

Planning Act 2016

Chapter 4 Infrastructure

120 Limitation of levied charge

(1) A levied charge may be only for extra demand placed on trunk infrastructure that the development will generate.

(2) When working out extra demand, the demand on trunk infrastructure generated by the following must not be included—

(a) an existing use on the premises if the use is lawful and already taking place on the premises;

(b) a previous use that is no longer taking place on the premises if the use was lawful at the time the use was carried out;

(c) other development on the premises if the development may be lawfully carried out without the need for a further development permit.

(3) However—

(a) the demand generated by a use or development stated in subsection (2) may be included if an infrastructure requirement that applies, or applied to the use or development, has not been complied with; and

(b) the demand generated by development stated in subsection (2)(c) may be included if—

(i) an infrastructure requirement applies to the premises on which the development will be carried out; and

(ii) the infrastructure requirement was imposed on the basis of development of a lower scale or intensity being carried out on the premises.

(4) In this section— **charges notice** means— (a) an infrastructure charges notice; or (b) a notice stated in section 125(3). **infrastructure requirement** means a charges notice, or a condition of a development approval, that requires

Queensland Development Tribunal function

Based on the available legislation and tribunal decisions, the action you described—the Tribunal citing a provision of the planning scheme not raised by either party—is **likely within their authority**.

While the applicant bears the burden of proof, **the Tribunal has a duty to make a correct and lawful decision based on all applicable law**, not just the arguments presented.

Here is the detailed legal basis for why this is generally considered permissible.

The Tribunal's Duty to Apply the Correct Law

The Tribunal's role is not merely to act as an umpire between the two parties' arguments. Its primary function is to make a **legally correct decision on the appeal before it**. This means it must base its decision on the relevant facts *and* the correct interpretation and application of the law.

Even if a party fails to cite a specific provision, **the Tribunal is expected to know and apply the relevant legislation** and planning instruments (like the planning scheme) that govern the matter. If the Tribunal ignores a relevant provision that is key to the decision, it risks making a legal error.

The Tribunal's Broad Power to Inform Itself

This duty is supported by a specific statutory power. As confirmed in a recent Tribunal decision, **section 249 of the *Planning Act 2016* provides the Tribunal with broad powers to inform itself in the way it considers appropriate when hearing a proceeding**.

This power means the Tribunal can:

- **Consider the entire planning scheme:** It is not limited to the specific clauses mentioned by the parties. The Tribunal can and should review the scheme in its entirety to identify all provisions that are relevant to the appeal.
- **Seek the views of any person:** If the Tribunal identifies a new provision, it believes is important, it has the power to seek input from the parties on that provision to ensure fairness.

How It Works in Practice: The *Houghton* Case

A practical example of this can be seen in the Tribunal's decision for **Houghton v Ross & Unitywater (Appeal No. 24-024)**.

- **The Situation:** The appellant argued his proposed carport complied with a specific part of the Queensland Development Code (Acceptable Solution A2.2(2)(c)).

- **The Tribunal's Role:** In its "Reasons for the decision," the Tribunal stated that it had to consider the appellant's argument "**against the [relevant] criteria.**" Importantly, the Tribunal pointed out that the appellant's claim could not be established because "**the Appellant did not consider in the grounds for appeal, the definition of clear zone as stated in [the Code].**" The Tribunal explained that the definition "**must be read together with the Acceptable Solution**" to understand the true intent of the requirement.
- **The Outcome:** By applying the full context of the Code—including the definition the appellant overlooked—the Tribunal found the proposal did not comply and confirmed the refusal.

This case illustrates that the Tribunal is expected **to apply the law as it is written, not just as it is argued** by the parties. If a party's argument is legally incomplete because it ignores a relevant definition or another provision, the Tribunal is acting within its authority to correct that and apply the law fully.

Your Avenue for Appeal

However, the fact that the Tribunal *can* do this does not automatically mean it was *correct* in your specific case. If you believe the Tribunal misapplied the provision or that its reliance on it was unfair, you have a right to challenge the decision.

Under the *Planning Act 2016*, a party may appeal a Tribunal's decision to the Planning and Environment Court on either of the following grounds:

1. **An error or mistake in law** on the part of the Tribunal.
2. **Jurisdictional error.**

If you believe the Tribunal's reliance on that provision was a misinterpretation of the planning scheme (an error of law) or that it considered a matter outside its power (jurisdictional error), these are the exact grounds on which you can base an appeal.

Key Takeaway: Citing a new provision is generally within the **Tribunal's power as part of its duty to correctly apply the law.** Your challenge would need to focus on *how* the Tribunal applied that provision, arguing that its interpretation or use of it was legally flawed.

If you would like to discuss the specific details of your case to explore whether an appeal on these grounds is viable, please share more information.

The mater involved the interpretation of this Planning Act 2016 Chapter 4 Infrastructure **120** Limitation of levied charge

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- (c) other development on the premises if the development may be lawfully carried out without the need for a further development permit.

(3) However—

- (a) the demand generated by a use or development stated in subsection (2) may be included if an infrastructure requirement that applies, or applied to the use or development, has not been complied with; and
- (b) the demand generated by development stated in subsection (2)(c) may be included if—
 - (i) an infrastructure requirement applies to the premises on which the development will be carried out; and
 - (ii) the infrastructure requirement was imposed on the basis of development of a lower scale or intensity being carried out on the premises.

(4) In this section— charges notice means—

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- a charges notice, or
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The Tribunal determined that an **acceptable development** in the future is ground to take this into consideration regarding the determination of Extra Demand neither party suggested it could

Based on the legislation and the relevant court cases, the Tribunal's action of considering a **future development** that neither party raised is **likely an error of law**.

By interpreting "*other development*" to include a **potential future use that hadn't been approved or started**, the Tribunal appears to have **misapplied** section 120 of the *Planning Act 2016*.

Here is the detailed legal analysis of why this is the case.

The Correct Legal Test for "Other Development"

The key to your appeal lies in how the courts have interpreted **section 120(2)(c)** of the *Planning Act 2016*.

This section states that when calculating "extra demand," the demand generated by "other development on the premises" must be excluded *if* that development "may be lawfully carried out without the need for a further development permit" .

The critical question is: What kind of "*other development*" qualifies for this exclusion?

The Planning and Environment Court provided a definitive answer in **Douglas Construction & Engineering Pty Ltd v Logan City Council [2023] QPEC 28**.

In that case, the Court considered a very similar argument. The appellant wanted to exclude the demand generated by a future warehouse use, arguing it was "other development" that could be lawfully carried out.

The Court rejected this argument.

Justice Kefford DCJ made several key findings that are directly relevant to your case:

Aspect of Dispute	Appellant's Argument (Rejected)	Court's Finding	Application to Your Case
What is "the development"?	The "development" is only the specific building work applied for .	"The references to 'the development' encapsulated all types of development, that in combination, facilitate the end use of the premises. It is the end use of the premises that places demand on trunk infrastructure, not one type of development in isolation. "	The Tribunal should have considered the total development (e.g., the use) that your application facilitates, not just the physical work.
What is "other development"?	A future material change of use is "other development" on the premises.	The proposed future use (e.g., a warehouse) is not "other development." It is the same development for which the charge was levied.	The "acceptable development in the future" you describe is likely not "other development" under the Act. It is the ultimate purpose of your application.

Aspect of Dispute	Appellant's Argument (Rejected)	Court's Finding	Application to Your Case
When is development lawful?	A use is lawful if it is "accepted development" under the planning scheme.	Even if a use is "accepted," it cannot be lawfully carried out without the necessary permits for building work and operational work that enable it. At the time of the charge, no material change of use had been made, so there was no "other development" to consider.	A future use is not "lawfully carried out" until all necessary approvals are in place and the use has actually started. A theoretical future right is not enough.

Why the Tribunal's Action Was an Error

Applying the *Douglas Construction* reasoning to your situation, the Tribunal's decision to consider an "acceptable development in the future" as a basis for determining "extra demand" appears to be a clear misstep for two reasons:

1. **It misinterprets "other development"**: The future use is not "other development." *other development* is the very development (the end use) **that your application is for**. The **infrastructure charge** is levied to account for the demand that this end use will place on trunk infrastructure.
2. **It misinterprets "may be lawfully carried out"**: A future use that is merely "acceptable" under the planning scheme is not a development that "may be lawfully carried out" for the purposes of section 120.

As the Court in *Douglas Construction* made clear, if the land is vacant and the use hasn't started, there is no "other development" that has been lawfully carried out.

The Tribunal's reliance on a provision not raised by either party is not inherently beyond its authority, as **it has a duty to apply the correct law**.

However, if in doing so it **misapplies the law**, that constitutes an **error or mistake in law**, which is a valid ground for appeal to the Planning and Environment Court.

Your Avenue for Appeal

You have strong grounds to appeal this decision.

Under the *Planning Act 2016*, you can appeal to the Planning and Environment Court on the ground of **"an error or mistake in law on the part of the tribunal"**.

The error of law is the Tribunal's misinterpretation and misapplication of **section 120(2)(c)** of the *Planning Act 2016*.

The binding precedent set in *Douglas Construction* directly contradicts the Tribunal's reasoning.

The Court in that case explicitly held that a future use is not "*other development*" to be excluded from the calculation of extra demand.

Because you have identified a specific legal error, you should file an appeal.

The Planning and Environment Court has the power to set aside the Tribunal's decision if it finds that the error materially affected the outcome.

Given the complexity of this area of law and the clear precedent in your Favor, I strongly recommend you seek legal advice promptly to prepare your appeal.

Would you like me to explain the steps involved in filing an appeal with the Planning and Environment Court?