



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-041
Appellant:	Withans Pty Ltd as Trustee for Kemps Family Super Fund
Respondent (Enforcement Authority):	Bundaberg Regional Council
Site Address:	14 Arthur Street, Bundaberg South, in the State of Queensland and described as Lot 18 on RP382 – the subject site

Appeal

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* (PA) against the decision of the Council to give an Enforcement Notice under section 168 of the PA dated 5 August 2019, requiring the use of the subject site for the purpose of providing accommodation to persons in a manner constituting assessable development to cease until all necessary development permits are in effect for the development.

Date and time of hearing:	N/A (appeal decided on submissions)
Place of hearing:	N/A (appeal decided on submissions)
Tribunal:	Stafford Hopewell – Chair Russell Schuler – Member
Submissions provided by:	Appellant – Bernie Kemps Bundaberg Regional Council – Michael Ellery

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 252 of the *Planning Act 2016* (**PA**) decides that the Tribunal has no jurisdiction for the tribunal proceedings.

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

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

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

Background:

1. The Appellant is the owner of the subject site, upon which is constructed a building that is being used to provide accommodation to backpackers.

The Enforcement Notice

2. The Bundaberg Regional Council (**Council**) gave an enforcement notice dated 5 August 2019 (the **Enforcement Notice**) to Withans Pty Ltd as Trustee under Instrument 718946232 for the Kemps Family Super Fund in relation to following alleged development offences under the PA:
 - (a) a development offence under section 163 of the PA being the carrying out of assessable development without all necessary development permits being in effect for the development; and
 - (b) a development offence under section 165 of the PA by carrying out an unlawful use of premises.
3. The Council asserts in the Enforcement Notice that since in or about December 2018, the subject site has been used:
 - (a) to provide accommodation to persons in a manner constituting assessable development under the Bundaberg Regional Council Planning Scheme 2015 (the **planning scheme**);
 - (b) in contravention of section 163 of the PA;
 - (c) in contravention of section 165 of the PA.

The Appeal

4. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 5 September 2019.
5. The Appellant's Form 10 sets out the Appellant's grounds of appeal. In summary, the Appellant states that the property was purchased following the completion of a due diligence investigation, including contacting Council, and based on the information provided by the Council there was no indication as to any special concessions given to the original application.

Jurisdictional issue

6. In response to the Council being served with the Notice of Appeal on 29 August 2019 by the Appellant, the Council by letter dated 3 September 2019 from Michael Ellery, Group Manager Development, wrote to the Appellant advising that the Council is of the opinion that the Tribunal does not have jurisdiction to hear this matter. The Council correspondence stated that this view had been confirmed by the Council's solicitors but no legal advice or further detail was provided in support of the Council's view. The Council further invited the Appellant to relodge the appeal with the Court
7. As the Council has expressed the view that the Tribunal does not have jurisdiction to hear the Appeal, the Tribunal decided to request that the parties be invited to provide submissions on the jurisdiction of the Tribunal as a preliminary matter.
8. On 19 November 2019, the Tribunal made the following orders that were communicated by the Registry to the parties by email (**Orders**):

1. *The Council is to provide by email to the Registry and Appellant the reasons for why it submits that the Tribunal does not have jurisdiction to hear the Appeal by 4.00pm Wednesday 27 November 2019; and*
2. *The Appellant is to provide by email to the Registry and Council its response to the Council's submission and any other matters in relation to the jurisdiction of the Tribunal to hear the appeal by 4.00pm Thursday 5 December 2019.*

Submissions

9. On 25 November 2019, the Council by email to the Registrar from Michael Ellery provided its submission (**Council's Submission**). In summary, the Council submitted:
 - (a) the appeal does not meet the qualifying criteria in Table 3 of Schedule 1 (Appeals to a tribunal only) of the PA;
 - (b) the appeal does not meet the qualifying criteria in Table 1 of Schedule 1 (Appeals to the P&E Court and, for certain matters, to a tribunal) because, properly construed, two factors are required for an appeal to the tribunal pursuant to Table 1:
 - (i) the appeal needs to be about the matters mentioned in Table 1, which it is (item 6); and
 - (ii) the appeal needs to meet the qualification criteria in section 1(2)(a)-(l) which it does not.
10. On this basis, the Council expressed the view that the Tribunal does not have jurisdiction to hear the Appeal which should have been made to the Court.
11. On 5 December 2019, Bernie Kemps for the Appellant provided the Appellant's response to the Council's submission (**Appellant's Submission**).
12. In summary, the Appellant's Submission submitted that the Appeal does meet the qualification criteria set out in section 1(2)(h)(i) of Schedule 1 of the PA on the basis that sub paragraphs 1(2)(b) and/or (g) of Schedule 1 of the PA are engaged.
13. The Appellant further submitted that, as a self-represented litigant taking on a well-resourced Council, in respect of a matter that concerns a dwelling house, it is appropriate and a matter of public interest that this matter be determined in the comparatively lower cost and self-represented litigant friendly jurisdiction of the Tribunal.

Jurisdiction:

14. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.¹
15. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).
16. Section 1(2)(h)(i) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g).

¹ Section 229(1)(a) of the PA.

Decision Framework:

17. The Appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the Appeal is to be heard and determined under the PA.
18. This is an appeal by the Appellant, the recipient of the Enforcement Notice and accordingly, the Council, being the enforcement authority that gave the Enforcement Notice, must establish that the Appeal should be dismissed.²
19. The Tribunal is required to hear and decide the Appeal by way of a reconsideration of the evidence that was before the Council which decided to give the Enforcement Notice the subject of this appeal.³
20. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal⁴.
21. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person⁵.
22. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.⁶
23. The Tribunal may decide that the Tribunal has no jurisdiction to decide the tribunal proceedings.⁷ Otherwise, the Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
 - (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; or*
 - (e) *for a deemed refusal of an application:*
 - (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
 - (ii) *deciding the application.*

Material Considered:

24. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 5 September 2019.

² Section 253(3) of the PA.

³ Section 253(4) of the PA.

⁴ Section 253(5)(a) of the PA.

⁵ Section 249 of the PA.

⁶ Section 253 and section 246 of the PA.

⁷ Section 252(1) of the PA.

- (b) An email dated 19 November 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, requesting submissions from the parties on the jurisdiction of the Tribunal to hear the Appeal.
- (c) An email dated 25 November 2019 from Michael Ellery, Group Manager Development of Council to Jill Molloy, the Acting Registrar, Development Tribunals providing the Council's submission in relation to jurisdiction.
- (d) An email dated 5 December 2019 from Bernie Kemps on behalf of the Appellant to Jill Molloy, the Acting Registrar, Development Tribunals providing the Appellant's submission in relation to jurisdiction.
- (e) *Planning Act 2016 (PA)*.
- (f) *Building Act 1975 (BA)*.

Findings of Fact:

- 25. The Enforcement Notice alleges that development offences have been committed pursuant to section 163 of the PA in respect of carrying out assessable development without all necessary development permits being in effect and section 165 of the PA in respect of carrying out an unlawful use of premises.
- 26. At paragraphs 10 to 12 of the Enforcement Notice the Council summarises its belief that a material change of use that is assessable development under the Council's planning scheme has occurred and that there are no effective development permits for the material change of use nor any existing use rights.
- 27. The Enforcement Notice thus deals with the use of the subject site under the Council's planning scheme.
- 28. Under section 1(2)(h) of Schedule 1 of the PA, the Tribunal has jurisdiction to hear the Appeal if the Enforcement Notice is in relation to a matter under paragraphs (a) to (g) of section 1(2).
- 29. Having regard to each of paragraphs (a) to (g) in turn:
 - (a) paragraph (a) applies to a refusal, or deemed refusal of a development application for a material change of use for a classified building, or certain operational work;
 - (b) paragraph (b) applies to a development approval for a material change of use for a classified building, or certain operational work associated with building work;
 - (c) paragraph (c) applies if a development permit was applied for—the decision to give a preliminary approval for—a material change of use for a classified building , or certain operation work;
 - (d) paragraph (d) applies to a development condition if the development approval is only for a material change of use that involves the use of a building classified under the Building Code as a class 2 building;
 - (e) paragraph (e) applies to a decision for, or a deemed refusal of, an extension application for a development approval that is only for a material change of use of a classified building;
 - (f) paragraph (f) applies to a decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use of a classified building;

- (g) paragraph (g) applies to a matter under the PA, to the extent the matter relates to the Building Act, other than a matter that may or must be decided by the Queensland Building and Construction Commission (**QBCC**).
30. Section 248(5) of the BA, relevantly provides that an enforcement notice given under that section is taken to be an enforcement notice given under section 168 of the PA.
31. The Council notes at paragraph 3 of the Enforcement Notice that the subject site has the benefit of a building development approval for a Class 1b Building for the purpose of a Community Residence and temporary accommodation for persons escaping domestic violence (maximum 5 occupants) given on 15 December 2008 (**Building Development Approval**).⁸

Reasons for the Decision:

32. The Council has submitted that the Enforcement Notice does not satisfy any of the criteria contained in paragraphs (a) to (g) of section 1(2) of Schedule 1 of the PA but has not provided any analysis or explanation in support of its view.
33. The Appellant, in contrast, has submitted that paragraphs (b) and/or (g) of section 1(2) of Schedule 1 of the PA are engaged.
34. As set out in the Appellant's Submission, the following grounds are put forward as to why the Tribunal has jurisdiction to decide the Appeal:
- (a) the building on the subject site is a "classified building" under the PA;
 - (b) the decision to give the Enforcement Notice is based on the grounds set out in the Enforcement Notice, including that the subject site has the benefit of the Building Development Approval which is for a classified building;
 - (c) in considering whether to give the Enforcement Notice, the Council was required to give consideration as to whether use is compliant with the Building Development Approval;
 - (d) the Council's decision therefore concerns a provision of a development approval for a material change of use for a classified building and matters under the PA that relate to the BA.
35. The Appellant further submitted that, as a self-represented litigant, it was in the public interest that this matter should be determined by the Tribunal.
36. As noted above, paragraph 1(2)(b) of Schedule 1 of the PA applies to a development approval for a material change of use for a classified building, or certain operational work associated with building work, and paragraph 1(2)(g) applies to a matter under the PA, to the extent the matter relates to the BA, other than a matter that may or must be decided by the QBCC.
37. In relation to paragraph 1(2)(b) of Schedule 1 of the PA, the Enforcement Notice at paragraph 3 states that the subject site has the benefit of "building development approval for a Class 1b Building" which is a "classified building" as defined under the PA.

⁸ A copy of the Building Development Approval is attached to the Appellant's Form 10 as Annex C.

38. This Building Development Approval is however an approval under the BA for building work and is not a development approval for a material change of use for a classified building or operational work associated with building work.
39. While the decision notice and certificate of classification⁹ issued in relation to the Building Development Approval refer to a "change of use", this is in the context of a change of classification of the building and not a material change of use of premises.
40. The "Development Application Decision Notice Approval" dated 15 December 2008 is clear that the approval is only in relation to building work.
41. Further, the Enforcement Notice does not itself relate to the Building Development Approval and does not allege any non-compliance with the Building Development Approval. Rather, the Enforcement Notice merely notes the existence of the Building Development Approval which the Council submits does not authorise the existing use of the subject site.
42. In other words, the Enforcement Notice does not allege that the current use of the subject site is non-compliant with the provisions of the Building Development Approval but that the alleged unlawful use is altogether a different use outside of the scope of the Building Development Approval and that the Building Development Approval is not relevant to the lawfulness of the current use.
43. The Tribunal therefore considers that paragraph 1(2)(b) of Schedule 1 of the PA is not engaged in these circumstances.
44. In relation to paragraph 1(2)(g), this concerns a matter under the PA, to the extent it relates to the BA. While the subject site has the benefit of the Building Development Approval, the concern of the Council which has given rise to the Enforcement Notice is that the current use of the subject site is assessable development under the Council's planning scheme and is not authorised by a valid development permit.
45. The Enforcement Notice therefore deals with the use of the subject site under the Council's planning scheme and does not concern a matter that relates to the BA.
46. The Tribunal therefore considers that paragraph 1(2)(g) of Schedule 1 of the PA is not engaged.
47. The Tribunal finds that the decision to give the Enforcement Notice is not in relation to a matter under paragraphs 1(2)(a) to (g) of Schedule 1 of the PA and therefore does not satisfy section 1(2)(h) of Schedule 1 of the PA.
48. Further, the Tribunal's jurisdiction is defined by the terms of the PA and the Tribunal has no discretion to hear a matter that is not within the Tribunal's statutory jurisdiction.
49. Accordingly, the Tribunal decides pursuant to section 252 of the PA that it has no jurisdiction to hear the Appeal.

⁹ A copy of the certificate of classification is attached to the Appellant's Form 10 as Annex D.

Stafford Hopewell

Development Tribunal Chair
Date: 13 February 2020