



## Development Tribunal – Decision Notice

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### *Planning Act 2016*

<b>Appeal Number:</b>	12 - 2018
<b>Appellant:</b>	Ian Benford and Susan Benford
<b>Assessment Manager:</b>	Brisbane City Council
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	160 Wynnum North Road, Wynnum West Queensland 4178 and described as Lot 4 on SP284740, Parish of Tingalpa, – the subject site

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### **Appeal**

Appeal under the *Planning Act 2016* (PA), section 229 and Schedule 1, sections 1(2)(b)(ii) and 1(2)(h)(i) and table 1, item 6 in relation to an Enforcement Notice regarding a condition of a development permit for operational work associated with certain building work.

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<b>Date and time of hearing:</b>	10:00am, 15 June 2018
<b>Place of hearing:</b>	41 George Street at the office of the Tribunal Registry.
<b>Tribunal:</b>	John O'Dwyer – Chair Jenny Owen – Member Stafford Hopewell – Member
<b>Present:</b>	Susan Bedford – Appellant Glenn Davidson – Brisbane City Council Peter Bryer – Brisbane City Council

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### **Decision:**

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) upholds the appeal and replaces the decision to issue an Enforcement Notice with a decision that no Enforcement Notice is to issue.

### **Background**

This appeal arose as a result of Brisbane City Council (Council) issuing an Enforcement Notice in respect of a driveway at 160 Wynnum North Road Wynnum West described as Lot 4 on SP284740 (160 Wynnum North Road) for failure to comply with development approval conditions in relation to a development permit for the Reconfiguring of a Lot (ROL) application that created the land and in relation to the development permit for building work for the construction of the dwelling on the site.

The ROL development permit required construction of a crossover in front of 158 Wynnum North Road Wynnum West described as Lot 5 on SP284740 (158 Wynnum North Road) and access easements over Lots 4 and 5 on SP284740 in favour of the other lot to enable egress from both lots to be in a forward direction from the site.

The ROL conditions did not specify that this was to be the only access point for both lots 4 and 5. The ROL permit did not require the landowner to advise future owners and occupiers of these arrangements.

At some point in time after the ROL application was approved, but before the dwelling at 160 Wynnum North Road was occupied in February 2017, a driveway was constructed from this land to Wynnum North Road.

On 3 November 2017, Council inspected the premises and then determined that the driveway was not approved by the existing approvals for the site.

A local law application was made for the driveway using an express application on 9 November 2017 and was approved on that date. However, the application incorrectly stated that there was no bus stop, whereas there is a bus stop in front of 160 Wynnum North Road that existed at the time the local law application was lodged (the bus stop was also existing at the time the ROL application was lodged). When a bus stops with its front door at the bus stop, the rear doors open and passengers have to step down onto the driveway at 160 Wynnum North Road.

On 21 November 2017 Council contacted the Appellant by telephone and explained the non-compliance.

Council issued a Show Cause Notice on 1 December 2017 and following consideration of a response on 12 January 2018 from the owners – now the appellants, Council issued an Enforcement Notice on 18 January 2018. This was sent to the owners by Registered Post. The letter was claimed by the owners on 8 February 2018.

The key elements of the Enforcement Notice are:

- Access to 160 Wynnum North Road is only permitted via the access easement from the adjoining property as detailed within the development permit for the ROL and the development permit for building work.
- The self-assessable driveway permit relating to the driveway at the front of 160 Wynnum North Road is not valid, due to the access forming part of a development approval, noting a full development application for an amendment of the development (planning) approval had to be lodged for consideration by Council.

In the Enforcement Notice Council required the driveway and grid crossing to be removed and the footpath to be reinstated.

This Appeal against the enforcement notice was lodged on 5 March 2018.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 5 March 2018.

2. Decision Notice Application A004175968 for the ROL that created the lots at 158-160 Wynnum North Road.
2. Decision Notice Application A004425453 for Building Work at 160 Wynnum North Road
3. Email from Susan Weber to the Registrar on 8 June 2018 at 2.43 pm providing additional emails between Susan Weber and Brennan – AHC on 13 February 2018
4. Email from the Registrar to the Appellant and Respondent dated 1 June 2018, requesting further information.
5. Email from Susan Weber to the Registrar on 8 June 2018, in response to the request for further information, providing a copy of the bus timetable for the route past their property and a scan of the Registered Post envelope in which the Enforcement Notice was sent.
6. Email from the Registrar to the Appellant and Respondent dated 11 June 2018, circulating the information from the appellant and additional information from the public domain being the ROL decision notice and views of the land from Google Earth and Queensland Globe.
7. Email from the Council to the Registrar dated 26 June 2018, providing the supporting documents for the decision notice for the building work.
8. Email from the Appellant to the Registrar dated 29 June 2018 providing a response that they would accept the terms for the relocation of the bus stop.
9. Email from Council to the Registrar dated 16 July 2018, providing the decision notice for the building work.
10. *Planning Act 2016 (PA)*

### **Jurisdiction**

At the hearing Council representatives questioned the jurisdiction of the Tribunal to hear the appeal.

The Tribunal determined that it did have jurisdiction under the PA section 229 and Schedule 1, sections 1(2)(b)(ii) and 1(2)(h)(i) and table 1, item 6.

### **Further Information**

The Building Permit was not provided as evidence for the Tribunal by either party in advance of or at the hearing. The Tribunal requested Council provide a copy of the Building Application and Decision Notice, so that its conditions could be assessed in relation to the Enforcement Notice. A copy of the permit was subsequently provided by Council.

The Tribunal also requested the Council provide advice from its Transport Department as to whether the local law application was likely to have been approved had the bus stop box on the form been ticked. This information was subsequently provided by Council and referred to the Appellants for comment.

### **Findings of Fact**

The Tribunal makes the following findings of fact:

1. The building permit for the dwelling at 160 Wynnum North Road does not contain specific conditions that relate to the construction of the driveway.
2. The building permit requires compliance with the development approval (ROL) that created Lots 4 and 5 on SP284740 and created requirements for reciprocal easements

over Lots 4 and 5 on SP284740, submitting a plan of subdivision and documentation, lodging of a notated plan and documentation and provision of access to Lots 4 and 5 on SP284740 including manoeuvring areas so that vehicles can exit the site in a forward direction. These conditions have been met.

3. At the time of issue of the Enforcement Notice, there were no outstanding conditions on the building permit that supported the Enforcement Notice.
4. The appellant has provided evidence of another Council approval that clearly states no vehicular access is permitted from a specified road and to provide a written undertaking to advise potential buyers of the restrictions on access to the site.
5. Aerial views in Google Earth show vehicles parked in front of the double garage on 158 Wynnum North Road in ways that restrict the ability of occupiers of 160 Wynnum North Road to use the easement for manoeuvring to enter and leave the site in a forward direction. On one occasion in June 2017, vehicles parked in a way that occupiers of 160 Wynnum North Road were not able to access their property through the driveway at 158 Wynnum North Road.
6. The ROL conditions are insufficient to achieve the purported intent of the ROL development permit as expressed by Council at the hearing, being to prohibit any direct road access to 160 Wynnum North Road, and the building permit does not include any additional conditions to support the purported intent of the ROL development permit to prohibit any direct road access to 160 Wynnum North Road.
7. A company applied to Council for a driveway permit for Lot 4 on SP284740 at 160 Wynnum North Road. In submitting the application, the applicant stated incorrectly that there was no bus stop. As a result, a driveway permit was issued by Council on 9 November 2017.
8. Council conducted an inspection on 3 November 2017. Council advised their inspector spoke to the tenant of 160 Wynnum North Road who advised they had taken occupancy of the premises in February 2017 and the driveway had already been constructed by that time.
9. The driveway as constructed creates an unsafe situation at the bus stop and is not constructed to Council standards.

## **Considerations**

Having regard to the drafting of the conditions of the approvals, including the absence of conditions of the type submitted in Findings of Fact item 4 above, has resulted in the Tribunal not accepting Council's statement that access to 160 Wynnum North Road is only permitted via the easements in Lots 4 and 5 on SP284740 (i.e. the ROL development permit and the building permit have the effect of prohibiting any other access to 160 Wynnum North Road). At face view the ROL conditions had been met by the time the plan of subdivision was registered and the dwellings had been constructed on both properties. There is no ongoing element requiring the ROL conditions on restricted access to be passed onto future owners and occupiers.

The driveway permit was issued by Council on 9 November 2017 between the Council inspection on 3 November 2017 and the issuing of the Show Cause Notice on 1 December. The appellant therefore believed that the driveway was properly approved and legally constructed.

In response to a request by the Tribunal, Council has advised that if the driveway application had stated there was a bus stop at the site, the application would have been referred to Brisbane Transport and the application would have been refused.

The Tribunal accepts that the driveway at 160 Wynnum North Road is inappropriately located in relation to the bus stop, as the rear door of a standard Brisbane bus will open onto the driveway. The appellant argues there are few bus services to that stop. Nevertheless, the Tribunal considers that if a vehicle commenced to leave 160 Wynnum North Road and had to stop for a bus arriving at the same time, passenger egress may be adversely affected. That is not an acceptable risk.

Action to remedy the matter may exist under other legislation as the driveway was approved under a local law.

At the hearing, Council representatives advised a solution would be for the appellant to pay for the relocation of the bus stop and to reconstruct the driveway to Council standards at an estimated cost of \$20,000-40,000.

### **Reasons for the Decision**

The Enforcement Notice has been issued for failure to comply with a Development Approval in relation to a Development Permit for a ROL and a Building Permit. The building permit calls up the conditions of the ROL development permit.

There is no evidence that there is any failure to comply with the conditions of the building permit including the conditions of the ROL

The ROL conditions called up by the building permit appear to have been met. There are reciprocal easements over Lots 4 and 5 on SP284740, a driveway has been constructed as required in front of 158 Wynnum North Road and there are manoeuvring areas that could allow vehicles from both properties to leave the properties in a forward direction (providing no vehicles are parked in the driveway at 158 Wynnum North Road).

The ROL permit conditions do not provide a guarantee of reasonable and practical access to 160 Wynnum North Road. There is no requirement for the details of the access restriction conditions of the ROL development permit to be passed on to future owners and occupiers. Therefore, the occupiers of 158 Wynnum North Road may be unaware of the easements and their purpose and so do not leave the easement clear to allow access to 160 Wynnum North Road.

The Tribunal considers that Council should only create access arrangements of this nature where there is provision for direct access onto the dominant property (in this case 160 Wynnum Road North) that is clear of the driveway within the servient property. The owners and occupiers of a dominant Lot should not have to go to the owners or occupiers of a servient Lot to ask for vehicles to be shifted so they can access or leave their land.

Under the PA section 253(3), Council as the enforcement authority has the onus of proving the appeal should be dismissed. Given the above facts and circumstances, Council has not proven that there is non-compliance with the building permit conditions including the ROL conditions called up by the building permit, and so the appeal should be upheld.

However, the driveway, as it exists at 160 Wynnum North Road, is potentially unsafe and the Tribunal considers action to remedy that situation is needed outside of this appeal. The Tribunal suggests that the parties consider a solution that still uses the driveway crossover at 158 Wynnum North Road, widens that crossover eastwards to provide a more direct

path into 160 Wynnum North Road and removes the part of the existing crossover at 160 Wynnum North Road that lies south of the footpath.

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**John O'Dwyer**  
**Development Tribunal Chair**  
**Date: 30 August 2008**

## **Appeal Rights**

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

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

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

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

## **Enquiries**

All correspondence should be addressed to:

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

**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**