Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**38-18**
Appellant:	Schonell Projects Pty Ltd
Assessment Manager:	Brisbane City Council
Concurrence Agency: (if applicable)	N/A
Site Address:	109 Sir Fred Schonell Drive, St Lucia described as Lots 1, 2, 3 and 4 on SP140376

Appeal

Appeal under section 229 and Schedule 1, section 1 and table 1, item 4(a)(i) of the *Planning Act 2016* (**PA**) by Schonell Projects Pty Ltd (**Appellant**) against the infrastructure charges notice dated 15 June 2018 (**ICN**) given by Brisbane City Council (**Council**) on the ground the notice involved an error relating to the application of the relevant adopted charge under the Brisbane City Council Brisbane Infrastructure Charges Resolution (No. 6) 2017 (**Charges Resolution**).

Date and time of hearing:	20 December 2018 at 2.00pm
Place of hearing:	Conference Room, Level 16, 41 George Street, Brisbane
Tribunal:	Stafford Hopewell – Chair Anne Maccheroni – Member Shane Adamson - Member
Present:	Darryl Vaughan – Appellant Milena Mog – Brisbane City Council

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(a) of the PA, confirms the decision of the Council to give the ICN which has been calculated correctly under the Charges Resolution.

Background

1. The infrastructure charges to be levied on the development are required to be calculated in accordance with the Charges Resolution. It was common ground between the parties that the relevant charges are those contained in Schedule 4 of the Charges Resolution.

2. Under the Charges Resolution, the 'applied local government levied charge ($ per demand unit)' is to be calculated on the basis of the number of suites in the development and the number of bedrooms per suite.

3. The fundamental dispute between the parties is whether the infrastructure charge is to be calculated on the basis that the development comprises 3 suites of 3 or more bedrooms (which is asserted by the Appellant) or 30 suites with 1 bedroom (as submitted by the Council).

4. In deciding this issue, it is necessary to determine how the approved development is to be characterised for the purpose of levying infrastructure charges under the Charges Resolution. This in turn requires the determination of what constitutes a 'suite' and the number of suites contained in the development.

Development Approval

5. On 7 February 2018, a development application was made by the Appellant to Council as the assessment manager for a development permit for a material change of use for Rooming Accommodation.

6. On 15 June 2018, Council's delegate approved the development application.

7. On 22 June 2018, the Appellant suspended the the relevant appeal period in order to make representations in respect of conditions of the development approval.

8. On 3 July 2018, further representations were made by the Appellant alleging that the ICN issued by the Council was incorrect.

9. On 8 September 2018, the Council's delegate issued a negotiated decision notice in respect of the development application making the changes to the conditions sought by the Appellant.

10. The Council's delegate however advised that the representations made in relation to the ICN were not agreed to and that Council had determined not to issue a negotiated infrastructure charges notice.

ICN

11. The ICN is dated 15 June 2018 and the levied charge is in the amount of $80,889.20.

12. The levied charge under the ICN has been calculated on the basis the approved development constitutes 30 suites of 1 bedroom each.

13. The adopted charge under the Charges Resolution for each 1 bedroom suite is $4,044.46 per suite resulting in a total charge of $121,333.80. However, the approved development has the benefit of a demand credit for 4 dwellings (1 or 2 bedroom dwelling) which totals $40,444.60.

14. Accordingly, the total charge under the ICN is $80,889.20 ($121,333.80 less $40,444.60).

Grounds of Appeal

15. The Appellant's grounds of appeal are set out in its letter of 26 September 2018 to the Registrar. In summary, the Appellant submits that Council has incorrectly calculated the infrastructure charge.

16. The Appellant submits that for the purpose of the calculation of the levied charges under the Charges Resolution, the approved development constitutes 3 suites of 3 or more bedrooms. On this basis, the adopted charge for the approved development under the Charges Resolution is submitted to be $36,400.14 (3 suites at $12,133.38 per suite).

17. As noted above, Council issued the ICN on the basis the approved development constitutes 30 one bedroom suites and maintained this view in the Appeal.

18. The key issue to determine the Appeal is whether the approved development should properly be considered as comprising 30 one bedroom suites or alternatively, 3 suites comprising 3 or more bedrooms, for the purposes of calculating the levied charges under the Charges Resolution.

Jurisdiction

19. The Appeal is against the ICN given by Council on the ground the notice involved an error relating to the application of the relevant adopted charge under section 229 and Schedule 1, section 1(2)(i) and table 1, item 4(a)(i) of the PA.

Decision framework

20. The onus is on the Appellant to establish the Appeal should be upheld.

21. The Appeal is by way of reconsideration of the evidence that was before the Council.

22. 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 PA.

Material Considered

23. 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 Tribunal Registrar on 28 September 2018.
    b. Infrastructure Charges Notice dated 15 June 2018.
    c. Negotiated Decision Notice dated 9 September 2018.
    d. Memorandum by Brisbane City Council dated 20 December 2018 submitted at the Tribunal hearing.
    e. Correspondence from Darryl Vaughan dated 21 December 2018.
    f. Planning Act 2016.
    g. Brisbane Infrastructure Charges Resolution (No. 6) 2017.
    h. Brisbane City Plan.

Findings of Fact

<u>Approved development</u>

24. Council's approval package dated 10 September 2018 described the approval as a development permit for material change of use for Rooming Accommodation.

25. The development approval is subject to approved drawings and documents.

26. There is no reference to the number of 'suites' approved as part of the approval package.

27. It is common ground the approved development comprises a 3 storey/level building and each storey/level contains private bedrooms and communal facilities.

28. The number of bedrooms per storey/level is as follows:

    a. Ground level – 6 bedrooms;

    b. Level 1 – 12 bedrooms;

    c. Level 2 – 12 bedrooms.

29. The approved development thus comprises a total of 30 bedrooms.

30. Each bedroom has its own private bathroom, kitchenette and study area.

31. The parties agree that each bedroom is not self-contained.

32. Each storey/level has one full kitchen as part of the communal facilities to share between all of the bedrooms of that level, as well as a living area and laundry.

Reasons for the Decision

Charges Resolution

33. Schedule 4 of the Charges Resolution specifies the adopted charges for Rooming Accommodation as defined under the City Plan.

34. Under schedule 4, the charge is required to be calculated on the basis of the number of suites with the $ per demand unit based on the number of bedrooms per suite.

35. Accordingly, the calculation of the levied charge for the approved development is dependent on determining both the number of suites it contains and the number of bedrooms in each suite.

Meaning of Suite

36. Under schedule 1 of the Charges Resolution:

    suite *means a number of connected rooms one of which is a bedroom in which an individual or a group of two or more related or unrelated people reside with the common intention to live together on a long term basis and who make common provision for food or other essentials for living.*

37. The Appellant submitted the approved development comprises 3 suites of 3 or more bedrooms with each storey/level of the building constituting a single individual suite. On this basis, it was submitted by the Appellant that:

    a. The Ground level is a suite of 6 bedrooms;

    b. Level 1 is a suite of 12 bedrooms; and

    c. Level 2 is a suite of 12 bedrooms.

38. The Council, in contrast, submitted that the approved development comprises 30 suites of one bedroom each.

39. Having regard to the definition of ‘suite’, a suite has the following key features:

    a. A number of connected rooms;

b. At least one room which is a bedroom;

c. An individual or a group of two or more related or unrelated persons who reside with the common intention to live together; and

d. Make common provision for food or other essentials for living.

40. The Tribunal considers the crucial aspect of the definition of suite as applied to the approved development is whether the common intention to live together and make common provision for food or other essentials for living is shared between the occupant(s) of each bedroom or the collection of bedrooms on each storey/level of the building.

41. In the Tribunal's opinion, in the approved development, the common intention is confined to the occupant(s) of each bedroom.

42. The Charges Resolution clearly envisages that a suite can comprise one bedroom. Given each bedroom is occupied under a separate arrangement independent of the other bedrooms, it is considered that each of the three separate levels of the approved development is not a single suite of 6 or 12 bedrooms (depending on the level).

43. The fact the design of the development provides for a shared kitchen as part of the common facilities on each of the three levels, does not change the definition of 'suite' under the Charges Resolution.

44. Accordingly, the Tribunal does not consider each storey/level of the building to be a separate suite. The Tribunal considers the approved development comprises 30 single bedroom suites along with common facilities and therefore infrastructure charges for the development have been calculated correctly.

Other issues

45. The Appellant, in support of its interpretation, sought to rely on what it said was the past conduct of Council to levy charges on other student accommodation in the manner advocated by the Appellant.

46. In the Appellant's submission, Council's approach to the ICN was inconsistent with its previous decision making and therefore inequitable between different applicants in the same circumstances and resulted in a higher charge compared to the approach argued by the Appellant.

47. In response, at the hearing Council's representative acknowledged the Appellant was correct that Council had previously levied charges in the manner identified by the Appellant. However, Council's representative sought to clarify that this was in error and contrary to the standard approach Council takes (i.e. the examples raised by the Appellant were not consistent with the definitions under the ICN).

48. The Appellant in further submissions made on 21 December 2018 to the Registrar, raised that no evidence was provided by the Council to show what was the 'predominant' approach by the Council and there were few examples of similar developments in recent years.

49. The Tribunal notes the concerns raised by the Appellant about the apparent inconsistency in the levying of infrastructure charges on student accommodation. Ideally, infrastructure charges should be levied in a consistent manner, but the overriding requirement is that charges be levied lawfully and in accordance with the correct interpretation of defined terms under the ICN.

50. The Tribunal's role is to decide the correctness of the infrastructure charges levied on the development the subject of this appeal. The way in which charges have been levied on other developments is not a relevant matter. This is particularly the case where Council itself acknowledges there has been a lack of consistency in the way charges have been levied for student accommodation, rather than any change Council has consciously made to the definition of 'suite' under the Charges Resolution.

Stafford Hopewell
Development Tribunal Chair
Date: 28 March 2019

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

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