to extending the operation of the Show Cause Notice to allow for a development application to be lodged, did not affect the operation of the Show Cause Notice, nor the subsequent Enforcement Notice, however the Appellant appeared to be of the understanding that the result of the offer was that he needed to satisfy the Council about the fire safety of the Premises and obtain an extension to the operation of firstly, the Show Cause Notice and subsequently, the Enforcement Notice, before he could lodge a development application for a development permit to use the Premises for Rooming Accommodation for more than 5 people.

78. As a result, the Appellant spent considerable time between the issue of the Show Cause Notice and the Enforcement Notice, trying to engage with the QFES and address fire safety requirements for the Premises. The Appellant was not successful in obtaining evidence from QFES about the fire safety of the Premises when occupied by more than 5 persons and so no extension was given by the Council to the operation of the Show Cause Notice and the Council went on to issue the Enforcement Notice.

79. The Appellant's confusion came to light at the hearing and answered some questions that the Council officers had as to why the Appellant had not lodged a development application in the time between the issue of the Show Cause Notice in January and the date of the hearing in July. They expressed the opinion that had he done so, the matter may not have progressed to this hearing, as any development application so lodged would likely have been decided by this time.

80. The Council officers conveyed to the Appellant at the hearing that there was no impediment to him lodging a development application to seek approval to use the Premises for Rooming Accommodation for more than 5 people, nor was an extension of time for compliance with the Show Cause Notice and later the Enforcement Notice, a precursor to lodging such an application. The Appellant made it clear at the hearing that this was not his understanding and the Council officer's expressed surprise and said they did not believe they had at any time given that indication to the Appellant.

81. By the end of the hearing, the Appellant seemed to understand that he could lodge a development application at any time and did not need to obtain an extension for

compliance with the Enforcement Notice to do so. This was confirmed in the Appellant's Email, in which he expressed the intent to lodge a development application.

82. This fire safety issue is a matter between the Appellant and the Council arising out of an accommodation the Council was prepared to make to give the Appellant time to seek an approval provided the Council was satisfied of the fire safety for the residents of the Premises while an approval was sought.

83. The Tribunal has jurisdiction to hear an appeal about the Council's decision to give the Enforcement Notice however, as this issue was not raised in the Enforcement Notice, it has no bearing on the Tribunal's consideration of the Council's decision to give the Enforcement Notice. For this reason, the Tribunal has not made any findings in respect of the fire safety issue.

84. The Tribunal also refers to the Appellant's email to the Tribunal's Registry on 8 August 2024, in which the Appellant asked the Tribunal to undertake a third party investigation about the fire safety issue. It is not the role of the Tribunal to order a third party investigation into the fire safety issue. As identified above, the Tribunal's jurisdiction is limited to a consideration of the Council's decision to issue the Enforcement Notice. For the reasons identified above, the Tribunal has not made any findings in respect of the Appellant's request.

Conclusion

85. As this was an appeal with respect to an enforcement notice, the onus of proof was on the Council to establish that the appeal should be dismissed. The Tribunal is satisfied that the Council has discharged its onus in this respect and established that the appeal should be dismissed because development offences have been and are still occurring at the Premises.

86. However, the Tribunal is conscious of the Appellant's concerns expressed at the hearing, about leases that are in place with the tenants of the Premises and giving sufficient notice to the tenants so that they can find alternate accommodation.

87. The Tribunal notes that pursuant to section 171 of the Planning Act, an appeal against an enforcement notice stays the operation of the notice until the appeal has been decided. If the appeal is dismissed, the Enforcement Notice would enliven and the Appellant would have to immediately comply by reducing the number of occupants at the Premises to be no more than 5 because the time for compliance was identified as a date, Monday 22 April 2024, which has passed. At the time the Enforcement Notice was given to the Appellant, Monday 22 April 2024 was 2 weeks from the date of the Enforcement Notice.

88. Following the same timeframe, the Tribunal is prepared to also give the Appellant 2 weeks from the date of this decision to reduce the number of residents residing in the Premises to 5 or less.

_____

Samantha Hall
Development Tribunal Chair

Date:

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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GPO Box 2457
Brisbane QLD 4001

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