Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-043
Appellant:	Donald Bruce Edwards
Respondent:	Rodney Retell
Site Address:	35 Cameron St, Fairfield, described as Lot 3 on RP 69061 ─ the subject site

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Appeal/Application

Appeal under section 229 and Schedule 1, section 1 and Table 1, Item 1 of the *Planning Act 2016* against a provision of the development approval given by Rodney Retell dated 22 August 2019. Application under section 250 of the *Planning Act 2016* for a declaration about whether the development application made to Rodney Retell on 21 August 2019 was properly made.

Date and time of hearing:	On submissions	
Tribunal:	Michelle Pennicott	Chair
	Lama Khalifa	Member
	Markus Pye	Member

Decision:

The Development Tribunal, in accordance with section 252 of the *Planning Act 2016*, decides that the Tribunal has no jurisdiction for the proceedings, as Mr Edwards does not have standing as the applicant for the 21 August 2019 building development application.

Note—
Pursuant to section 252(3) of the *Planning Act 2016,* any period for starting proceedings in the Planning and Environment Court, for the matter that is the subject of the tribunal proceedings, starts again when the tribunal gives the decision notice to the party who started the proceedings.

See:

- Section 229 and Schedule 1 of the *Planning Act 2016* for the Planning and Environment Court's appeal jurisdiction.
- Section 11 of the *Planning and Environment Court Act 2016* for the Planning and Environment Court's declaratory jurisdiction.
- For general information about the Planning and Environment Court: https://www.courts.qld.gov.au/courts/planning-and-environment-court

Background

1. This is the third appeal to a development tribunal, as well as there being QCAT proceedings, relating to building works for a dwelling extension on the subject site.

2. Mr Edwards, as owner, entered into a contract with John S Firrell, as contractor, dated 30 June 2014 for an extension to the existing dwelling on the subject site ("2014 Building Contract").

3. The 2014 Building Contract included the construction of box gutters between the roof of the existing dwelling and the roof of the extension.

4. On 17 July 2014 a building work development permit was issued by Mr Retell, as building certifier, to Sovereign Homes Qld Pty Ltd ("Sovereign") for the dwelling extension ("2014 Building Approval"). The plans which formed part of the 2014 Building Contract were approved by the 2014 Building Approval.

5. Following completion of the building work, Sovereign brought proceedings against Mr Edwards in the Queensland Civil and Administrative Tribunal (QCAT) seeking payment of an amount owing pursuant to the 2014 Building Contract. Mr Edwards made a cross claim relating to various defects.

6. The QCAT application (BDL253-15) was heard on 25-27 October 2017.

7. Shortly prior to the QCAT hearing, on 19 October 2017, Mr Retell issued a building work development permit to Sovereign for "Alternative Building Solution for Roofwater Drainage" ("2017 Building Approval").

8. The 2017 Building Approval was given by Mr Retell in reliance on a Form 15—Compliance certificate for building design or specification dated 18 October 2017 by Neil Blair and Associates Pty Ltd for "Hydraulic Services Design Only of Alternative Solution for Vee Gutter Design". The Form 15 was relied on by Sovereign at the QCAT hearing.

9. On 8 November 2017, Mr Edwards appealed to a development tribunal against the 2017 Building Approval (Development Tribunal Appeal No. 57-17). In his grounds of appeal, Mr Edwards stated:

   > "… we have a BA which has been rushed through by the Builder and the Certifier, which sole purpose is to be seen to be meeting their legal obligations before a QCAT hearing. It does nothing to assure the home owner that what has been built is not defective".

10. On 21 August 2018, QCAT delivered its decision in BDL253-15. In relation to the box gutters, QCAT found that in not constructing the gutter according to the plans and specifications (as was conceded by John Firrell and Sovereign) Sovereign was in breach of the contract. QCAT allowed $10,000 for the cost of rectification and concluded that it was not unreasonable for the current gutter to be removed and reinstalled according to the specifications. This decision is under appeal to the Queensland Civil and Administrative Tribunal Appeal Tribunal.

11. On 4 September 2018, the tribunal in Development Tribunal Appeal No. 57-17 made its decision. The tribunal found that the material relied on by Mr Retell was "wholly deficient" and did not satisfy the requirements of the Building Act. The tribunal set aside the 2017 Building Approval and ordered Mr Retell to remake the decision according to law by 2 October 2018. In making its decision, the tribunal considered whether Mr Edwards had standing and determined that he did on the basis that, as the owner, he was a person in whom the benefit of the approval vests.

12. On 2 October 2018, Mr Retell issued an amended building work development permit to Sovereign for “Alternative building solution for roofwater drainage” (“2018 Building Approval”).

13. On 22 October 2018, Mr Edwards appealed to a development tribunal against the 2018 Building Approval (Development Tribunal Appeal No. 44-18). In his grounds of appeal, Mr Edwards alleged the 2018 Building Approval was “wholly deficient and breach [sic] the relevant legislation”.

14. On 10 July 2019, the tribunal in Development Tribunal Appeal No. 44-18 made its decision. The tribunal determined that the supporting documents for the alternative solution accepted by Mr Retell were deficient because they did not adequately reference all relevant Deemed to Satisfy requirements and demonstrate how the design of the gutter complied with the performance provisions of NCC 2016. The tribunal concluded, “having regard to the material that was provided the application ought not have been approved”. The tribunal replaced the decision approving the 2018 Building Approval with a decision refusing the application for an alternative building solution for roofwater drainage.

15. On 21 August 2019, Sovereign lodged a building development application with Mr Retell for “Alternative Building Solution for Roofwater Drainage” (“2019 Building Application”).

16. On 22 August 2019, Mr Retell issued a building work development permit to Sovereign for the 2019 Building Application (“2019 Building Approval”). The 2019 Building Approval, under “Approved Documentation”, approves:
    (a) Aqualogical Plumbing Design Solutions Performance Solution Report Rev B Dated 21/08/2019 (A190823);
    (b) Sovereign Homes DWG NoWD-01A - WD05A dated Aug ‘19; and
    (c) Form 15 dated 22/08/2019 Anthony Gerrard John Freeman and referenced Job No A190823 Performance Solution Report.

17. On 13 September 2019, Mr Edwards commenced the subject appeal against the 2019 Building Approval. The description of the appeal in the Form 10—Notice of Appeal/Application for Declaration is “1. Appeal about a development application, including a building development application 2. Appeal about whether a development application is properly made”.

18. The grounds of appeal are set out in an attachment. The grounds of appeal allege breaches of various provisions of the *Building Act 1975*, *Building Regulation 2006* and *Planning Act 2016*. The majority of the allegations relate to the building development application itself not being compliant with the legislation.

19. The grounds of appeal allege that the 2019 Building Approval was given the day before Mr Edwards’ submissions to the QCAT Appeal Tribunal were due and that the 2019 Building Approval is sought to be admitted as fresh evidence by Sovereign in the QCAT Appeal Tribunal proceedings. Mr Edwards alleges the 2019 Building Approval was applied for and approved so that the builder could overcome their legal obligations.

Parties invited to address jurisdiction

20. On 30 January 2020, the Registrar at the Tribunal’s request sent an email to the parties expressing the Chairperson’s preliminary view that Mr Edwards may not have standing as an Appellant because he is not the applicant for the development application. The

parties were informed that the tribunal would first decide the question of standing and therefore invited submissions and evidence from the parties on the question of standing. The email stated:

> "**Preliminary observations of the Chairperson on whether Mr Edwards has standing (for the parties to further consider in making submissions)**
>
> 1. For a development application, an appeal to the tribunal may be made against a provision of the development approval: Planning Act, Schedule 1, Table 1, Item 1(c).
> 2. The Appellant in the appeal must be the applicant: Planning Act, Schedule 1, Table 1, Column 1.
> 3. According to the decision notice dated 22 August 2019 the applicant is Sovereign Homes Qld Pty Ltd. The tribunal has not been provided with a copy of the development application itself.
> 4. Applicant, for an appeal in relation to an application, also includes the person in whom the benefit of the application vests: Planning Act, Schedule 2, definition of applicant.
> 5. The Court of Appeal in Sushames & Ors v Pine Rivers SC & Ors [2006] QCA 171 considered substantially the same definition of applicant under the repealed Integrated Planning Act 1997.
> 6. In that case, the Court of Appeal held that the owner was not an applicant because:
>   a. it was not the named applicant;
>   b. the application was not made on its behalf (there was no evidence that the named applicant was acting as the owners agent); and
>   c. it was not a party to any agreement or arrangement which purported to vest the benefit of the application in it (there was no evidence of any contractual arrangement to the effect that the named applicant was doing so on the owners behalf or at the direction of the owner or that the owner had a right to take the place of the named applicant).
> 7. Therefore, mere ownership of premises does not make the owner a person in whom the benefit of the application vests.
> 8. The interpretation of applicant by the Court of Appeal in Sushames is binding on the tribunal.
> 9. Applying that to the present appeal, Mr Edwards can only be the Appellant if:
>   a. Mr Edwards was the named applicant; or
>   b. The named applicant was acting as Mr Edwards agent; or
>   c. Mr Edwards has a contractual right to take the place of the named applicant.
> 10. If none of the above applies, then Mr Edwards was not the applicant and is not a person in whom the benefit of the application vests and therefore cannot be the Appellant in an appeal to the tribunal. … "

21. The parties were invited to provide evidence and submissions on whether or not Mr Edwards has standing as the applicant.

Mr Retell's material

22. On 3 February 2020 Mr Retell provided copies of the 2019 Building Application, 2019 Building Approval, engagement agreement between Sovereign and Mr Retell, Approval Advice to Mr Edwards and Lodgement record from Brisbane City Council.

Mr Edwards' submissions on jurisdiction

23. On 21 February 2020 Mr Edwards provided his submissions on jurisdiction and evidence.

24. Mr Edwards submits that he has standing because he is the applicant for the *development approval*.

25. Mr Edwards relies on the "Note" to the definition of applicant in the *Planning Act 2016* which refers to section 280 for the meanings of *applicant* used in particular contexts.

26. Mr Edwards says that for a development approval (as opposed to a development application) the applicant is a person in whom the benefit of the approval vests.

27. Mr Edwards refers to the tribunal decision in Appeal No. 57-17. The tribunal in that appeal determined that Mr Edwards, as the owner of the premises, was the applicant. Those reasons refer to the definition of applicant for a development approval in section 280 and that an owner of the premises where building work is to take place is the person in whom the benefit of the approval vests.

28. Mr Edwards submits that the *Integrated Planning Act 1997*, considered by the Court of Appeal in the *Sushames* case, did not have the same provisions as appears in the *Planning Act 2016* as to the appellant for a development approval.

29. Mr Edwards concedes that he is not the applicant for the 2019 Building Application. He concedes that the applicant was Sovereign. Mr Edwards says the 2019 Building Application was made without his knowledge and even if it were presented to him he would not have consented to the application being made knowing the contents weren't true.

30. Mr Edwards says that the appeal mechanism is to allow affected owners to challenge the conduct he alleges against the builder and certifier (namely the making of a development application to overcome their legal obligations).

Mr Retell's submissions on jurisdiction

31. On 19 March 2020 Mr Retell's lawyers, Cornwalls, provided submissions on jurisdiction.

32. Mr Retell submits:

    (a) the applicant was Sovereign;

    (b) Sovereign had exclusive control of the 2019 Building Application;

    (c) Sovereign had a right and indeed an obligation to make a development application as part of its contract with the owner;

    (d) the tribunal in Appeal No. 57-17, in finding that Mr Edwards had standing, did not consider the *Sushames* case.

33. Mr Retell observes that Mr Edwards argues that he is the applicant as he received the ultimate benefit of the outcome of the application but seeks to undo that benefit by setting aside the approval of the work done to his property.

Further submissions from Mr Edwards

34. On 23 March 2020, Mr Edwards provided submissions in reply.

35. Mr Edwards submits that Mr Retell's submission that Sovereign had a right and an obligation to make the application as part of their contract with him is contrary to the position advanced by Sovereign in the QCAT and QCATA proceedings in which Sovereign asserted that the contract had come to an end after practical completion on 11 December 2014 (and that a new contract would be required for Sovereign to do any work on the property after that date).

36. Mr Edwards submits:

> "No subsequent contract has materialised that would give it any power to make a development application over my property since December 2014. To say they have a contractual obligation is simply untrue. No contract exists".

Further responses from Mr Retell and Mr Edwards

37. Mr Retell's lawyers, Cornwalls, sent a further letter to the Tribunal on 23 March 2020. The letter responds to Mr Edwards' allegations about Mr Retell's and Cornwalls' conduct.

38. Mr Edwards sent a further letter to the Tribunal on 24 March 2020. The letter responds to allegations about Mr Edwards' conduct.

39. Mr Retell's lawyers, Cornwalls, sent a further letter to the Tribunal on 27 March 2020.

Request for and provision of building contract

40. On 11 June 2020, at the Tribunal's request, Mr Edwards provided a copy of the 2014 Building Contract.

41. The relevant provisions of the 2014 Building Contract are:
    (a) Item 2 of Schedule 1 (Particulars of contract) defines the owner as Donald Bruce Edwards;
    (b) Item 3 of Schedule 1 (Particulars of contract) defines the contractor as John S Firrell;
    (c) clause 1.1 (General conditions) provides that the contractor must complete the works in accordance with the contract and comply with all laws and lawful requirements of any statutory or other authority with respect to the carrying out of the works;
    (d) clause 37.1 (General conditions) defines:
        (i) "works" to mean the works to be carried out, completed and handed over to the owner in accordance with the contract as shown in the contract documents including variations;
        (ii) "contract" to mean the agreement in the contract documents (which is defined as being the general conditions, any special conditions, the specification, the plans and other documents specified in item 12);
    (e) clause 2.3 (General conditions) provides that the party named in item 5A of schedule 1 (the contractor is named in item 5A) is responsible for obtaining building permits and must take all reasonable steps to do so by the start and price review date (which is stated in item 6 to be 14 July 2014);
    (f) clause 2.4 (General conditions) provides that the owner must sign all documents and do all acts as requested by the contractor to obtain all permissions, consents and approvals required from the relevant statutory or other authority;

(g) clause 11.1 (General conditions) provides that the contractor must, on behalf of the owner, comply with any lawful requirement of any statutory or other authority to the extent that such requirement relates to the carrying out and completing the works;

(h) clause 11.2 (General conditions) provides that the contractor must notify the owner of any extra work required to comply with clause 11.1 and request a variation to carry out that extra work;

(i) clause 11.3 (General conditions) provides the owner must sign all documents and do all acts as requested by the contractor to obtain all permissions, consents and approvals required from the relevant statutory or other authority;

(j) clause 29.1 (General conditions) provides that neither party may assign the contract or any other right, benefit of interest under the contract without the prior written consent of the other party;

(k) clause 14(b) of the Specifications provides for “box gutters with ply support sump and overflow provisions included to Level 2 and 3 roof intersections as per plan”;

(l) the Roof Plan WD-06 Revision A dated April 2014 shows a dotted line as “line of tapered gutter under. Refer WD-07”;

(m) the Part Roof Plan WD-07 Revision A dated April 2014 shows a solid line and “fall gutter” with arrows pointing in a westerly direction and northerly direction.

Material considered

42. The following material has been considered in arriving at this decision:

(a) Form 10—Notice of Appeal and attachments;

(b) Documents provided by Mr Retell on 3 February 2020;

(c) Submissions and documents provided by Mr Edwards on 21 February 2020;

(d) Submissions provided on behalf of Mr Retell on 19 March 2020;

(e) Submissions provided by Mr Edwards on 23 March 2020;

(f) Letters from Cornwalls on behalf of Mr Retell on 23 March 2020 and 27 March 2020;

(g) Letter from Mr Edwards dated 24 March 2020 and attachments;

(h) Contract between Donald Bruce Edwards and John S Firrell dated 30 June 2014;

(i) Edwards v Retell (Unreported, Development Tribunal, 4 September 2018 in Appeal No. 57-17);

(j) Edwards v Retell (Unreported, Development Tribunal, 10 July 2019 in Appeal No. 44-18); and

(k) Sovereign Homes Qld Pty Ltd v Edwards [2018] QCAT 276.

Findings of fact

43. Sovereign was the named applicant for the 2019 Building Application.

44. Sovereign did not make the 2019 Building Application on Mr Edwards’ behalf.

45. Mr Edwards had no knowledge of the 2019 Building Application, would not (if asked) have authorised the making of it on his behalf and does not now ratify the making of it.

46. There is no contract between Sovereign as the named applicant for the 2019 Building Application and Mr Edwards which vests the benefit of the 2019 Building Application in Mr Edwards.

Reasons for decision

47. For the reasons which follow, Mr Edwards is not the "applicant" of the 2019 Building Application and therefore does not have standing to bring an appeal or an application for a declaration in respect of it.

<u>*Planning Act 2016* – appeal in relation to a development application</u>

48. Section 229 of the *Planning Act 2016* provides that Schedule 1 of the *Planning Act 2016* states, relevantly:

(a) the matters that may be appealed to a Tribunal or the P&E Court; and

(b) the person who may appeal a matter (the *appellant*).

49. Schedule 1, Table 1, Item 1 states:

Table 1
Appeals to the P&E Court and, for certain matters, to a tribunal

1. Development applications

For a development application other than an excluded application, an appeal may be made against—

(a) the refusal of all or part of the development application; or

(b) the deemed refusal of the development application; or

(c) a provision of the development approval; or

(d) if a development permit was applied for—the decision to give a preliminary approval.

Column 1 Appellant	Column 2 Respondent	Column 3 Co-respondent (if any)	Column 4 Co-respondent by election (if any)
The applicant	The assessment manager	If the appeal is about a concurrence agency's referral response—the concurrence agency	1 A concurrence agency that is not a co-respondent 2 If a chosen assessment manager is the respondent—the prescribed assessment manager 3 Any eligible advice agency for the application 4 Any eligible submitter for the application

50. The heading to the item is "1. Development applications". The heading forms part of the provision.[1]

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1 *Acts Interpretation Act 1954*, section 35C (Headings part of provision etc.)

51. Item 1 sets out, “For a development application”, various aspects of decisions, including relevantly a provision of the development approval, which an appeal may be made against.

52. Column 1 identifies that it is “The applicant” for the development application who may appeal.

53. In Schedule 2 (Dictionary) “applicant” is defined as:

> ***applicant***, for an appeal in relation to an application, includes the person in whom the benefit of the application vests.
>
> *Note—*
>
> For the meanings of *applicant* used in particular contexts, see section 280.

54. Both the heading and the introductory words to Item 1 make clear that Item 1 is an appeal in relation to a development application.

55. Therefore, the definition of “applicant” in Schedule 2, which applies “for an appeal in relation to an application”, applies.

56. Mr Edwards relies on section 280, referred to in the Note. Section 280 provides that in the Act a reference to a person or thing stated in column 1 of the table in section 280 is a reference to the person or thing stated in column 2. Sub-headings within the table provide the particular contexts in which the term may be found.

57. The table in section 280 states, relevantly, as follows:

Column 1	**Column 2**
For a development application—	
the applicant	the applicant for the application
For a development approval—	
the applicant	the person who applied for the approval or a person in whom the benefit of the approval vests

58. Mr Edwards submits that he, as owner, is the person in whom the benefit of the approval vests and therefore he is “The applicant” with the right of appeal.

59. However the particular context in which “applicant” is used which is relevant to the appeal is Item 1 of Table 1 which is for a “development application”, not a development approval.

Meaning of applicant in *Sushames* under the repealed *Integrated Planning Act 1997*

60. The appeal provisions of the *Integrated Planning Act 1997* which were in force at the time of the Court of Appeal’s decision in the *Sushames & Ors v Pine Rivers SC & Ors* [2006] QCA 171 were as follows:

(a) Chapter 4, Division 8 provided for "Appeals to court relating to development applications".

(b) Section 4.1.27 provided for appeals by applicants:

> **4.1.27 Appeals by applicants**
>
> (1) An applicant for a development application may appeal to the court against any of the following—
>
> (a) the refusal, or the refusal in part, of a development application;
>
> (b) a matter stated in a development approval, including any condition applying to the development, and the identification of a code under section 3.1.6;[90]
>
> (c) the decision to give a preliminary approval when a development permit was applied for;
>
> (d) the length of a currency period;
>
> (e) a deemed refusal.

(c) Section 4.1.28 provided for appeals by submitters:

> **4.1.28 Appeals by submitters—general**
>
> (1) A submitter for a development application may appeal to the court only against—
>
> (a) the part of the approval relating to the assessment manager's decision under section 3.5.14 or 3.5.14A; or
>
> (b) for an application processed under section 6.1.28(2)—the part of the approval about the aspects of the development that would have required public notification under the repealed Act.
>
> (2) To the extent an appeal may be made under subsection (1), the appeal may be against 1 or more of the following—
>
> (a) the giving of a development approval;
>
> (b) any provision of the approval including—
>
> (i) a condition of, or lack of condition for, the approval; or
>
> (ii) the length of a currency period for the approval.

(d) Section 4.1.43 provided that for an appeal started by a submitter (as was the case in *Sushames*) "the applicant" is a co-respondent for the appeal:

> **4.1.43 Respondent and co-respondents for appeals under div 8**
>
> (1) Subsections (2) to (8) apply for appeals under sections 4.1.27 to 4.1.29.
>
> (2) The assessment manager is the respondent for the appeal.
>
> (3) If the appeal is started by a submitter, the applicant is a co-respondent for the appeal.

61. “Applicant” was defined in Schedule 10:

> ***applicant***, for a development application mentioned in chapter 4, includes the person in whom the benefit of the application vests.
>
> ***applicant***, for chapter 3, means the applicant for a development application.

62. Section 1.3.8 provided, amongst other things:

> **1.3.8 References in Act to applicants, assessment managers, agencies etc.**
>
> In a provision of this Act about a development application, a reference to—
>
> (a) the applicant is a reference to the person who made the application; and

63. The *Integrated Planning Act 1997* had no equivalent of the meaning of “the applicant” for a “development approval” in section 280 of the *Planning Act 2016*.

64. In *Sushames* there was a sale contract between the owner and a purchaser. The purchaser made a development application, which was approved. The approval was appealed against by a submitter. When the sale contract was terminated the owner sought to participate in the appeal as “the applicant”.

65. The Court of Appeal found that the owner was not the applicant and therefore had no standing in the appeal because:

    (a) it was not the original named applicant;

    (b) the application was not made on its behalf (there was no provision in the contract that the purchaser agreed to exercise its rights as applicant on behalf of the owner or at the direction of the owner);

    (c) it had no role in the application process before the Council;

    (d) it was not a party to any agreement or arrangement which purported to vest the benefit of the application in it;

    (e) it is simply an owner (in that case an owner who gave written consent to the making of the development application).[2]

66. The owner argued in the Court of Appeal that the benefit of the application vested in it by virtue of section 3.5.28 of the *Integrated Planning Act 1997*. Section 3.5.28 provided that a development approval attaches to land and binds the owner. Section 73 of the *Planning Act 2016* is in similar terms.

67. Although the Court of Appeal acknowledged that the owner would be the beneficiary of any approval obtained and therefore had an interest in preserving it, the Court of Appeal stated that it did not lead to the conclusion that it was the person in whom the benefit of the development application vested.[3]

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2 *Sushames & Ors v Pine Rivers SC & Ors* [2006] QCA 171 at [13] per Williams JA and [31] per White J, agreeing with the analysis of Rackemann DCJ at first instance in *Sushames & Ors v Pine Rivers Shire Council & Anor* [2005] QPEC 096 at [17]

3 *Sushames & Ors v Pine Rivers SC & Ors* [2006] QCA 171 at [20] per Keane JA

Interpretation of “applicant” from *Sushames* applies

68. Although the table format of the appeal provisions in the *Planning Act 2016* is different to the sentence format in the Integrated *Planning Act 1997*, in substance the appeal right is the same, it is the applicant for the development application who may appeal.

69. The definition of “applicant” for a development application is also the same and therefore the Court of Appeal’s interpretation of who is the person in whom the benefit of the application vests in *Sushames* applies.

70. Adopting the sequential analysis of the Court of Appeal in *Sushames*:
    (a) Mr Edwards was not the named applicant for the 2019 Building Application;
    (b) Sovereign did not make the 2019 Building Application on Mr Edwards’ behalf (Mr Edwards indeed says that if he had been asked, he would not have authorised the making of it and Mr Edwards does not now ratify the making of it);
    (c) Mr Edwards had no role in the application process (Mr Edwards states that he had no knowledge of it);
    (d) there is no contract between the named applicant, Sovereign, and Mr Edwards which vests the benefit of the 2019 Building Application in Mr Edwards;
    (e) Mr Edwards is simply the owner.

71. As established by the Court of Appeal, an owner does not, from the bare fact of ownership, have standing in an appeal in relation to a development application.

72. The only matter which points to a possible agency relationship is clause 11.1 of the 2014 Building Contract between Mr Edwards and John Firrell which stated that the contractor must, on behalf of the owner, comply with any lawful requirement of any statutory or other authority to the extent that such requirement relates to the carrying out and completing of the works.

73. Clause 11 goes on to provide a process for the contractor to notify the owner of any extra work required to comply with clause 11.1 and to request a variation to carry out that extra work.

74. There is no evidence that the 2019 Building Application or the guttering work the subject of it was required by a statutory authority. Mr Edwards has further stated that guttering work the subject of the 2019 Building Application is not the works he contracted John Firrell to carry out.

75. The Tribunal notes that in *Sovereign Homes Qld Pty Ltd v Edwards*, [2018] QCAT 276, QCAT found that Sovereign, in not constructing the gutter according to the plans and specifications, was in breach of the contract.

76. It is clear from Mr Edwards’ perspective that the 2019 Building Application was not one made within the scope of any authority given by Mr Edwards to John Firrell and Mr Edwards strongly rejects the actions of Sovereign in making the 2019 Building Application. Indeed, Mr Edwards’ grounds of appeal are primarily challenges to the content of the application itself.

77. In *Sushames*, the Court of Appeal emphasised an application for development approval is one coherent proposal and “is, necessarily, directed by an applicant” and when the legislation speaks of “the person in whom the benefit of the application vests”

it is referring to the person who, at the time of the appeal, is *exclusively entitled to control* the application.[4]

78. The Court of Appeal went on to say:

> "…Importantly, the provisions of the IPA **do not envisage a multiplicity of such "applicants" at any one time**. The IPA does not envisage that an application to be assessed may be advanced or modified or withdrawn by **several divergent voices**. **That situation would be intolerable** for an assessment manager." [5]
>
> (emphasis added)

79. Mr Edwards, in taking issue with the very application for which he seeks to be the applicant, is indeed a "divergent voice" from that of the named applicant. It is the "intolerable situation" identified by the Court of Appeal.

80. As Mr Edwards is not the applicant for the 2019 Building Application, he does not have standing to appeal. The Tribunal's appeal jurisdiction is not enlivened.

Planning Act 2016 – declaration about whether application is properly made

81. As Mr Edwards' Form 10—Notice of Appeal/Application for Declaration describes his appeal as also being "2. Appeal about whether a development application is properly made" and the majority of the grounds of appeal relate to alleged deficiencies with the application material, the Tribunal has also considered whether the Tribunal's declaratory jurisdiction is enlivened.

82. Pursuant to section 240 of the *Planning Act 2016* the following persons may start proceedings for a declaration about whether a development application is properly made:

    (a) the applicant;

    (b) the assessment manager.

83. In the case of an applicant, the proceedings must be started within 20 business days after the applicant receives notice from the assessment manager that the development application is *not* properly made: section 240(3)(a).

84. Mr Edwards did not receive notice from Mr Retell that the 2019 Building Application was not properly made.

85. In setting the time limit for an applicant by reference to receipt of a notice that the development application is *not* properly made, the legislature clearly did not envisage a scenario of an applicant seeking a declaration against its own application.

86. The extended definition of 'applicant' in Schedule 2, as set out in paragraph 53 of these reasons, applies only to an appeal in relation to a development application.

87. Therefore, in accordance with section 280, the meaning of the 'applicant' for the development application referred to in section 240 is a reference to 'the applicant for the application'.

88. For the reasons set out in paragraphs 70(a) to (c) of these reasons, Mr Edwards was not the applicant for the 2019 Building Application.

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[4] *Sushames & Ors v Pine Rivers SC & Ors* [2006] QCA 171 at [15] per Keane JA

[5] *Sushames & Ors v Pine Rivers SC & Ors* [2006] QCA 171 at [15] per Keane JA

89. He has no standing to bring an application for a declaration about whether it was properly made.

90. Pursuant to section 11 of the *Planning and Environment Court Act 2016* there is open standing for any person to seek a declaration about a matter done, to be done or that should have been done for the *Planning Act 2016* (which would include a development application made or a development approval given) but that general declaratory jurisdiction rests with the Planning and Environment Court, not the Development Tribunal.

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Michelle Pennicott
Development Tribunal Chairperson
Date: 29 July 2020

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