



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	21-054
Appellant:	Mohammad Ibrahim Arafeh
Respondent: (Enforcement authority)	Brisbane City Council
Site Address:	20 Mews Street Chermide West and described as Lot 44 RP 92277 - the subject site

Appeal

Appeal purportedly under section 229 and schedule 1, sections 1(1) and 1(2) and table 1, item 6, of the *Planning Act 2016* (“the PA”) against the enforcement authority’s decision to give an enforcement notice under section 165 of the PA, in relation to an alleged unlawful use of premises.

Date and time of hearing:	Appeal determined on submissions
Place of hearing:	Not applicable
Tribunal:	Mark Chapple – Chair Chiara Wood – Member Andrew Veres – Member
Present:	N/A

Decision:

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

Please be advised that you may elect to lodge an appeal about this matter in the Planning and Environment Court (the Court). The Court appeal period starts again from the date you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

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>

Background

1. The Appellant is the owner of the subject site.
2. The Respondent is the Enforcement Authority for the Local Government Area where the subject site is located.

3. The Respondent gave an enforcement notice to the Appellant of 12 August 2021 alleging that the subject site was being used as a warehouse for vehicles without obtaining any Development Approval. The premise of the notice was that the subject site was “located in the Low Density District Neighbourhood Plan subject to the Aspley District Plan Neighbourhood Plan and various overlays as defined in Brisbane City Plan 2014 (‘the Plan’)”. It is alleged an inspection by the Respondent’s officers of the subject site on 9 March 2021 had revealed, *inter alia*, that “Twelve (12) damaged and very old vehicles were parked outdoor, in the front yard of the premises (only two of them have number plate (sic) attached)” and that an inspection of the subject site on 11 August 2021 by the Respondent Officers revealed *inter alia* “Eight vehicles were parked at the front yard of the premises.”
4. The enforcement notice states that under the *Plan* a Material Change of use of the Subject Site for the purpose of “Warehouse” in the Low-Density Residential Zone is “assessable development requiring Development (Planning Approval) from the Council.”
5. The enforcement notice alleges that on 12 August 2021 the Respondent’s records indicated there was “no Development (Planning) Application made” to the Respondent “nor any Development (Planning) Approval issued by” the Respondent for “Warehouse” use on the subject site.

Material Considered

The material considered in arriving at this decision comprises:

1. ‘Form 10 – Appeal Notice’, grounds for appeal material lodged with the Tribunals Registrar on 8 September 2021.
2. enforcement notice from the Brisbane City Council to Appellant, 12 August 2021.
3. Aerial image 20 Mews Street, Chermside West.
4. Email the Appellant to Gary Wong 28 May 2021.
5. Email Gary Wong to the Appellant 16 August 2021.
6. Email Gary Wong to the Appellant 7 July 2021.
7. Email Appellant to Gary Wong.
8. BCC Application Site History 20 Mews Street, Chermside West.
9. BCC Property Details 20 Mews Street, Chermside West.
10. BCC Property Details 20 Mews Street, Chermside West.
11. Current Title Search, Title Reference: 13691129, Lot 44 on RP 92277 of 15 March 2021.
12. Show Cause Notice from the Brisbane City Council to the Appellant.
13. Order His Honour Judge Searles of the Planning and Environment and Court of 31 October 2012 in the matter of *Mohammad Ibrahim Arafah v. Brisbane City Council No 5007 of 2011*.
14. Email from Acting Registrar, Dena Diaz to the Parties of 7 December 2021 with directions.
15. Submissions on behalf of the Respondent 21 December 2021.
16. Appellant’s submissions
17. Email from Acting Registrar, Dena Diaz to the Appellant 21 December 2021.

The Appeal

1. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 8 September 2021.
2. The Notice of Appeal, in Item 4 Grounds for Appeal/Declaration refers to "see attached". The attached document includes statements that "*The Definition of warehousing under City Plan 2014 is: 'a warehouse is a premise used for storage AND distribution of goods'. There is no storage nor distribution of any goods conducted from the premises.*" The attached document also includes the statement "*Mohammed Ibrahim Arafeh resides at the premises with his family and the premises is (sic) wholly and solely used for residential purposes only with the auxiliary uses associated with residential use including dwelling, cooking, eating, parking of personal vehicles including recreational items/vehicles*".

Submissions and Responses about Jurisdiction

On 7 December 2021 Ms Dena Diaz the Acting Registrar of the Development Tribunals sent an email to the parties in the terms set out below:

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

The Tribunal has reviewed the Appeal material lodged 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*

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

Section 1 (2) (g) mention matters under the Building Act and whilst a Building approval may have been granted for a dwelling house at 20 Mews Street, the offence itself and therefore the subject of the Enforcement Notice would appear to relate to whether the appropriate planning approval has been obtained for use of the premises as a "warehouse" under the Brisbane City Plan and the Planning Act.

The Tribunal through the Registrar makes the following directions to the Appellant and the Respondent, pursuant to section 250 of the PA:

1. *That Brisbane City Council, copying the other party, provide a written submission to the Registry by 5pm on Tuesday 21 December 2021, addressing any jurisdictional aspect or aspects it wishes to raise for the appeal and provide to the Tribunal the Show Cause Notice and email correspondence referred to in the Enforcement Notice.*
2. *That the Appellant, copying the other party, provide a submission in response within ten (10) business days of receiving a copy of the Council's submission.*

Respondent's Submission

The Respondent made a submission of 21 December 2021 where it concluded that the Tribunal did not have jurisdiction to consider the appeal and that the proper jurisdiction was the Planning and Environment Court.

The submission included the following passages:

"11. In summary, Council has conducted an investigation into the premises and allege a 'Warehouse' use is occurring at the premises. A material change of use of the premises for the purpose of a 'Warehouse' use in a Low-Density Residential Zone is assessable development under the planning scheme requiring a Development (Planning) Approval from Council."

Jurisdiction

21 Schedule 1 of the Act guides the proper jurisdiction for appeals.

22 The Tribunal is only able to hear and determine an appeal against a decision to give an enforcement notice if the subject matter falls within any of the prescribed categories outlined in schedule 1, section 1(2)(a)-(g) of the Act.

23 The categories contained in Schedule 1, section 1(2)(a)-(g) are outlined as follows:

- a. paragraph (a) triggers the Tribunal's jurisdiction if the matter involves the refusal, or deemed refusal of a development application, for a material change of use for a classified building, or specific operational works;*
- b. paragraph (b) triggers the Tribunal's jurisdiction if the matter involves a provision of a development approval for a material change of use for a classified building, or specific operation works associated with building work;*
- c. paragraph (c) triggers the Tribunal's jurisdiction if a development permit was applied for, and relates to a decision to give a preliminary approval for a material change of use for a classified building, or specific operational work;*
- d. paragraph (d) triggers the Tribunal's jurisdiction if the matter involves 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) triggers the Tribunal's jurisdiction if the matter involves 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) triggers the Tribunal's jurisdiction if the matter involves 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. paragraph (g) triggers the Tribunal's jurisdiction if the matter involves a matter under the Planning Act, to the extent the matter relates to the Building Act, other than a matter that may or must be decided by the Queensland Building and Construction Commission.*

24 In respect of this matter, the Tribunal does not have jurisdiction to hear and determine the appeal in accordance with Schedule 1 of the Act.

25 *An 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 Act.” (footnotes omitted)*

Appellant’s Submission

The Appellant gave an undated submission.

Near the beginning of his submission the Appellant states that many of the respondent’s submissions under the heading “background” are irrelevant.

In paragraph 5. of his submission the Appellant “vehemently” rejects that the subject premises is used as warehouse.

In paragraph 13 of his submission the Appellant submits that this matter is one that can be heard by either the Planning and Environment Court or the Tribunal. In the passages leading up to this submission the Appellant states:

“7. *Under Item 6 of table 1 of schedule 1 of the PA states:*

6. Enforcement notices

An appeal may be made against the decision to give an enforcement notice.

Section 1 (2) of Schedule 1 of the PA is satisfied, this is due to the fact the enforcement notice was issued regarding a matter under:

- (h) a decision to give an enforcement notice—*
- (i) which relates ‘to a matter under paragraphs (a) to (g)*

Paragraph (g) states:

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;

Further,

Section 250 of the Building Act 1975 states:

Appeals against enforcement notices

- (1) A person who is given an enforcement notice under section 248 may appeal to a development tribunal as if the appeal were an appeal under the Planning Act.*

8. Under Schedule 1, Table 1 of the PA – which does not provide clear differentiation between the two jurisdictions of the Tribunal or the Planning and Environment Court, states under item 6:

6. Enforcement notices

An appeal may be made against the decision to give an enforcement notice.

- 9. The respondent (the council) have in all their submissions failed to make any reference to any sections of the act that limits the hearing of matters related to enforcement notices to the Planning and environment court.*

10. *While this matter is not related to an application refusal or building work, it is certainly covered by section 250 of the building act 1975 (appeals against enforcement notices) This appeal is directly related to an issuing of an enforcement notice by the respondent (the council)."*

Under the heading *Other matters to considered* the Appellant states in paragraph 19 that the Respondent failed follow the Tribunal's direction by failing to copy the Appellant with the Respondents submission.

Additionally, under the heading *Other matters to considered* the Appellant submitted he was misled by the words near the end in the Enforcement Notice under the heading *RIGHT TO REVIEW* where it states:

*"Under Section 229 of the Act, an appeal may be made against the decision to give an Enforcement Notice.
An appeal can be made to the Planning or Environment Court or to a development tribunal for certain matters as identified in Schedule 1 of the Act. An appeal must be started within 20 business days after the day the notice is served to you."*

After submitting that he had been misled by the words under the heading *RIGHT TO REVIEW* in the Enforcement Notice the Appellant refers to the *PA sec 250* and submits in paragraph 23 that *"Due to the above submissions, and as the Tribunal has the power to make any direction/order that it considers appropriate the Appellant submits that the Tribunal hear the matter"*.

Tribunal's Jurisdiction

The Tribunal identifies the source and nature of its jurisdiction as follows:

1. Section 229(1) of the PA provides that schedule 1 of the PA states ("the schedule") the matters that may be appealed to a Tribunal and states the matters which must be appealed to the Tribunal.
2. Section 1(1)(b) of the schedule provides that the matters stated in table 1 of the schedule ("table 1") are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that table 1 only applies to a Tribunal if the matter involves one of a list of matters set out in section 1(2). Section 1(5) of the schedule provides that matters in table 3 may only be appealed to the Tribunal.
3. The schedule, section 1(2) paragraphs (a) to (g), are reproduced below in the full context in which they appear in the schedule:

"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.”*

The Appellant has submitted that there is jurisdiction for the Tribunal arising from the combination of the schedule, section 1 (2) (g) and the *Building Act 1975* (BA), section 250. The Preamble to the BA is as follows:

“An Act to regulate building development approvals, building work, building classification, building certifiers and pool safety inspectors, and to provide for particular matters about swimming pool safety and sustainable buildings, and for other purposes”

The material establishes that there is a house at 20 Mews Street and the approval for, and building of, that house may each be a matter that relates to the BA in terms of the schedule 1, section 1(2)(g). The activity complained of by the Enforcement Notice is warehousing including the parking of vehicles in the front yard. The alleged activity is not limited to the dwelling house. The Tribunal finds that the warehousing the subject of the Enforcement Notice is not a matter under the PA that relates to the BA as the alleged use does not “relate” to a classified building and accordingly jurisdiction does not arise pursuant to schedule 1, section 1(2)(g).

As submitted by the Appellant, table 1 in item 6 provides “*An appeal may be made against the decision to give an enforcement notice.*” The Tribunal notes that under the schedule, section 1(2)(h), the Tribunal’s jurisdiction is limited to appeals of a decision to give an enforcement notice in relation to matters under paragraphs (a) to (g) of section 1(2) of the schedule or under the *Plumbing and Drainage Act 2018*.

If the word “matter” was given a consistent meaning throughout the schedule in accordance with its meaning in section 1(1), this would result in paragraphs (a), (c) and (f) of section 1(2) of the schedule having no operation. For example, an enforcement notice would not be given in relation to a refusal or deemed refusal of an application for material changes of use of a classified building.

The Tribunal finds that the meaning to be given the word matter in section 1(2)(h) is its ordinary and natural meaning. The Australian Oxford Colour Dictionary [1996 Oxford University Press Australia] includes as definitions of the word matter “*thing that is amiss; content as opposed to form; substance; affair; concern*”

Applying the ordinary and natural meaning of the word “matter” in the schedule, section 1(2)(a) could give jurisdiction if an enforcement notice were given in relation to a material change of use for classified building. As noted earlier the Enforcement Notice complains of 20 Mews Street being used for *warehousing* including the parking of cars in the front yard. While the material establishes there is a house at the subject site the alleged use is of the subject site, including land and is not limited to the house. In the circumstances, the Tribunal finds that jurisdiction does not arise from the combination of paragraphs (a) and (h) of section 1(2) of schedule 1.

Paragraphs (b), (c), (d), (e) and (f) of section 1(2) of schedule 1 allow appeals to the Tribunal in a range of circumstances with the limitation that the material change of use of a classified building is core to the matter. For the same reasons given by the Tribunal in relation to the schedule 1, section 1(2)(a), the Tribunal finds that those provision in combination with paragraph (h) of section 1(2) do not give the Tribunal jurisdiction to hear the appeal.

Table 2 of the schedule sets out matters which must be appealed to the Planning and Environment Court and table 3 of the schedule sets out matters which must be appealed to the Tribunal, but those tables do not have any application to the circumstances of the appeal.

The Tribunal finds that the circumstances do not allow the Tribunal to use its power under the PA section 250 to allow itself jurisdiction where it otherwise would not have had jurisdiction.

It seems on its face that the Respondent’s Submission of 21 December 2021 was not copied to the Appellant by the Respondent as submitted by the Appellant, however the Tribunal is informed by Dena Diaz, Acting Registrar of the Development Tribunal that the Respondent’s submission was sent to the Appellant via email on 21 December 2021. In the circumstances, the Tribunal finds no procedural unfairness has resulted if the Respondent did fail to comply with that part of the direction.

The Tribunal notes the Appellant’s submission that many of the Respondent’s submissions under the heading *Background* are irrelevant. The Tribunal finds that the matters in paragraph 5 of the Respondent Submission with respect to the Order of His Honour Judge Searles DCJ of 31 October 2012 in *Mohammad Ibrahim Arafeh v. Brisbane City Council No 5007 of 2011* are not relevant to issue of the Tribunal’s jurisdiction.

The Tribunal notes the Appellant’s submission that he was misled by the material under the heading *RIGHT TO REVIEW* in the Enforcement Notice. The Tribunal finds that the material is

not misleading as it provides that an appeal for “*certain matters*” as identified in the schedule. The Tribunal finds that assuming the material was misleading (which the Tribunal does not find was the case) and misled the Appellant to appeal to the Tribunal, this would not afford the Tribunal jurisdiction where there otherwise was none.

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

Mark Chapple

Development Tribunal Chair

Date: 7 February 2022

Appeal Rights

Schedule 1, table 2, item 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.

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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