Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-024
Appellants:	Ruth Eva Brand and Andrea Mapelli
Respondent:	Brisbane City Council
Site Address:	25 Arakurta Street, Lota, described as Lot 200 on RP33230 – 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:	26 November 2021
Place of hearing:	Development Tribunal, Brisbane
Tribunal:	Michelle Pennicott Chair Julie Brook Member
Present:	**Representative for the Appellants:** Ellen McDonogh, Town Planner, Gateway Survey & Planning **Representatives for the Council:** Michelle James, Built Environment Officer, Development Compliance Eric Atkins, Built Environment Supervisor, Development Compliance

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 5 May 2021 with a decision to not give the enforcement notice.

Background

1. The appeal is against the Council's decision to give an enforcement notice dated 5 May 2021, reference CA138988 ('Enforcement Notice').

2. The Enforcement Notice alleges that the Appellants have committed and/or are committing a development offence under section 165 of the Planning Act – unlawful use of premises.

3. The Enforcement Notice alleges the unlawful use is a residential use of the premises that is an 'Undefined use'.

4. The Enforcement Notice indicates that on a site inspection by the Council, five units were observed with facilities including bathroom and toilet facilities and a kitchen with benchtops measuring larger than 1.7m, refrigerators greater than 120L and sinks with a capacity greater than 20L.

5. The Enforcement Notice also states that common facilities were observed on the ground floor, including laundry facilities and a "full-sized kitchen consisting of a sink, refrigerator, an oven, an exhaust hood, an electric stove and storage facilities".

6. The Enforcement Notice contends that the use is an undefined use because it is not consistent with the definition of Rooming accommodation because the facilities provided are not consistent with 'limited facilities' and are consistent with the definition of 'self-contained' in that there is exclusive possession and use of a kitchen, bathroom and toilet facilities.

7. Under the heading 'Requirements', the Enforcement Notice requires the Appellants 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 countertop areas not exceeding 1.8 lineal metres and no cooking appliances or spaces with electrical outlets for cooking appliances.

8. The Appellants challenge the requirement in the Enforcement Notice to limit facilities to those listed. The Appellants contend that the limitations are nonsense, not based on any instrument and contrary to other Rooming accommodation approvals and cases.

Material considered

9. The following material has been considered in arriving at this decision:
   (a) Form 10—Notice of Appeal and attachments;
   (b) Council's written submission on jurisdiction dated 11 June 2021;
   (c) Appellants' written submission on jurisdiction dated 5 July 2021;
   (d) Email from Brennan Brook dated 25 November 2021 in relation to other cases involving the issue of limited facilities;
   (e) Folder of inspection photographs and inspection findings provided by the Council at the hearing on 26 November 2021;
   (f) Email from the Council on 29 November 2021 with clarification of how Council measured the benchtops recorded in the 'Inspection findings' table and with 5 attachments:
      (i) Online advertisement image of kitchen in unit 5;

(ii) Internal Council memo regarding interpretation guidance on limited facilities;

(iii) Image of communal kitchen;

(iv) Image of communal kitchen;

(v) Image of electric stovetop in units/rooms

(g) Email from Brennan Brook dated 9 December 2021 in relation to the internal Council memo regarding interpretation guidance on limited facilities.

Jurisdiction

10. 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*.

11. 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 in this appeal concerns an unlawful use of a class 1 building which is "in relation to a material change of use of a classified building"'.

12. The detailed reasons for this view are set out in the Appendix to this decision.

Decision framework

13. 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]

14. The enforcement authority must establish the appeal should be dismissed.[3]

15. To succeed, the enforcement authority must prove, on the balance of probabilities,[4] the commission of the development offence alleged in an enforcement notice.

16. 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]

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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)

Enforcement notice requirements

17. 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]

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

Issue in dispute

19. As set out in the Background in this decision, the Enforcement Notice alleges the premises is not being used for Rooming accommodation because the premises is not consistent with the interpretation of 'limited facilities', but is consistent with the definition of 'self-contained' in that there is exclusive possession and use of a kitchen, bathroom and toilet facilities. The Enforcement Notice requires the Appellants to ensure the use has only the limited facilities within the exclusive use area of the premises which the notice goes on to enumerate.

20. The Appellants' grounds of appeal centre on the definitional requirement that there be "only limited facilities available for private use". The Appellants takes issue 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.

21. 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.

22. 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

23. The definition of Rooming accommodation in Brisbane City Plan 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

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6 *Planning Act 2016* s168(1) (Enforcement notices)

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

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"

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

25. 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".

26. 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.

27. '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."

28. The phrase 'self-contained residence' is not defined in the *Residential Tenancies and Rooming Accommodation Act 2008*.

29. 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]

30. 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'.

31. 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 Dictionary[10] 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:

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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)

"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."

(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."

32. Finally, in relation to second component, "or has only limited facilities available for private use", there is no definition of that phrase in Brisbane City Plan. Therefore the ordinary meaning applies.

33. 'Limited' is defined in the Macquarie Dictionary as "confined within limits; restricted, circumscribed, or narrow: *a limited space*." [11]

Findings of fact

34. The Appellants' notice of appeal is accompanied by a copy of the approved building plans, stamped as approved on 13/06/18.

35. The approved building plans include:
    (a) a Ground floor plan (Sheet 102);
    (b) an Upper level plan (Sheet 103).

36. The approved building plans show, relevantly:
    (a) On the Ground floor plan:
        (i) a unit marked 'Bed 5' containing:
            A. a room marked 'Bath' with a toilet, shower and basin;
            B. an area marked 'Store';
            C. an area marked 'Linen';
        (ii) an area marked 'Kitchen' containing:
            A. a stove;
            B. a sink;
            C. an area for a refrigerator ('Ref');
            D. a closet with a laundry tub and washing machine ('W/M');
            E. a broom closet ('BR');
    (b) On the Upper level plan, four units marked 'Bed 1' to 'Bed 4', each containing:
        (i) a robe;

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[11] *Macquarie Dictionary* (online at 20 December 2021) 'limited' (def 1)

(ii) a tiled area with a sink;

(iii) a tiled room marked ‘Ens’ containing a shower and toilet.

(iv) a balcony.

37. Both the Ground floor plan and Upper level plan have a note which states that “*Fixtures, fitting and finishes are as per the Contract Standard Specifications and Inclusions list*”.

38. The folder provided by the Council of the evidence relied on by the original decision maker contained photographs of the 28 April 2021 site inspection referred to in the Enforcement Notice and a two page document titled, ‘Inspection findings’.

39. The photographs of Council’s inspection include the following:

(a) A photo of the ground floor kitchen area. The photo shows:

(i) kitchen facilities reflective of what was shown on the approved plans (stove, sink and refrigerator) as well as a rangehood, cabinets and a built-in oven;

(ii) a table with four chairs;

(iii) a person standing in front of a door leading to what is shown on the approved building plan as the laundry;

(iv) a sliding door leading out to a clothes line.

(b) Photos of the inside of a unit which collectively show:

(i) a built-in robe;

(ii) a bench area with cabinets above and below the bench;

(iii) a built-in rangehood in the cabinets above the bench;

(iv) on top of the bench:

A. a deep fryer;

B. a kettle;

C. a toaster;

D. various bottles that resemble what are commonly vitamin or supplement bottles;

(v) a fridge/freezer with a microwave oven on top;

(vi) a sink, with cabinets below and a mirrored cabinet above (with toiletries inside);

(vii) a bathroom with shower and toilet;

(c) Photos of the inside of another unit. The photos collectively show:

(i) a built-in robe;

(ii) a bench area with cabinets above and below the bench;

(iii) on top of the bench:

A. a kettle;

B. a blender;

C. a spice rack containing spices and vitamins;

D. various boxes of tea;

E. a chopping board.

(iv) a fridge/freezer with a microwave oven on top;

(v) a sink with an electric toothbrush, cabinets below the sink and a mirrored cabinet above the sink;

(d) Photos marked 'Top Floor Unit' which collectively show:

(i) part of a bench with a double power point and plugged into the power point is a kettle and a portable cooktop with a single plate;

(ii) a box of cereal, a bowl, honey, two candles, salt and pepper grinders, three jars stacked on top of each other (containing what appears to be tea, coffee and sugar), a roll of paper towels and a knife block.

(iii) a sink with a dishrack, cabinets below the sink and a mirrored cabinet above the sink;

(iv) a fridge/freezer with a microwave oven on top;

(e) a photo of a bench area with a kettle and what appears to be a wine cooler, and cabinets above and below the bench;

(f) a photo of a bench area, with cabinets below the bench and a microwave, a kettle, a cutting board and a bottle of salt on top of the bench;

(g) a photo of a sink with a dish rack, cabinets below and a mirrored cabinet above (and a fridge next to the sink).

(h) photos of doors numbered 1, 2, 3 and 4, all with a key pad.

40. The 'Inspection findings' document sets out:

(a) what was observed outside of the property;

(b) what was observed upon entering the ground floor of the property;

(c) what was observed inside unit 5 on the ground floor;

(d) what was observed inside unit 1 on the second floor;

(e) list of 'Comments made by Adrian confirmed'.

41. The 'Inspection findings' states that the benchtop measurement for unit 1 is 1.76m (L) x 0.58m (W). The requirements of the Enforcement Notice are that 'cabinets and/or countertop area not to exceed 1.8 lineal metres'. Therefore, it is not clear whether unit 1 was in fact already compliant with the 1.8m measurement or whether the Council is expecting to see some modification made to the unit 1 benchtop despite it being only 1.76m.

42. It is also not clear whether the 1.8 lineal metre limit is cumulative of all cabinets and countertop areas.

43. It is also of note that the list of 'Comments made by Adrian confirmed' states, "*It is not generally expected or intended that the occupants use the kitchen for washing up*".

44. 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 oven and/or portable cooktop to cook food;

(b) bathroom facilities, namely a shower and washbasin;

(c) toilet facilities, namely a toilet.

45. 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

46. In the Enforcement Notice, the Council alleges that the facilities provided are not consistent with the interpretation of ‘limited facilities’ and are ‘consistent with the definition of ‘self-contained’ in that there is exclusive possession and use of a kitchen, bathroom and toilet facilities.

47. 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 use the communal kitchen instead.

48. The Tribunal was interested to understand whether the specific measurements/dimensions set out in the requirements of the Enforcement Notice were derived from a technical standard or were perhaps representative of a common size threshold for kitchen appliances.

49. The Council representatives explained that the 120 litres specified for the under counter opening for the refrigerator reflects the capacity of bar fridges commonly available.

50. The Council representatives explained that the size thresholds were agreed upon by Council officers internally as ‘guiding principles’ which reflect the hallmarks of a kitchen. The officers drew reference from *MP 5.7 – Residential Services Building Standard* defines a kitchen as an area where meals are prepared. Therefore the requirements in the Enforcement Notice, including the countertop length, are directed at the rooms not having spaces that could reasonably be used for preparing food.

51. The Council provided a copy of the internal document referred to at the hearing, *CA21 245320 CPaS - Development Services - Interpretation Guidance - limited facilities.docx*.

52. The Council representatives emphasised that the document is an internal document only. That is clear from its content. It is undated and contains comment balloons and a section at the end headed, ‘Next actions’, which tend to indicate it is either a working document or a draft document only.

53. The ‘Purpose’ of the document is stated to be:

> “Investigate the best possible pathway to provide information (guidance) to the public (Building Certifiers particularly) on Council’s interpretation/ application of the term ‘limited facilities’ as used in the definition of Rooming Accommodation.”

54. The majority of the content is reflective of that purpose – an examination of various Council webpages and documents.

55. The document includes a suggestion of a Council officer as to what are limited facilities in premises used for Rooming accommodation:

> “**What are ‘limited facilities’ in premises used for rooming accommodation?**
>
> Under Mandatory Part 5.7 of the Queensland Development Code, a ‘kitchen’ means ‘where meals are prepared for or by residents.
>
> Provided the building has a shared kitchen that is accessible to residents and complies the acceptable solutions in A1 of this part of the QDC, it’s not unreasonable that each room be allowed to have the following:

> ***Limited facilities*** includes (in addition to bathroom and toilet facilities) a single sink with a capacity no greater than 20L and an under counter opening with a floor covered with a durable, impervious material (finished to a smooth even surface free of cracks and crevices) to accommodate a refrigerator no greater than 120L with cabinets and/or counter top area not exceeding 1.2 lineal metres."

56. The '1.2 lineal metres' is marked with a comment which states:

> "This would allow for the under-counter fridge and for the sink's plumbing and drainage, but no other under counter storage. I originally had 1.8m but was convinced otherwise to disable use of counter top for small kitchen appliances."

57. The Appellants' representatives, in a reply submission dated 9 December 2021:

    (a) drew attention to the change from 1.8 lineal metres (which is the requirement specified in the Enforcement Notice the subject of this appeal) to 1.2 lineal metres; and

    (b) submitted that:

> > "Council should not be eradicating kitchenettes, by disabling all food prep, they should rather be focussing on what food prep/cooking facilities are permitted so that the kitchenettes are functional but are limited in function".

58. At the hearing, the Appellants' representative submitted the requirement to remove all kitchen appliances would mean the units would be even more basic than most hotel rooms.

59. The Appellants' representative submitted that in a shared accommodation arrangement single female residents should be able to at least make a cup of tea in their room in the middle of the night without needing to go out to the communal kitchen.

60. 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.

61. The use is lawful provided it has 'only limited facilities available for private use'.

62. 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**".

63. 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).

64. Although the rooms have kitchen, bathroom and toilet facilities, the Tribunal considers that the facilities are only limited facilities available for private use.

65. The kitchen in each room has only a microwave and/or a portable cooktop with a single plate for cooking.

66. 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 oven and portable cooktop with a single plate are limited facilities for cooking only.

67. 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]

68. 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.

69. 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 not 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~~".

70. The Appellants' reply submissions of 9 December 2021 makes the point well:

> "The word limited doesn't mean 'none'…"
>
> "From [the dictionary definition of limited] it appears by limiting facilities, the underlying use is still there however it has limited functionality for e.g. a train is still a train, however has limited stops/capacity/services. We extract from this that the rooms can still have all the items contributing towards being self-contained however these items are limited in functionality i.e. a kitchen can still have cooking facilities, however limited in function, ie. only undertake basic food prep".

71. 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 the plugging in of a kettle or the plugging in of electronic devices such as phone chargers.

72. The Council's approach can well be understood from a simplicity and certainty point of view, but it has the effect of making unavailable the alternative that is in fact available 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~~".

73. 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.

74. For completeness, the Tribunal will address the other grounds of appeal, none of which the Tribunal accepts.

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[12] The Tribunal notes that the approved building plans show a sink in the bathroom of Unit 5. There was no evidence as to whether there is a particular reason for the different configuration, for example, for disability access purposes or to serve as a manager's residence (as contemplated in paragraph (b) of the definition of Rooming accommodation).

75. The first ground of appeal which the Tribunal readily rejects is the Appellants' contention that the requirements are contrary to what the Appellants described as a 'test case on limited facilities' in *Abrahams v Brisbane City Council* P&E Appeal No. 2048 of 2018.

76. 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 Appellants place 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.

77. The Appellants' 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*.

78. 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.

79. 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.

80. 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.

81. 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. That is evident from the internal document titled 'Limited facilities'.

82. The Appellants' representative went so far as to suggest, in an email to the Registry dated 25 November 2021, that for Council to seek to enforce requirements which are not 'formally legislated' amounts to a criminal offence of misconduct in public office. The Tribunal strongly rejects that contention for the following reasons:

    (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.

83. 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.

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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

84. The Tribunal's jurisdiction is established by the *Planning Act 2016*, section 229 and Schedule 1.

85. Section 229(1) provides that Schedule 1 states the matters that may be appealed to a tribunal or the P&E Court.

86. Schedule 1, section 1(1) provides that Table 1 states the matters that may be appealed to the P&E Court or a tribunal.

87. In Table 1, one of the matters that may be appealed against is a decision to give an enforcement notice.

88. 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).

89. 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*.

90. The decision to give the Enforcement Notice was not under the *Plumbing and Drainage Act 2018*.

91. 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)".

92. 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 the Enforcement Notice in this appeal in relation to a matter under paragraphs (a) to (g)?

93. The Appellants submit that the Tribunal does have jurisdiction as the Enforcement Notice, in substance, challenges the building certifier's ability to give a building work approval.[13]

94. 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).[14] The Council submits that while the building work development approval may be relevant to the consideration of whether a development offence has occurred, the appeal is not in respect of the building work development approval itself.[15]

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[13] Appellants' submissions dated 21 June 2021.

[14] Council's submissions dated 11 June 2021, paragraph 22.

[15] Council's submissions dated 11 June 2021, paragraph 23.

What is 'a matter' under paragraphs (a) to (g) that a decision to give an enforcement notice must involve?

95. 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."

96. 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.

97. 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.

98. 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".

99. 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

100. '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.[16]

101. '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)).

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[16] 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)?

102. 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.[17] 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.[18] 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*.[19] Paragraph (h) can therefore be given effect when read together with paragraph (g).

103. 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)

104. 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

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17 *Planning Act 2016*, Schedule 2, definition of 'provision'

18 *Planning Act 2016*, s49(5)

19 *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).

105. 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".[20] 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)

106. 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),[21] namely:

(a) a material change of use for/of a classified building (paragraphs (a), (b), (c), (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)).

107. 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".[22]

108. It also sits more comfortably with the focus of enforcement notices being development activity by persons, rather than decisions by assessing authorities.

109. 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.

110. 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.

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

21 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))

22 *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."

111. 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.

112. 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)?

113. The Enforcement Notice the subject of this appeal alleges that the Appellants have committed and/or is committing a development offence under section 165 of the *Planning Act 2016*.

114. 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.

115. The specific allegation in the Enforcement Notice is that the premises is being used for an Undefined Use.

116. '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*.

117. 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*".

118. However, in the Tribunal's view, an enforcement notice which alleges an unlawful use is also "*in relation to a material change of use*".

119. ‘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”.[23]

120. 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.

121. A material change of use is therefore at the heart of an allegation of an unlawful use.

122. 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?

123. The remaining question is whether the Enforcement Notice is in relation to a material change of use *of, or for, a classified building*.

124. The premises in question are a class 1 building.[24] The premises are therefore are a ‘classified building’.[25]

125. 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.[26]

126. Despite difference in prepositions, the Tribunal considers that all paragraphs are to be read as a material change of use ‘*of*’ a classified building.

127. 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’.[27]

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

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

25 ‘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.

26 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].

27 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

128. 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.