



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-012
Appellant:	Barry Allen
Enforcement Authority:	Cairns Regional Council (“Council”)
Site Address:	29-31 Zanzoo Close, Redlynch, formally described as Lot 6 on RP744005 (‘the subject site’)

Appeal

Appeal under section 229 and schedule 1, sections 1(1)(b) and 1(2)(h), and table 1, item 6, of the *Planning Act 2016* (“the PA”) against the enforcement authority’s decision to give an enforcement notice under section 168 of the PA, in relation to an alleged development offence committed by the appellant, in the form of the carrying out of assessable development without all necessary development permits.

Date and time of site inspection (by the chairperson only):	Friday 11 June 2021 at 11:00am
Date and Time of Hearing:	By video conference – Tuesday, 29 June 2021 at 11:00am
Tribunal:	Neil de Bruyn – Chairperson Suzanne Bosanquet – Member Mark Chapple – Member
Present (at inspection):	Barry Allen – appellant Keanu Johnston – Council Representative Ben Santagiuliana – Council Representative
Present (at hearing):	Barry Allen – appellant Keanu Johnston – Council Representative Ben Santagiuliana – Council Representative Sterling Beal – Council Representative Teneille MacKee – Council Representative

Decision:

The Development Tribunal (‘the tribunal’), in accordance with section 254(2)(c) of the *Planning Act 2016* (‘the PA’), **replaces** the decision of the enforcement authority to give an enforcement notice with a decision to not give an enforcement notice and to set the enforcement notice aside.

Background:

1. This appeal, Appeal 21-012, has been heard together with Appeal 21-013, a related appeal (“the related appeal”) by the appellant against an assessment manager’s refusal of an application for a building works development permit for a substantially similar structure to that the subject of this appeal.
2. The appellant has erected a Class 10a structure (“the structure”) on the subject site, in the form of two vertical shade sails attached to two metal posts and an existing palm tree. The structure is located adjacent to a part of the eastern side boundary (“the boundary”) of the subject site, which is a common boundary with the adjoining Lot 7 on RP744005 (33-35 Zanzoo Close) (“Lot 7”). This structure is located towards the rear of the relevant boundary and roughly adjacent to an existing dwelling within Lot 7.
3. Based on plans of the structure (forming part of the material submitted for the related appeal), the structure currently consists of:
 - Two 90mm x 5mm metal posts, each 5.5m in height above ground level and with 1.6m deep, 450mm diameter concrete footings, each set back 1.4m from the boundary;
 - a 450mm diameter palm tree, forming a third supporting element of the structure; and
 - two 5m wide x 3.5m high shade sails extending between, and attached to, the three above-mentioned supporting elements.
4. Following receipt of information (from an unnamed source), Council investigated and identified the existence of the structure. Council duly issued two “unapproved structure notices” on 29 June 2020 and 8 October 2020, directing the appellant to take the necessary steps to obtain a building works development permit for the structure from a private building certifier. As at 4 December 2020, a private building certifier had not been engaged to receive and assess a building works application, and Council duly issued a show cause notice pursuant to section 167 of the PA on the same date. According to the verbal submissions of the parties during the hearing, the appellant did not respond to the show cause notice.
5. According to the evidence before the tribunal in relation to the related appeal, the appellant lodged a building application on, or shortly before, 5 January 2021, being the date of the assessment manager’s confirmation notice. Similarly, it appears from that evidence that the building works application was referred to Council as a concurrence agency for design and siting on the same date (5 January 2021).
6. Notwithstanding the lodgement and subsequent referral of the above-mentioned building works application, Council issued an enforcement notice pursuant to section 168(1) of the PA on 18 February 2021. The enforcement notice alleges that the appellant had committed an offence against section 163(1) of the PA, by carrying out assessable development without all necessary development permits being in effect for the development. The enforcement notice referred to the development as being in the form of a “shade sail structure ... erected adjacent to the boundary fence without an approval.”
7. The enforcement notice goes on to outline the history of the matter, as summarised in Paragraph 4 above, and required the appellant to “remove the structure until the relevant approvals have been obtained.”
8. The appellant lodged this appeal on 15 March 2021, essentially on the following grounds:
 - a) The enforcement notice was issued after the appellant had made application for a building approval for the structure, and after the application had been referred to Council in relation to the siting of the development.

- b) An appeal against the enforcement notice was necessary in order to put a stay on the action required by the enforcement notice until such time as the related appeal against the refusal of the building works application has been decided.

Jurisdiction:

9. Section 229(1) of the PA provides that Schedule 1 (“the schedule”) of the PA states the matters that may be appealed to a tribunal.
10. Section 1(1)(b) of the schedule provides that the matters stated in Table 1 of the schedule (“Table 1”) are the matters that may be appealed to a tribunal. However, section 1(2) of the schedule provides that Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in section 1(2).
11. Section 1(2)(h) provides that Table 1 applies to a tribunal if the matter involves a decision to give an enforcement notice in relation to a matter stated in paragraphs (a) to (g) of the list set out under section 1(2). Paragraph (g) provides that Table 1 applies to a tribunal if the matter involves a matter under the PA, to the extent the matter relates to the Building Act 1975, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission.
12. Table 1 thus applies to the tribunal in this appeal. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision Framework:

13. For this appeal, the onus rests on the enforcement authority to establish that the appeal should be dismissed (section 253(3) of PA).
14. 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 (section 253(4) of PA); however, 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 PA.
15. The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA and the tribunal’s decision takes the place of the decision appealed against (section 254(4)).

Material Considered:

16. The following material has been considered by the tribunal in this appeal:
- a) ‘Form 10 – Notice of Appeal’ lodged by the appellant with the tribunal’s registrar on 15 March 2021, including:
- i. The appellant’s grounds for appeal (“grounds for appeal”); and
 - ii. a copy of the Cairns Regional Council letter of 18 February 2021, enclosing the enforcement notice of the same date.
- b) Certain material submitted for the related appeal, being:
- i. The assessment manager’s (Mr Rodney Byl of The Building Approval Company (“TBAC”)) confirmation notice dated 5 January 2021, for a building works application made for the structure;
 - ii. the assessment manager’s correspondence of 5 January 2021, referring the above-mentioned application to Council as a concurrence agency;

- iii. a plan showing the structure in the same form as described in Paragraph 3 above and in substantially the same, if not the same, form as observed by the chairperson at the inspection; and
 - iv. photographs of the existing structure.
- c) Photographs taken by the chairperson at the inspection on 11 June 2021, of the structure and surrounds.
- d) The *Planning Act 2016* and *Planning Regulation 2017*.

Findings of Fact:

17. In section 2 (Details of Offence) of the enforcement notice, the alleged offence is given the description: "Pursuant to Section 163(1) of the Planning Act 2016, a person must not carry out assessable development unless all necessary development permits are in effect for the development".
18. The enforcement notice states that council officers investigated a shade sail structure erected adjacent to the boundary without an approval, but does not state the result of the investigation nor describe the structure alleged to exist in contravention of the PA, section 163(1). Although, on the face of the enforcement notice, there is possible ambiguity about "the nature of the alleged offence," which is required by section 168(3) to be stated, the tribunal finds that it was understood by all parties that it related to the erection of the shade sail structure near the eastern boundary of the subject site, and as described in paragraphs 2 and 3 above.
19. Section 4 of the enforcement notice (Details of Required Action) requires the following action by the appellant:
- "1. Remove the Structure until the relevant approvals have been obtained"
20. Section 168(4) of the PA provides that an enforcement notice may require demolition or removal of all or part of works, if the enforcement authority reasonably believes it is not possible or practical to take steps:
- a) to make the development accepted development; or
 - b) to make the works comply with a development approval; or
 - c) if the works are dangerous—to remove the danger.
21. The enforcement notice does not state that, nor were any submissions made at the hearing to establish that, the enforcement authority reasonably believed that it was not possible or practical to take steps to make the structure accepted development, or to comply with a development approval, or that the structure was dangerous. In the circumstances, the tribunal finds that, pursuant to section 168(4), the enforcement authority did not have the power to decide to give an enforcement notice requiring the "removal of the structure"
22. Section 169 of the PA provides as follows:
- 1) *This section applies if a private certifier is engaged in relation to development.*
 - 2) *The enforcement authority must not give an enforcement notice for that part of the development for which the private certifier is engaged until the authority has consulted about the giving of the notice with—*
 - a) *the private certifier; or*
 - b) *if the enforcement authority is the private certifier—the local government.*

- 3) *However, subsection (2) does not apply if the enforcement authority reasonably believes the works for which the enforcement notice is to be given are dangerous.*
 - 4) *If the enforcement authority is the private certifier, the authority may not delegate power to give an enforcement notice that orders the demolition of a building.*
 - 5) *The enforcement authority may carry out consultation under this section in the way the enforcement authority considers appropriate."*
23. The enforcement notice states, in the particulars in Section 2, that: "A search of Council Records was conducted on 17 February 2021 where a concurrence agency application has been submitted by TBAC on behalf of B. Allen, however no approval and/or building application has been obtained as required within the Show Cause Notice."
24. Among the material for the related appeal, the tribunal has seen evidence relating to the referral of a building works application to Council as a concurrence agency by Rodney Byl, a certifier with TBAC, on behalf of the appellant on or about 5 January 2021. During the hearing, a council representative (Sterling Beal) stated that Council was aware that a certifier had been engaged at the time of deciding to issue the enforcement notice, on or about 18 February 2021, and that Council did not consult with the certifier about the giving of the enforcement notice.
25. The tribunal therefore finds that, when Council as the enforcement authority made the decision to give the enforcement notice, a certifier had been engaged in relation to the building works application for the approval of the structure, and that the enforcement authority did not consult with the certifier about the giving of the enforcement notice. In the circumstances, the tribunal finds that the enforcement authority was prohibited by section 169(2) of the PA from giving the enforcement notice.

Reasons for the Decision:

26. The tribunal, in accordance with section 254(2)(b) of the PA, has decided this appeal as set out under the heading 'Decision' at the beginning of this decision notice.
27. The reasons for this decision are that:
- a) Pursuant to section 168(4) of the PA, the enforcement authority did not have the power to decide to give an enforcement notice requiring the "removal of the structure"; and that
 - b) the enforcement authority did not consult with the private certifier engaged by the appellant before giving the enforcement notice, as required by section 169(2) of the PA, and the enforcement authority was thus prohibited from giving the enforcement notice.
28. For above reasons, the tribunal finds that enforcement authority has not established that the appeal should be dismissed, as required by section 253(3) of PA.

Neil de Bruyn
Development Tribunal Chair

Date: 6 August 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
Brisbane QLD 4001

Telephone (07) 1800 804 833

Email: registrar@hpw.qld.gov.au