



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	24-023
Appellant:	Aaron and Melissa Peters
Respondent:	Scenic Rim Regional Council
Site address:	135-137 Prosperity Drive, Boyland Qld 4275 and described as Lot 46 on SP152913

Appeal

Appeal under Schedule 1, table 1, item 6 of the *Planning Act* regarding an Enforcement Notice dated 9 April 2024 issued pursuant to section 248 of *Building Act 1975* by the Scenic Rim Regional Council ('**Enforcement Notice**'), on grounds of compassion and Articles 3 and 8 of the *Human Rights Act*.

Date and time of hearing:	Not applicable
Place of hearing:	On the papers
Tribunal:	Ross Williams —Chair Don Grehan —Member Mike Pickering —Member

Decision:

The Development Tribunal ('**Tribunal**'), in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) upholds the decision of the Scenic Rim Regional Council to issue the Enforcement Notice.

For the reasons set out in paragraphs [19]-[33] the appeal is dismissed.

Background

1. This appeal concerns an Enforcement Notice issued under section 248 of the *Building Act 1975* (Qld) by the Scenic Rim Regional Council ('**Council**') to Aaron and Melissa Peters ('**the Appellants**') on 9 April 2024.
2. By their notice of appeal, the Appellants argue that:
 - (a) they purchased the property at 135-137 Prosperity Drive, Boyland, Queensland (the '**Property**') in July 2023;
 - (b) there are two buildings located on the Property. Building One is a class 10a shed and Building Two is a relocatable container building;

- (c) they seek to occupy the class 10a shed until completion of their class 1a structure;
 - (d) they have demonstrated a willingness to proceed with building the class 1a structure;
 - (e) they will be homeless if they comply with the Enforcement Notice and cease occupation of the class 10a shed; and
 - (f) they appeal the Enforcement Notice on compassionate and human rights grounds.
3. By way of the Enforcement Notice, Council alleges that:
- (a) no building approval has been given for Building One or Building Two to be used as a class 1a house or dwelling of a domestic or residential nature;
 - (b) there is no building approval or Form 21 to demonstrate that either building satisfies the performance provisions of the National Construction Code; and
 - (c) pursuant to the National Construction Code and Bush Fire Hazard Code of the *Scenic Rim Planning Scheme 2020*, the Property is in a high-risk bushfire hazard area and does not meet the relevant construction requirements or water tank specifications.

Jurisdiction

- 4. The appeal is within the jurisdiction of the Tribunal.
- 5. The Enforcement Notice the subject of these proceedings was issued under section 248 of the *Building Act*.
- 6. Pursuant to section 250 of the *Building Act*, a person who is given an Enforcement Notice under section 248 may appeal to the Tribunal as if the appeal were an appeal under the PA.
- 7. Table 1 of Schedule 1 of the PA states that an appeal may be made against the decision to give an Enforcement Notice.
- 8. Schedule 1, section (1)(2)(h) of the PA states that Table 1 applies to a tribunal if the matter involves a decision to give an Enforcement Notice in relation to a matter under paragraphs (a) to (g). Here, the Enforcement Notice relates to a matter under the *Building Act*.
- 9. Pursuant to Schedule 1, (1)(2)(g) a relevant matter includes a matter relating to the *Building Act*, other than a matter that may be decided by the Queensland Building and Construction Commission.
- 10. Accordingly, Table 1 of Schedule 1 applies, and the Tribunal has jurisdiction to hear an appeal against the decision to give an Enforcement Notice.

Decision framework

- 11. Generally, the appellant bears the onus of proof to establish the appeal should be upheld.
- 12. However, for an appeal by the recipient of an Enforcement Notice, the authority that gave the Enforcement Notice must establish that the appeal should be dismissed pursuant to s253(3) of the PA. Here, the Council bears the onus to establish the appeal should be dismissed.
- 13. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against pursuant to section 253(4) of the PA.

14. The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings).
15. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Material considered

16. The material considered in arriving at this decision was:
 - (a) the Form 10 Notice of Appeal, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals registrar on 3 April 2024.
 - (b) written submissions from the Appellants;
 - (c) the Enforcement Notice and accompanying letter issued by the Council on 9 April 2024;
 - (d) The *Planning Act 2016*;
 - (e) The *Scenic Rim Planning Scheme*;
 - (f) The National Construction Code;
 - (g) The *Human Rights Act 2019* and
 - (h) The *Building Act 1975*.

Further submissions and material from Council not required

17. The Appellants provided a fulsome submission. The Council has not provided any submission in relation to the appeal. Here, no further submission from the Council is required as the Enforcement Notice was sufficient to outline the position of the Council. Due to the adequate materials outlining the position of each party, it was appropriate to decide the appeal on the papers.

Findings of fact

18. The Tribunal makes the following findings of fact:
 - (a) The Appellants purchased the Property in July 2023;
 - (b) There are two buildings located on the Property;
 - (c) Building One is a class 10a shed and Building Two is a relocatable container building;
 - (d) Building One was approved for development in 2008 for use as a shed by the previous owner;
 - (e) The previous owner had intended to occupy the class 10a shed while a class 1a property was built;
 - (f) The class 1a building was never built. Instead, the Property was sold to a subsequent owner who continued to occupy the class 10a shed until selling the Property to the Appellants in 2023;
 - (g) Building Two, which the Appellants have expressed an intention to sell, was placed at the premises in July or August 2021;
 - (h) On 18 December 2023, the Appellants were given a show cause notice by the Council as there is no building approval or Form 21 to demonstrate that either

Building One or Building Two of the Property satisfies the performance provisions of the National Construction Code;

- (i) On 9 April 2024, the Appellants received an Enforcement Notice from the Council due to an alleged contravention of the section 248 of the *Building Act*;
- (j) The Council submit that the Property is located in a high-risk bushfire hazard area and as such, pursuant to the National Construction Code and Bush Fire Hazard Code of the *Scenic Rim Planning Scheme 2020*:
 - i. Class 1a (occupied) buildings at the Property must be constructed out of a steel frame; and
 - ii. the Property must meet water tank specifications.
- (k) The water tank is constructed from polyethylene, which is not compliant with the *Scenic Rim Planning Scheme*;
- (l) Additionally, there is no hardstand area (concrete or gravel) to allow a medium rigid vehicle within 6 metres of the water tank;
- (m) The Appellants engaged Max Bushfire Protection to conduct a bushfire hazard assessment management plan in January 2024 however, the scope of the report was to evaluate the proposed class 1a development and does not affect the current risk to the Property;
- (n) Pursuant to the Enforcement Notice, the Council requires the Appellants to:
 - i. immediately cease using Building One for habitable purposes;
 - ii. immediately cease using Building Two for habitable purposes;
 - iii. demolish or remove Building Two from the premises by 31 July 2024; and
 - iv. lodge a development application with a private building certifier for the building works with respect to Building One by 13 September 2024,
- (o) The Appellants seek to occupy Building One (class 10a shed) while their class 1a structure is completed;
- (p) By way of demonstrating their willingness to proceed with building the class 1a structure, the Appellants submit that:
 - i. design plans are completed;
 - ii. construction drawings are being finalised;
 - iii. a certifier has been engaged for the class 1a structure and Class 10a existing structure;
 - iv. fire assessment has been carried out;
 - v. soil tests have been carried out;
 - vi. an energy efficiency certifier was anticipated to complete works on 13 May 2024;
 - vii. an effluent site inspection was anticipated to occur on 7 May 2024;
 - viii. a site survey was anticipated to occur on 13 May 2024.

- (q) A person who is given an Enforcement Notice under s 248 of the *Building Act* may appeal to the Development Tribunal as if the appeal were an appeal under the *Planning Act*;
- (r) The Tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.

Reasons for the decision

- 19. The Tribunal has determined that we have jurisdiction to hear the appeal.
- 20. We have decided to uphold the decision of the Council in issuing the Enforcement Notice to the Appellants.
- 21. In relation to the factual scenario, the Appellants submit, and the Tribunal accepts that:
 - (a) the Appellants purchased the Property in July 2023 which contains two buildings (one of which is a class 10a shed where the Appellants currently reside);
 - (b) on 18 December 2023, the Appellants were given a show cause notice by the Council as neither building had approval or a Form 21 to demonstrate compliance with the performance provisions of the National Construction Code. Additionally, the Property is located within a high-risk bushfire hazard area and has not satisfied the Bush Fire Hazard Code of the Scenic Rim Regional Council;
 - (c) on 9 April 2024, the Appellants received an Enforcement Notice from the Council;
 - (d) the Appellants wish to remain in their class 10a shed until they finalise construction of a class 1a property;
 - (e) the Appellants have made progress with their plans to construct a class 1a property, however, the current actions of the Appellants do not comply with the Enforcement Notice.
 - (f) the Appellants argue that notwithstanding the Enforcement Notice, they should be able to remain at the Property, residing in the class 10a shed until their class 1a property is built.
- 22. The Appellants seek an appeal in relation to the Enforcement Notice based on the grounds of:
 - (a) human rights;
 - (b) compassion; and
 - (c) fairness (with respect to the argument that the Enforcement Notice is a targeted attack).
- 23. The Tribunal agrees that decision makers in Queensland are bound by the *Human Rights Act 2019* (Qld) ('**Human Rights Act**') and because the function of the Tribunal is of a public nature, it is likely the Tribunal is bound by the *Human Rights Act*.
- 24. All individuals in Queensland have human rights which accordingly includes the Appellants.
- 25. Human rights need to be balanced against the rights of others and the broader community. Human rights may be subject to reasonable limits that can be demonstrably justified in a free and democratic society.
- 26. In considering whether a human right should be limited, the *Human Rights Act* lists factors which may be relevant, including:

- (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; and
 - (d) the importance of the purpose of the limitation.
27. We consider that a primary object of the Enforcement Notice is to mitigate the risk to the Appellants due to the Property's location in a high-risk bushfire area. Additionally, the Enforcement Notice mitigates risk to all people in neighbouring properties and the wider bushland area.
28. Pursuant to the *Scenic Rim Planning Scheme 2020 (Scheme)*, the purpose of the Scheme is to ensure development is designed and located to minimise risk to people and property from bushfires.
29. Pursuant to the Bushfire Hazard Overlay Code, contained within the Scheme, buildings within the hazard area need to be designed, located, and managed to ensure the risk to the safety of people and damage to property is mitigated to an acceptable level.
30. The Bushfire Assessment Report provided by the Appellants addresses the risks to the Property and makes recommendations for future developments; it does not demonstrate the mitigation of any current risks to the property, nor does it respond to the particulars on which the Enforcement Notice is based.
31. The purpose of the Enforcement Notice is to mitigate the risk to life and to property. The requirements of the enforcement notice achieve this purpose. Accordingly, the Enforcement Notice is a reasonable and justifiable limit on the Appellants' human rights and is consistent with a free and democratic society.
32. The Appellants also argue that previous owners of the Property occupied the Buildings for years without attracting the scrutiny of the Council. Additionally, that there are multiple non-compliant buildings within the region which do not appear to be the subject of an Enforcement Notice. The Appellants argue that the actions of the Council and surrounding circumstances amount to a targeted attack. The Tribunal considers that these arguments do not invalidate the Enforcement Notice as it is a stand-alone document relevant to the Property in question. The Tribunal considers that once issued, compliance with the Enforcement Notice should be assessed on its face.
33. We have determined that there is no scope to change or set aside the decision to issue the Enforcement Notice on human rights, compassionate or fairness grounds. Accordingly, the appeal fails.

Ross Williams
Development Tribunal Chair

Date: 26 July 2024

Appeal rights

Schedule 1, Table 2, item 1 of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

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, Local Government, Planning and Public Works
GPO Box 2457
Brisbane Qld 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au