



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	20-041
Appellant:	Tina and Tony Pty Ltd
Respondent:	Brisbane City Council
Site Address:	60 Lancelot Street, Tennyson, described as Lot 350 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:	10 January 2022
Date and time of hearing:	24 September 2021
Place of hearing:	Development Tribunal, Brisbane
Tribunal:	Michelle Pennicott Chair Michael Moran Member
Present:	Representatives for the Appellant: 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 1 December 2020 with a decision to not give the Enforcement Notice.

Background

2. The appeal is against the Council's decision to give an enforcement notice dated 1 December 2020, reference CA135928 ('Enforcement Notice').
3. The Enforcement Notice alleges that the Appellant has committed and/or is committing the development offence under section 165 of the Planning Act - unlawful use of premises.
4. The Enforcement Notice states that:
 - (a) on 16 June 2020, Building Approval A005410068 was granted for a 'Dwelling'; and
 - (b) on 7 July 2020, Building Approval A005493601 was granted for 'Conversion of 1a dwelling to 1b'.
5. The Enforcement Notice alleges the unlawful use is a residential use of the premises that is an 'Undefined use'.
6. The Enforcement Notice indicates that on a site inspection by the Council, five individual rooms were observed with facilities including a private bathroom, a two seater couch, a table and two chairs, a television, a sink, a fridge, a microwave, several kitchen appliances, a pantry, a slide out rangehood and a portable cooktop.
7. The Enforcement Notice also states that a shared laundry, a shared kitchen, a shared common area with a table and chairs and an internet router were observed.
8. The Enforcement Notice contends the use is not a Rooming Accommodation use because each room contains a kitchen, bathroom and toilet and therefore constitutes self-contained units and the facilities available for private use in the rooms (bedroom, bathroom, kitchen and sitting area) are not 'limited facilities'.
9. The Enforcement Notice therefore contends the use is an undefined use, for which a development (planning) approval is required.
10. Under the heading 'Requirements', the Enforcement Notice requires the Appellant to ensure the Rooming accommodation use accommodates only the limited facilities enumerated in the Enforcement Notice within the exclusive use areas of the premises. The facilities enumerated are a single sink with a capacity no greater than 20L, an under counter opening for a refrigerator no greater than 120L, cabinets and/or countertop areas not exceeding 1.8 lineal metres and no cooking appliances or spaces with electrical outlets for cooking appliances.
11. The Appellant challenges the requirement in the Enforcement Notice to limit facilities to those listed. The Appellant contends the limitations are nonsense, not based on any instrument and contrary to other Rooming accommodation approvals and cases.

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 on 1 April 2021 of the evidence before the person who made the decision appealed against;
 - (c) Council's submissions dated 3 June 2021;
 - (d) Appellant's submissions dated 22 June 2021.

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) the decision to give the Enforcement Notice concerns an unlawful use of a class 1 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

Enforcement notice requirements

20. 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.⁶

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* s168(1) (Enforcement notices)

21. An enforcement notice may require a person to refrain from committing and/or remedy the effect of a development offence.⁷

Issue in dispute

22. As set out in the Background in this decision, the Enforcement Notice alleges the premises is not being used for Rooming accommodation because the rooms are self-contained and do not contain only limited facilities for private use. The Enforcement Notice requires the Appellant to ensure the use has only the limited facilities within the exclusive use area of the premises which the notice goes on to enumerate.
23. The Appellant's grounds of appeal centre on the definitional requirement that there be "only limited facilities available for private use". The Appellant takes issue with the Council's conclusion that the premises does not have only limited facilities available for private use and takes issue with the requirements of the Enforcement Notice being responsive to that.
24. It is not in dispute between the parties that:
- (a) each resident has a right to occupy 1 or more rooms on the premises;
 - (b) each resident does not have a right to occupy the whole of the premises; and
 - (c) each resident shares other rooms, facilities, furniture or equipment outside the resident's room with 1 or more other residents.
25. Based on the approved building plans, the details of site inspection in the Enforcement Notice and the photographs of the site inspection, the Tribunal is satisfied of the existence of those facts.

Definition of Rooming accommodation

26. The definition of Rooming accommodation in Brisbane City Plan is faithfully set out in paragraph 15 of the Enforcement Notice and is as follows:

"Rooming accommodation means the use of premises for—

- a. residential accommodation, if each resident—
 - i. has a right to occupy 1 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 1 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 service to residents, if the use is ancillary to the use in paragraph (a).

Examples of rooming accommodation— boarding house, hostel, monastery, off-site student accommodation"

27. As the editor's note in Brisbane City Plan records, the definition is a 'regulated requirement' of the *Planning Regulation 2017*, meaning that local governments are

⁷ *Planning Act 2016* s168(2) (Enforcement notices)

required to use the State's definition of the use term – a local government cannot come up with its own definition.⁸

28. It is the third element in the definition of Rooming accommodation that is the focus of the dispute between the parties:
- “iii. [each resident] 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”.
29. This third element has two components, separated by an ‘or’ which means they are in the alternative. Therefore the element will be satisfied if each resident *either*:
- (a) does not occupy a self-contained unit, as defined under the *Residential Tenancies and Rooming Accommodation Act 2008*, schedule 2; or
 - (b) has only limited facilities available for private use.
30. ‘Self-contained unit’ is defined in Schedule 2 of the *Residential Tenancies and Rooming Accommodation Act 2008* as:
- “self-contained unit means a part of a building, forming a self-contained residence, that is under the exclusive possession of the occupier and includes kitchen, bathroom and toilet facilities.”
31. The phrase ‘self-contained residence’ is not defined in the *Residential Tenancies and Rooming Accommodation Act 2008*.
32. The Macquarie Dictionary meaning of ‘self-contained’ is, relevantly:
- “1. containing in oneself all that is necessary; independent. 2. (of a flat or house) having its own kitchen, bathroom and lavatory; not necessitating sharing”.⁹
33. The dictionary definition of ‘self-contained’ therefore reinforces what is made explicit in the definition of ‘self-contained unit’ – if the unit has kitchen, bathroom and toilet facilities, then it is a ‘self-contained unit’.
34. None of the terms in the expression ‘kitchen, bathroom and toilet facilities’ are defined in the *Residential Tenancies and Rooming Accommodation Act 2008*. The Macquarie Dictionary¹⁰ definition of each those terms is, relevantly, as follows:
- (a) Kitchen:
 - “1. a room or place equipped for or appropriated to cooking.”
 - ‘Cook’ is in turn defined to mean relevantly:
 - “1. to prepare (food) by the action of heat, as by boiling, baking, roasting, etc”.
 - (b) Bathroom:
 - “1. a room fitted with a bath or a shower (or both), and sometimes with a toilet and washbasin. 2. a. a room fitted with a toilet.”
 - (c) Toilet:
 - “1. an apparatus for the disposal of urine and faeces, usually in the form of a bowl connected to a drainage system and fitted with a device for flushing water; water closet. 2. a room or booth fitted with a toilet (def. 1) or urinal, often with means for washing face and hands.”

⁸ *Planning Regulation 2017*, s7 (Use terms that may be adopted)

⁹ *Macquarie Dictionary* (online at 20 December 2021)

¹⁰ *Macquarie Dictionary* (online at 20 December 2021)

(d) Facilities:

“plural of facility: 1. Something that makes possible the easier performance of any action; advantage: *transport facilities*; *to afford someone every facility for doing something*. 7. (plural) Also, toilet facilities. Bathroom and toilet.”

35. Finally, in relation to second component, “or has only limited facilities available for private use”, there is no definition in Brisbane City Plan of that phrase. Therefore the ordinary meaning of the phrase applies.
36. ‘Limited’ is defined in the Macquarie Dictionary as “confined within limits; restricted, circumscribed, or narrow: *a limited space*.”¹¹

Findings of fact

37. Council’s decision making records includes, among other things:
- (a) approved building plans Building Approval A005493601 for ‘Conversion of 1a dwelling to 1b’, stamped approved 7 July 2020; and
 - (b) photographs, presumably of the site inspection of 24 July 2020 referred to in the Enforcement Notice.
38. The approved building plans include:
- (a) an Upper level plan (Sheet 102);
 - (b) a Lower level plan (Sheet 103);
 - (c) a Cabinets plan for Beds 1, 2, 4 and 5 and Bed 3 (Sheet 104.2); and
 - (d) a Cabinets plan for ‘Kitchen’ (Sheet 104.3).
39. The approved building plans show:
- (a) five rooms marked ‘Room 1’ to ‘Room 5’ on the upper level, each containing:
 - (i) a bathroom, marked with a toilet and shower (but no vanity basin in Rooms 1, 2, 4 and 5; but a vanity basin in Room 3);
 - (ii) an open plan area containing the following markings:
 - A. QS bed frame;
 - B. BS table;
 - C. robe;
 - D. bench (on the Cabinets plan this is shown as having a cabinet with 2 doors and 4 drawers for Rooms 1, 2, 4 and 5 and a cabinet with 4 doors and 4 drawers for Room 3);
 - E. o’heads (on the Cabinets plan this is shown as comprising a cabinet with 3 doors for Rooms 1, 2, 4 and 5 and a cabinet with 4 doors for Room 3);
 - F. ref (on the Cabinets plan for Rooms 1, 2, 4 and 5, this is shown with an ‘MW’ on top);
 - G. sink/basin with a tap (in Rooms 1, 2, 4 and 5 this is marked as ‘VB’ and the Cabinets plan shows a cabinet with 2 doors and 4 drawers underneath and a mirror above);
 - H. table with two seats;

¹¹ *Macquarie Dictionary* (online at 20 December 2021) ‘limited’ (def 1)

- I. coffee table in Rooms 1, 2, 4 and 5;
 - J. two seat sofa;
 - K. tv on wall;
- (iii) an area marked 'Common Living/Dining' on the upper level, containing the following markings:
- A. 'Ref';
 - B. a stove;
 - C. a Sink; and
 - D. on the Cabinets plan, it also shows a rangehood (RH), an under bench oven (UBO) and cabinets (3 doors and 4 drawers).
- (iv) a laundry and car parking spaces on the lower level.
40. The photographs in Council's decision making records include the following:
- (a) a photo of the 'Common Living/Dining' area on the upper level. The kitchen contains facilities reflective of what was shown on the approved plans (sink, stove, rangehood, built in oven and cabinets). There is also a table and 4 chairs shown in the photo;
 - (b) a photo of what appears to be the door to one of the rooms with an electronic lock pad;
 - (c) a photo of one of the rooms, containing facilities reflective of what was shown on the approved building plans – a two seater table, two seater sofa, tv on wall, queen bed, bathroom and a bench area with a fridge/freezer and microwave on top;
 - (d) three photos collectively showing:
 - (i) the sink/vanity basin area with a 2 door mirrored cabinet above. In the photo it can be observed that the area is used as both a bathroom sink (there are toiletries above the mirrored cabinet) and as a kitchen sink (there is a mug, a glass, a chopping board and dishwashing brush);
 - (ii) a fridge/freezer with a microwave on top;
 - (iii) the 'Bench' area that was marked on the approved building plans. In the photos the following can be observed:
 - A. a rangehood built into the cabinet above the bench;
 - B. powerpoints above the bench;
 - C. a toaster on the bench;
 - D. a kettle on the bench;
 - E. tea and coffee on the bench;
 - F. cabinets under the bench;
 - G. a portable cooktop stored in one of the cabinets;
 - H. 4 items of packet food (biscuits and packet soup) in one of the cabinets;
 - (e) a photo of the laundry area with a washing machine, dryer and laundry sink.
41. The Tribunal is satisfied that the description of the facilities in the Enforcement Notice generally accords with what is shown on the approved building plans and the photographs.

42. The Tribunal is satisfied that each of the five rooms are self-contained as defined under the *Residential Tenancies and Rooming Accommodation Act 2008* because each room contains:
- (a) kitchen facilities, namely a microwave and portable cooktop to cook food;
 - (b) bathroom facilities, namely a shower and washbasin;
 - (c) toilet facilities, namely a toilet.
43. The issues of central focus between the parties are whether the facilities described above are “only limited facilities available for private use” and whether the enumerated requirements of the Enforcement Notice impose restrictions responsive to that.

Reasons for decision

44. In the Enforcement Notice, the Council alleges that the facilities available for private use are not ‘limited’ because each room has a bedroom, bathroom, kitchen and sitting area.
45. At the hearing, the Council representatives explained that the requirements of the Enforcement Notice are directed at limiting the kitchen facilities in individual rooms so that residents share the main kitchen instead.
46. While the Council’s requirements could certainly be expected to result in more sharing of the main kitchen, it does not follow that the use is unlawful.
47. The use is lawful provided it has ‘only limited facilities for private use’.
48. It will be recalled that the Rooming accommodation definition offers an alternative to being self-contained:
- “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**”.
49. Being expressed in the alternative means that there can be a lawful Rooming accommodation use if either of the following is the case:
- (a) the room does not have one or more of the following:
 - (i) kitchen facilities;
 - (ii) bathroom facilities;
 - (iii) toilet facilities; or
 - (b) the room has all of the above facilities, but it has only limited facilities available for private use (limited meaning confined, restricted or narrow).
50. Although the rooms have kitchen, bathroom and toilet facilities, the Tribunal considers that the facilities are only limited facilities available for private use.
51. The kitchen in each room has only a microwave and a portable cooktop for cooking.
52. One only needs to compare that with the cooking facilities in the communal kitchen (built in oven and 4 burner stove) to conclude that a microwave and portable cooktop are only limited facilities for cooking.

53. The single sink for both washing of dishes and washing of one's face and brushing teeth also makes the kitchen and bathroom facilities in each room 'only limited facilities available for private use'.¹²
54. Some may consider those facilities to be more generous than what many shared accommodation rooms contain (student accommodation readily comes to mind), but that is not the test.
55. The requirements specified in the Enforcement Notice, if complied with, would have the effect that all cooking appliances are precluded. It would make the rooms not self-contained (by removing the kitchen facilities). That takes the requirements beyond what is required to have a lawful Rooming accommodation use and amounts to reading the definition as though the alternative was in the definition:
- "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~~".
56. Indeed the last requirement of the Enforcement Notice to remove all electrical outlets on the bench would have the indirect effect of removing any convenient power source for plugging in of a kettle or the plugging in of electronic devices such as the radio and laptop shown in the site inspection photos.
57. The Council's approach can well be understood from a simplicity and certainty point of view, but it has the effect of making the alternative that is available in the definition superfluous:
- "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~~".
58. The Tribunal is therefore not satisfied that the development offence alleged in the Enforcement Notice has been made out by the Council. Even if it had been made out, the Tribunal considers the requirements in the Enforcement Notice are not responsive to the development offence. It is appropriate to allow the appeal and replace the decision with a decision to not issue the Enforcement Notice.
59. For completeness, the Tribunal will address the other grounds of appeal, none of which the Tribunal accepts.
60. The first ground of appeal which the Tribunal readily rejects is the Appellant's contention that the requirements are contrary to what the Appellant described as a 'test case on limited facilities' in *Abrahams v Brisbane City Council* P&E Appeal No. 2048 of 2018.
61. It is understood that in the *Abrahams* appeal an order was made by the Planning and Environment Court amending the requirements of an enforcement notice in relation to a Rooming accommodation use. What the Appellant places significance on is that the order did not impose any restriction on the size of a fridge and did not prohibit cooking appliances or electrical outlets.
62. The Appellant's notice of appeal makes an allegation of perjury against the Council, based on the requirements in the Enforcement Notice the subject of this appeal being different (more onerous) than those ordered in *Abrahams*.

¹² The Tribunal notes that the approved building plans show a sink in the bathroom of Room 5. Paragraph 11(v) of the Enforcement Notice states that a male tenant advised during the inspection that all rooms were exactly the same, except the 'the disability room' which has the sink in the bathroom. This is presumably a reference to Room 5.

63. The Tribunal is satisfied the allegation is completely without foundation. Each appeal is to be dealt with on its particular facts and circumstances. The Tribunal understands the order in *Abrahams* reflected a mediated outcome. The Appellant's representatives were cautioned at the hearing, having repeated the allegation, that an allegation of perjury is a very serious allegation that they should refrain from throwing about lightly.
64. A similar ground of appeal which the Tribunal also rejects is the Appellants' contention that the requirements in the Enforcement Notice are contradictory to recent development approvals issued by the Council for Rooming accommodation. The show cause response cited the specific approvals, including approvals issued by other local governments. One of the approvals was for 36 Little Edward Street in Spring Hill (A004902796). At the hearing, the Appellants' representative drew to the Tribunal's attention that for the assessment of that application, the Council requested further information about the convenience of the shared facilities, but raised no issue with the individual rooms. The approved plans for that development show a sink and a stove within each room. That may be so but it is not necessarily determinative of the correct interpretation of 'only limited facilities available for private use' and each case must be determined on its own facts and circumstances.
65. That leads to the final ground of appeal which is that the requirements in the Enforcement Notice were made-up requirements, not contained in any Council policy or legislation.
66. The Council representatives submitted at the hearing that the specific capacities and sizes referred to in the requirements had been arrived at internally within Council in an effort to provide certainty and consistency in approach.
67. The Tribunal rejects the argument that the requirements in the Enforcement Notice are improper simply because they are not contained in any Council policy or legislation:
- (a) It will be recalled that the definition of Rooming accommodation is one prescribed by the State, as a 'regulated requirement';
 - (b) It is the State's definition which includes the phrase 'only limited facilities available for private use';
 - (c) That phrase is not defined, so its ordinary meaning applies;
 - (d) The Council has simply sought to apply the ordinary meaning;
 - (e) Most enforcement notices necessarily involve an enforcement authority setting out the specifics of how the recipient is to remedy the development offence based on the enforcement authority's interpretation of the law to the facts.
68. Although the Tribunal has decided the Enforcement Notice should not be given in this instance, that is not to say that Council's efforts in seeking to give meaning to the words 'only limited facilities available for private use' is improper. Ultimately, however, unless the phrase 'only limited facilities available for private use' is defined (either in the regulated requirement definition of Rooming accommodation or in an administrative definition), each development will turn on its particular facts and circumstances and there can be no hard and fast limits on particular facilities.

Michelle Pennicott
Development Tribunal Chairperson

Date: 10 January 2022

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 1800 804 833

Email: registrar@epw.qld.gov.au

Appendix

69. The Tribunal's jurisdiction is established by the *Planning Act 2016*, section 229 and Schedule 1.
70. Section 229(1) provides that Schedule 1 states the matters that may be appealed to a tribunal or the P&E Court.
71. Schedule 1, section 1(1) provides that Table 1 states the matters that may be appealed to the P&E Court or a tribunal.
72. In Table 1, one of the matters that may be appealed against is a decision to give an enforcement notice.
73. 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).
74. 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*.
75. The decision to give the Enforcement Notice was not under the *Plumbing and Drainage Act 2018*.
76. 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)".
77. 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)?
78. The Council submits that the Tribunal does not have jurisdiction as the appeal is against a decision to give an enforcement notice alleging the unlawful use of a premises which is not an issue that falls in paragraphs (a) to (g).¹³
79. The Appellant submits 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.¹⁴

¹³ Council's submissions dated 3 June 2021, paragraph 23.

¹⁴ 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?

80. 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.”

81. 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.
82. 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.
83. 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”.
84. 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

85. ‘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.¹⁵
86. ‘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)).

¹⁵ 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)?

87. 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.¹⁶ 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.¹⁷ 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*.¹⁸ Paragraph (h) can therefore be given effect when read together with paragraph (g).
88. 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)

89. 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

¹⁶ *Planning Act 2016*, Schedule 2, definition of ‘provision’

¹⁷ *Planning Act 2016*, s49(5)

¹⁸ *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).

90. 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".¹⁹ 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)

91. 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),²⁰ 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)).
92. 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".²¹
93. It also sits more comfortably with the focus of enforcement notices being development activity by persons, rather than decisions by assessing authorities.
94. 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.
95. 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.

¹⁹ *Macquarie Dictionary* (online at 20 December 2021) 'matter' (def 8)

²⁰ 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)).

²¹ *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.”

96. 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.
97. 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)?

98. The Enforcement Notice which is the subject of this appeal alleges that the Appellant has committed and/or is committing a development offence under section 165 of the *Planning Act 2016*.
99. Section 165 provides that a person must not use premises unless the use:
- (a) is a lawful use; or
 - (b) for designated premises—complies with any requirements about the use of the premises in the designation.
100. The specific allegation in the Enforcement Notice is that the premises is being used for an Undefined Use.
101. ‘Lawful use’, of premises, is defined in Schedule 2 of the *Planning Act 2016* to mean a use of premises that is a natural and ordinary consequence of making a material change of use of the premises in compliance with the *Planning Act 2016*.
102. The Enforcement Notice does not allege the development offence of carrying out assessable material change of use without a development permit. If it did, it would clearly be “*in relation to a material change of use*”.
103. However, in the Tribunal’s view, an enforcement notice which alleges an unlawful use is also “*in relation to a material change of use*”.

104. 'In relation to' is a broad relational phrase – it conveys a broad relationship between the decision to give an enforcement notice and a material change of use:
- “The prepositional phrase "in relation to" is indefinite. But, subject to any contrary indication derived from its context or drafting history, it requires no more than a relationship, whether direct or indirect, between two subject matters”.²²
105. In the Tribunal’s view, that relationship exists where an enforcement notice alleges a use is not a lawful use. This is because a necessary element of that offence is that there has been a material change of use of premises. To make out the offence, it must be proven that the use of premises is not the natural and ordinary consequence of making a material change of use of premises in compliance with the *Planning Act 2016*.
106. A material change of use is therefore at the heart of an allegation of an unlawful use.
107. The Enforcement Notice here specifically recognises that necessary relationship to make out the offence:
25. Under the Plan a Material Change of Use of the premises for the purpose of "undefined use" in a Low-Density Residential Zone is assessable development requiring a Development (Planning) Approval from Council.
26. On 4 August 2020, a search of Council records indicates there has been no Development (Planning) Application made to Council nor any Development (Planning) Approval issued by Council regarding the undefined use on the premises’.

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

108. The remaining question is whether the Enforcement Notice is in relation to a material change of use *of, or for, a classified building*.
109. The premises in question are a class 1 building.²³ The premises are therefore are a ‘classified building’.²⁴
110. 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
111. Despite difference in prepositions, the Tribunal considers that all paragraphs are to be read as a material change of use ‘*of*’ a classified building.
112. 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

²² *O’Grady v Northern Queensland Co Ltd* [1990] HCA 16 at [27] per Toohey and Gaudron JJ

²³ Paragraph 8 of the Enforcement Notice states that a building approval was granted for Conversion of 1a dwelling to 1b (Rooming Accommodation).

²⁴ ‘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]: Schedule 2 of the *Planning Act 2016*. Under the Building Code of Australia, both a class 1a and class 1b constitute a class 1 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,

Conclusion on jurisdiction

113. 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. The Enforcement Notice is in relation to a material change of use for a classified building because it relates to a material change of use of a class 1 building to an undefined use.