Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**20-033**
Appellant:	Balaclava Park Pty Ltd ACN 060 488 011
Respondent (Assessment Manager):	Noosa Shire Council
Site Address:	Hilton Park 6/80-86 Hilton Terrace, Noosaville (Lot 1 on RP104599 and Lot 2 on MCH3930)

Appeal

Appeal against the refusal by Council as assessment manager of an application for a minor change to an existing unit (in an approved group of multiple dwelling units), where the gross floor area is to increase by less than 2%.

Date and time of hearing:	
Place of hearing:	The subject site
Tribunal:	Wendy Evans – Chair Andrew Montgomery - Member
Present:	Luke Owen-Jones – Appellant's representative Kerri Coyle – Council representative The Owners

Decision:

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

In accordance with section 252 of the *Planning Act 2016*, the parties are advised that any period for starting proceedings in the Planning and Environment Court, for a matter that is the subject of the tribunal proceedings, starts again when this decision notice is given to the Appellant.

Background:

1. On or about 26 August 2020, an application was received by the Noosa Council, requesting a minor change to an existing development approval. The request was accompanied by DA Form 1, DA Form 2 and the Change Application Form.

2. The EarthCert material that described the changes sought, described it comprising an extension (to be carried out under the existing roof line) to an existing class 1a unit (in a complex of ten multiple dwelling units), where the total GFA for the unit would be increased from 1,029.4m2 to 1,044.4m2 (i.e. 15m2). This represents a change of less than 2% in gross floor area.

3. The Tribunal was not provided with a copy of the original decision notice the subject of the change request. Based on Council's material (namely the Council's officer report), the change request was processed as a request to change the development approval for the unit complex (which according to Council's officer report, was issued as a development permit for a material change of use (multiple dwelling units) in 1998).

4. The extent of change was questioned by the Tribunal member at the hearing, although where there is now a finding of no jurisdiction, it is not for this Tribunal to further consider the merits of the case.

5. By decision notice dated 12 October 2020, Noosa Council notified of its decision to refuse the requested changes for the following reasons:

    a. The proposal does not comply with Performance outcome PO11 of the Medium Density Zone code in Noosa Plan 2020 and will result in:

        i. Increased bulk and scale;
        ii. A decrease of private open space for Unit 6; and
        iii. A reduction in the extent of landscaping provided for the site.

    b. The proposed changes will reduce the private open space of Unit 6 and the extent of landscaping on site.

6. At the hearing of this matter, the Council and the Tribunal learnt for the first time, that the changes the subject of this appeal, had already been undertaken and were complete.

Material Considered

7. 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 Tribunals Registrar and dated 26 October 2020.

    b) Six page written submission provided by Ms Kerri Coyle (authored by Lisa Pienaar), on behalf of the Council at the hearing.

    c) Email and materials provided by Ms Kerri Coyle to the Registrar on 7 May 2021.

    d) Email provided by Mr Luke Jones to the Registrar on 7 May 2021.

    e) Email provided by Kerri Coyle to The Registrar on 10 May 2021.

    f) Tribunal directions email sent to the Parties on 10 June 2021.

    g) Email from Kerri Coyle to The Registrar on 21 June 2021 including copy of the building classification PDF.

    h) Email from Kerri Coyle to the Registrar requesting a 10 day extension to further expand on response to directions issued 10 June 2021.

    i) Email from Luke Jones to Simon Hart (Manger of Development Tribunals) Requesting a two week extension to respond to Directions issued 10 June 2021.

    j) Letter from Cleary Hoare solicitors to Simon Hart (Manger of Development Tribunals) dated 25 June 2021.

k) Email from Cleary Hoare solicitors to Simon Hart (Manger of Development Tribunals) dated 28 June 2021.

l) Tribunal directions email sent to the Parties on 28 June 2021 to allow further submissions.

m) Email and materials provided by Ms Kerri Coyle to the Registrar on 1 July 2021.

n) Letter from Cleary Hoare solicitors to the Registrar (Development Tribunals) dated 7 July 2021.

o) Email and materials provided by Mr Luke Owen-Jones to the Registrar (Development Tribunals) dated 28 July 2021.

Findings of Fact

8. The only finding of fact relevant to the decision made here, is that the group of multiple dwelling units, the subject of the relevant decision notice in dispute here, is classified as a class 2 building (see the Certificate of Classification dated 11 April 2000, provided in the email from Ms Kerri Coyle to the Registrar on 1 July 2021, and Survey Plan 120741 for Lots 1 – 10 and common property).

9. No material has been provided by the Appellant, to contradict this evidence provided by the Council, and indeed – the Appellant's solicitors accept this classification (see the Cleary Hoare letter).

10. The finding that the subject development is a class 2 building, means that it cannot constitute a 'classified building' under the *Planning Act 2016*.

11. A 'classified building' under the *Planning Act 2016* means "*a building classified under the Building code* as:

    a. A class 1 building; or

    b. A class 10 building, other than a building that is incidental to or subordinate to the use, or proposed use, of a building classified under the Building Code as a class 2, 3, 4, 5, 6, 7, 8 or 9 building."

Jurisdiction

12. Section 251 of the *Planning Act 2016* confirms that the tribunal may consider matters about a development application or change application, or applications or requests under either the *Building Act 1975* or the *Plumbing and Drainage Act 2018* (in certain instances).

13. Section 229 of the *Planning Act 2016* confirms that Schedule 1 to the *Planning Act 2016* states matters that may be appealed to the tribunal and/or the Planning and Environment Court.

14. Table 1 to Schedule 1 states the matters that may be appealed to the Planning and Environment Court or the tribunal. However, there are limitations as to when Table 1 applies in terms of the tribunal.

15. Table 2 to Schedule 1 states matters that may only be appealed to the Planning and Environment Court. That is not relevant here.

16. Table 3 to Schedule 1 states matters that may be appealed only to the tribunal. It is not in dispute that Table 3 is also not relevant here.

17. It is not in dispute that the heads of power set in Schedule 1, section 1(2) (a)-(e) and (h)-(l) of the *Planning Act 2016* inclusive, are not relevant here.

18. The question as to jurisdiction is limited then to whether the appeal is either:

Schedule 1, section 1(2)(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
Schedule 1, section 1(2)(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.

Schedule 1, section 1(2)(f)

19. In terms of Schedule 1, section 1(2)(f), based on the finding of fact made in this matter, that the development the subject of this appeal is a class 2 building (see findings of fact section below) – the use is not a 'classified building'.

20. The Tribunal does not accept the argument of the Appellant, to the effect that the word "only" in Schedule 1, section 1(2)(f) of the *Planning Act 2016*, ought simply attach to the 'material change of use', as opposed to the 'classified building'. In expressing this submission, the solicitors for the Appellant were not prepared to concede that the classification of the building as a class 2 building, was all that relevant to the point in issue (paragraph 2.7 of the Cleary Hoare letter).

21. The Cleary Hoare letter advised that:

> *3.8 At first glance, the section [1(2)(f) of the Planning Act 2016] may be thought to confer jurisdiction on a tribunal to hear an appeal for a decision for a change application only for a minor change application concerning a classified building and not a decision with respect to a minor change application.*
>
> *3.9 Adopting such an interpretation begs the question of whether, in the less expensive more accessible appeal regime process contemplated by the Planning Act, it was intended by the legislature to remove the right to appeal to a tribunal in the case of minor changes.*
>
> *3.10 However, this apparent anomaly does not arise if "only" in section 1(2)(f) is interpreted as being directed to limiting the scope of jurisdiction in material change matters to those involving classified buildings rather than minor change applications per se.*
>
> *3.11 The Council maintains that a tribunal cannot decide our client's appeal because, whilst it concerns a minor change application, it involves a class 2 building and therefore, falls outside the parameters of section 1(2)(f) in that it is only a material change application concerning a classified building that can be considered. However, applying such an approach would also see a tribunal prevented from deciding a minor change application even in respect of a classified building – surely an unintended and inexplicable outcome.*

3.12 Allowing a tribunal decision-making power in relation to material change matters and not minor change matters could be described as absurd and unreasonable and going against the above-mentioned purposes of the Planning Act for an efficient and effective system to the effect that the dispute resolution system is to be fair, accessible and reasonable.

22. With respect, this tribunal considers these submissions to be somewhat confused.

23. Schedule 1, section 1(2) of the *Planning Act 2016* confirms that table 1 to the Schedule "applies to a tribunal only if the matter involves" one of eleven listed provisions.

24. Schedule 1, section 1(3) of the *Planning Act 2016* further limits the jurisdiction of a tribunal to hear appeals, if the matter involves:

(a) For a matter in subsection [Schedule 1, section 1] (*2)(a) – (d):*

i. A development approval for which the development application required impact assessment; and

ii. A development approval in relation to which the assessment manager received a properly made submission for the development application; or

(b) A provision of a development approval about the identification or inclusion, under a variation approval, of a matter for the development.

25. It is clear that the jurisdiction of the tribunal to hear appeals, is deliberately more limited, than that otherwise created for the Planning and Environment Court.

26. What Schedule 1, section 1(2)(f) of the *Planning Act 2016* literally says is "*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*".

27. The earlier provisions of section 1(2), reiterate the focus on the classification of the building, or nature of the work, the subject of the jurisdictional power:

a. Schedule 1, section 2(a) concerns certain refusals or deemed refusals for a material change of use for a **classified building** (or operational work associated with building work, a retaining wall or tennis court);

b. Schedule 1, section 2(b) concerns a provision of a development approval for a material change of use for a **classified building** (or operational work associated with building work, a retaining wall or tennis court);

c. Schedule 1, section 2(c) concerns a decision to give a preliminary approval (in lieu of a development permit) for a material change of use for a **classified building** (or operational work associated with building work, a retaining wall or tennis court);

d. Schedule 1, section 2(d) concerns a development condition if, the building concerned is a **class 2 building** and it is for not more than 3 storeys and for not more than 60 sole-occupancy units;

e. Schedule 1, section 2(e) concerns 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**. (emphasis added)

28. The suggestion by the Appellant that the classification of the building is not determinative in the application of Schedule 1, section 1(2)(f) of the *Planning Act 2016*, clearly must fail. Firstly on the basis that the words are not ambiguous, and its literal interpretation calls for their

primacy. Secondly, because if the argument that the classification is not determinative in reading this provision were allowed, application of the same approach to the preceding sections would exponentially broaden the jurisdiction of the tribunal to hear appeals.

29. Not that anything turns on it here, it is worth confirming that there is no restriction in Schedule 1, section 1(2)(f) of the *Planning Act 2016* to minor changes only. The provision deals with 'a change application', which is defined in the *Planning Act 2016* with recourse back to section 78(1), which simply says "*a person may make an application (a change application) to change a development approval*". The sections that follow cover **both** 'minor change' and 'other changes'.

30. Where the building the subject of the change application is not a 'classified building', there is no head of power under Schedule 1 section 1(2)(f) of the *Planning Act 2016* for this tribunal to hear this appeal.

Schedule 1, section 1(2)(g)

31. This head of appeal power to the tribunal is for "*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*."

32. The types of matters that may or must be decided by the Queensland Building and Construction Commission are really different from those that the Planning and Environment Court or indeed this tribunal, would ordinarily be exposed to. They go to matters such as licencing and conduct of building certifiers (see section 133 of the *Building Act 1975*).

33. There is no question, that a local government's decision about a request to change an existing development permit for a material change of use, can be dealt with by the tribunal – where, as detailed above, the building concerned is a 'classified building'. It is the specific and clearly defined instance where this tribunal can hear appeals of this type. The Planning and Environment Court has jurisdiction to hear appeals going to a local government's decision about a request to change an existing development permit for a material change of use, without the restriction of the building needing to be a 'classified building' (see Table 1, Item 2 of the *Planning Act 2016*).

34. For this jurisdictional limb to apply, it has to be that the appeal relates to "*a matter under this Act* [the Planning Act]*, to the extent the matter relates to the Building Act".* This appeal concerns a meritorious change request, to an existing material change of use approval. It has been refused on grounds going to compliance with the local government planning scheme, by the local government as assessment manager. It is necessary to consider whether or not the individual parts of the scheme which have been relied upon here, go to matters that relate to the *Building Act 1975*.

35. Section 8(5) of the *Planning Act 2016* confirms that a local planning instrument must not include a provision about building work, to the extent it is regulated under the building assessment provisions (see section 30 of the *Building Act 1975*), unless allowed under the *Building Act 1975*. That is – the extent to which a local government planning scheme can regulate building work matters that are ordinarily matters which relate to the *Building Act 1975*, are deliberately limited at law.

36. The Sunshine Coast Planning Scheme 2014 makes it very clear in section 1.6, which elements of building work it regulates, within the confines of what is allowed by the *Building Act 1975*. The Medium Density Zone Code (under which this change application was assessed and refused), is not identified in section 1.6 of the Sunshine Coast Planning Scheme 2014. Nor do any provisions going to reason for refusal (b), going to the reduction of private open space and landscaping feature in section 1.6 of the Sunshine Coast

Planning Scheme 2014 (which is entirely correct, given these matters are not matters which relate to the *Building Act 1975*).

37. For this reason, this appeal cannot be dealt with under Schedule 1, section 1(2)(g) of the *Planning Act 2016*.

Wendy Evans

Development Tribunal Chair
Date: 29 July 2021

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
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