



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>21-009</b>
<b>Appellant:</b>	Lachlan Bilston
<b>Respondent (Enforcement authority):</b>	Brisbane City Council
<b>Site Address:</b>	62 Mashobra Street Michelton QLD 4053 and described as Lot 19 on RP 43325 – the subject site

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### **Appeal**

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016 (PA)* against the decision of Council to give an enforcement notice under sections 165 and 168 of the PA dated 5 November 2020, for carrying out unlawful development.

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<b>Date and time of hearing:</b>	N/A (appeal decided on submissions).
<b>Place of Hearing</b>	N/A (appeal decided on submissions).
<b>Tribunal:</b>	Henk Mulder - Chair Kelly Alcorn - Member Ian Buchanan - Member
<b>Submissions provided by:</b>	Appellant – Brennan Brook Brisbane City Council – Morgan Pratt

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### **Decision:**

The Development Tribunal (**Tribunal**), in accordance with section 252 of the *Planning Act 2016 (PA)* decides that the Tribunal has no statutory jurisdiction to hear or decide the Appeal.

In accordance with section 252(3) of the PA, the period for starting proceedings in the Planning and Environment Court (Court) to appeal the decision to give the Enforcement Notice starts again when the Tribunal gives this decision notice to the Appellant.

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

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

## Background

1. The Appellant is the owner of the subject site, upon which is constructed a building that is being used to provide accommodation. The Form 11 Certificate of Classification (CoC) dated 11/3/2020 as supplied by the Building Certifier establishes the building as a Dwelling, Class 1b, with a maximum population of 5 people permitted in the Dwelling.

2. From the National Construction Code Volume 2 (**NCC**):

Class 1b is one or more buildings which together constitute—

(a) a boarding house, guest house, hostel or the like that –

- 1) would ordinarily accommodate not more than 12 people; and
- 2) have a total area of all floors not more than 300 m (measured over the enclosing walls of the building or buildings); or

(b) four or more single dwellings located on one allotment and used for short-term holiday accommodation.

## The Enforcement Notice

3. The Brisbane City Council (**Council**) gave an enforcement notice dated 25 January 2021 (the **Enforcement Notice**) to Lachlan Fletcher Bilston and Sarah Jane Bilston in relation to following alleged development offences under the PA:

Section 165 – Unlawful use of premises.

A person must not use premises unless the use—

(a) is a lawful use;

4. The Enforcement Notice alleges that the Appellant is carrying out an undefined use in the Low Density Residential Zone which does not fall within the Brisbane City Plan 2014 (**CP**) definitions of 'rooming accommodation' or multiple dwelling', which is assessable development and requires a Development (Planning) Approval. The Council's position in its enforcement notice is based on a site inspection carried out by a Council officer on 24 November 2020.

## The Appeal

5. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 15 February 2021.

6. The Appellant's Form 10 sets out the Appellant's grounds of appeal.

## Jurisdictional issue

7. The Tribunal reviewed the issue of jurisdiction as a preliminary matter and decided to request that the parties be invited to provide submissions as to the statutory jurisdiction of the Tribunal under PA to hear the Appeal.

8. On 28 May 2021, the Tribunal made the following orders that were communicated by the Registry to the parties by email (**Orders**):

**To: All parties in Appeal No. 21-009 – for 62 Mashobra Street Mitchelton QLD 4053**

The Tribunal has requested the Registry to send the following communication to the parties in this appeal:

The Tribunal has reviewed the information for the Appeal and considers that there are jurisdictional aspects to the Appeal which may establish an impediment to proceeding with a decision by the Tribunal.

It seems that if the tribunal has jurisdiction for this appeal, it must be under item 6 of table 1 of schedule 1 of the *Planning Act 2016* (PA). None of the other items in table 1 or table 3 seem apposite and table 2 does not apply for a tribunal. But table 1 only applies if section 1(2) of schedule 1 is satisfied.

Section 1(2)(h) of schedule 1 provides as follows:

- (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; or

Of those paragraphs referred to in subparagraph (i) of paragraph (h), only paragraph (g) would seem to be potentially relevant:

- (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;

The Enforcement Notice the subject of the Appeal is for an alleged breach of s.165(a) - unlawful use of premises offence.

Whilst a Building approval was granted by a private building certifier for a Class 1b dwelling for Rooming accommodation, the offence itself and therefore the subject of the Enforcement Notice would appear to relate to whether the appropriate planning approval has been obtained by the owner/developer for the material change of use as required under the Brisbane City Plan and the Planning Act.

In this regard the Tribunal is tentatively of the view that the decision to give an Enforcement Notice may be viewed as relating to a matter under the Planning Act, but not to a matter under the Building Act.

The Tribunal through the Registrar makes the following directions to the Appellant and the Respondent, pursuant to section 250 of the Planning Act.

1. That Brisbane City Council provide a written submission (no more than three pages) to the Registry by **5pm on Friday 11 June 2021**, addressing any jurisdictional aspect or aspects it wishes to raise for the appeal.
2. That the Appellant provide a submission in response within ten (10) business days of receiving a copy of the Council's submission.

## Submissions

9. On 11 June 2021, Council provided its submission (**Council's Submission**) to the Registrar by email from Morgan Pratt. In summary, the Council submitted:
  - The Tribunal does not have jurisdiction to hear and determine the appeal in accordance with Schedule 1 of the PA, as the enforcement notice alleging the unlawful use of a premises is not an issue on appeal that falls within any of the prescribed categories contained in Schedule 1 section 1(2)(a)-(g) of the PA.
  - The Respondent suggests the building classification may be relevant to the consideration of whether the development offence has occurred, however in Council's view the appeal is unrelated to the building approval and the classification of the dwelling.
  - The proper jurisdiction in which the appeal must be heard and determined is the Planning and Environment Court.

10. On 5 July the Tribunal advised via email to the Appellant the following:

The Appellant's time to provide a submission, as per the Tribunal's directions on 28 May 2021, expired on 25 June 2021. The Tribunal may now proceed to decide the appeal without the benefit of any submission from the Appellant, as was directed on 28 May 2021 should be provided.

11. On 6 July 2021, Brennan Brook for the Appellant provided the Appellant's response to the Council's submission (**Appellant's Submission**), dated 21 June 2021. In summary, the Appellant submitted:

- The Appeal does meet the qualification criteria set out in Schedule 1 (2)(g) of the PA, that is, the issues contained in the Enforcement Notice pertain to building issues for the extent of materials, size and location of relevant facilities for the accommodation.
- The issues contained in the Enforcement Notice pertain to the Certifiers right to issue a building approval.
- The current Council requirements contradict a previous court ruling on the matter where these issues were ruled upon.

### **Material considered**

12. The material considered in arriving at this decision as to the jurisdiction of the Tribunal to decide this Appeal comprises:

- i. Form 11— Certificate / Interim Certificate of Classification (**CoC**) dated 11 March 2020
- ii. Show Cause Notice dated 27 November 2020
- iii. Response to Show Cause Notice dated 17 December 2020
- iv. Enforcement Cause Notice dated 25 January 2021
- v. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 15 February 2021.
- vi. Affordable Housing Company Pty Ltd Job No N62M Drawings 101-109 inclusive, plus drawing number 104.1 all marked 'Contractor Issue C1' and dated 30 January 2019 and two unnumbered drawings titled 'Standard Details' being Balcony Details and Balcony Details 2, undated (**Drawings**)
- vii. The Tribunal sought submissions from the parties that were communicated on 28 May 2021 by the Registry to the parties via email (**Orders**)
- viii. Council provided its submission (**Council's Submission**) to the Registrar by email from Morgan Pratt on 11 June 2021.
- ix. The Appellant provided a response to the Council's submission (**Appellant's Submission**), by email on 6 July 2021
- x. Brisbane City Plan 2014 (**CP**)
- xi. Planning Act 2016 (**PA**).
- xii. Building Act 1975 (**BA**).
- xiii. National Construction Code Volume 2 (**NCC**)

### **Jurisdiction**

13. The Tribunal's jurisdiction is defined by the terms of the PA and the Tribunal has no discretion to hear a matter that is not within the Tribunal's statutory jurisdiction.

14. The Tribunal can have jurisdiction for this appeal under item 6 of table 1 of schedule 1 of the PA. only if section 1(2) of schedule 1 is satisfied.
15. Under section 1(2), (h) of Schedule 1, the Tribunal has jurisdiction to hear this Appeal if the Enforcement Notice is in relation to a matter under paragraphs (a) to (g) of section 1(2).
16. Having regard to each of paragraphs (a) to (g) in turn:
  - a) paragraph (a) applies to a refusal, or deemed refusal of a development application for a material change of use for a classified building, or certain operational work;
  - b) paragraph (b) applies to a development approval for a material change of use for a classified building, or certain operational work associated with building work;
  - c) paragraph (c) applies if a development permit was applied for—the decision to give a preliminary approval for—a material change of use for a classified building , or certain operation work;
  - d) paragraph (d) applies to a development condition if 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;
  - e) paragraph (e) applies to 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;
  - f) paragraph (f) applies to 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;
17. Only paragraph (g) is considered potentially relevant to the Tribunal’s jurisdiction to hear this Appeal:
  - (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;
18. While a Development Permit for Building Work has been issued by the building certifier for the dwelling as a Class 1b building, a decision made under the BA does not override the assessment of whether the use as established is lawful under the PA.
19. The concern of Council which has given rise to the Enforcement Notice is that the current use of the subject site is assessable development under the Council's planning scheme and has not been authorised by a valid development permit as required under PA.
20. The Enforcement Notice does not allege that the current use of the subject site is non-compliant with the provisions of the Building Approval but that the alleged unlawful use is a development offence under the PA.
21. The Tribunal finds that the decision to give the Enforcement Notice is not in relation to a matter under paragraphs 1(2)(a) to (g) of Schedule 1 of the PA and therefore does not satisfy section 1(2)(h) of Schedule 1 of the PA.
22. Further, the Tribunal's jurisdiction is defined by the terms of the PA and the Tribunal has no discretion to hear a matter that is not within the Tribunal's statutory jurisdiction.

23. Accordingly, the Tribunal decides pursuant to section 252 of the PA that it has no jurisdiction to hear the Appeal.

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Henk Mulder

**Development Tribunal Chair**

**Date: 17 August 2021**

## **Appeal Rights**

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

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

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

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

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

## **Enquiries**

All correspondence should be addressed to:

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

**Telephone (07) 1800 804 833**

**Email: [registrar@hpw.qld.gov.au](mailto:registrar@hpw.qld.gov.au)**