



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	42- 18
Appellant:	Ainsley Marie O'Keefe
Respondent:	Council of the City of Gold Coast
Site Address:	18 Edens Court Nerang and described as Lot 88 on SP 157879 (the land)

Appeal

This is a decision under Planning Act 2016 (PA) section 252(2) following an application by the respondent under PA section 252(1)(b) about the jurisdiction of the Development Tribunal for an appeal under PA section 229 and schedule 1, sections 1 and 2, and table 1, item 6, against a decision by the Respondent to give an enforcement notice to the Appellant for allegedly carrying out assessable development, namely a material change of use of dwelling house premises arising from use of the premises for short term accommodation, without a development permit in breach of PA section 163.

Date and time of hearing:	N/A. The proceedings were decided on submissions
Place of hearing:	N/A
Tribunal:	Beverley Homel – Chair Jodie Sekac - Member
Present:	N/A

Decision:

The Development Tribunal (Tribunal), in accordance with PA section 252 decides that the Tribunal does not have jurisdiction to hear the appeal.

Please be advised that you may elect to lodge an appeal/declaration about the matter that is the subject of these proceedings in the Planning and Environment Court (the Court). The Court appeal period starts again from the date you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

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

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

Background

Land Use History

1. The existing dwelling on the land was constructed in 1983.
2. In 1983 the land was within the Albert Shire local government area and development on the site was regulated by the Albert Shire Planning Scheme 1982.
3. At the time of construction, the land was in the rural zone under the Albert Shire Planning Scheme. The use of land for a dwelling house was permitted development in the rural zone.
4. Consequently, the construction of the dwelling house required only an approval for building work from the Council and did not require formal planning approval.
5. In 1995 Albert Shire was amalgamated with the City of the Gold Coast.
6. The land is now in the low density residential zone of the Gold Coast City Plan (City Plan) which commenced in February 2016.
7. Under the City Plan, a material change of use for short term accommodation is impact assessable in the low density residential zone.
8. The appellant advertised the house for short term accommodation in or about September 2017.
9. The appellant has made no application for a development approval for the land to be used for short term accommodation.

Actions by the Local Government

1. On 9 January 2018, the Local Government (Council) gave the Appellant a show cause notice stating that the Council reasonably believed that the Appellant was or had been committing the development offence of contravening PA section 163, and inviting her to show cause why an enforcement notice should not be issued.
2. After considering a number of representations made by the Appellant through Zone Planning Group, in September 2018 the Council issued an Enforcement Notice to the Appellant under PA section 168, stating that the Council reasonably believed that the Appellant had committed a development offence against PA section 163, and requiring the Appellant to:-
 - a. cease using the premises to provide short term accommodation for tourists or travellers for periods of less than three months; and
 - b. not recommence using the premises to provide short term accommodation for tourists or travellers for periods of less than three months unless and until all necessary development permits are in effect for the making of a material change of use for the premises for short term accommodation.

Actions by the Appellant

1. On 2 February 2019, in response to the show cause notice, the Appellant, through Zone Planning Group, made representations to the Council confirming that the premises were advertised on Air BnB but disputing that this use triggered the need for a development application for a material change of use for short term accommodation under the City Plan. While not relevant to this decision on jurisdiction, it should be noted that the Appellant's view, consistently expressed at all stages of her dispute with the Council is that:-
 - a. Prior to commencement of the current City Plan, the definition of "detached dwelling" did not limit the use of a dwelling to long term or short term accommodation.
 - b. Therefore the use of the existing detached dwelling as an Air BnB letting is an existing lawful use of the premises;
 - c. PA section 260 provides that a change in a planning instrument does not further regulate a lawful use of premises;
 - d. Therefore no additional approvals are required to continue the Air BnB letting'
 - e. The need to apply for (an approval) for short term accommodation for the use of a premises for Air BnB or holiday letting is only applicable to new development where

approvals for the use have been applied for after the commencement of the current City Plan in February 2016.

2. After receipt of the enforcement notice, the Appellant, again through Zone Planning Group, appealed to the tribunal in October 2018, requesting the tribunal review the Council's decision to issue an enforcement notice and asking that the enforcement notice be set aside.

Jurisdiction

1. On receiving notice of the appeal, the Council wrote to the Development Tribunals Registrar on 7 November 2018, stating its concerns about whether the tribunal had jurisdiction to hear the appeal. The Council asked the Registry to respond to the Council on the issue of the jurisdiction so that the Council could consider whether jurisdiction should first be decided under PA section 252, on the basis of written submissions from the parties.
2. The Registrar replied to the Council stating that under the PA, it was not for the registry to determine jurisdiction, but rather the tribunal under PA s.252.
3. The tribunal was then established, and on the application of the Council under section 252(1)(b), is to decide whether it has jurisdiction for tribunal proceedings in this matter.
4. On 31 January 2019, the registrar gave both parties a notice under PA section 249(3) to provide a written submission regarding jurisdiction to the tribunal by 1 March 2019.
5. The Appellant then requested a further week to make submissions in response to the Council's submissions.
6. The Tribunal agreed to this request provided the Council was also given an opportunity to make submissions in response to any new material.
7. Both parties provided further submissions to the Tribunal on or before 15 March 2019.

Decision framework

As this decision is about the tribunal's jurisdiction to hear the appeal, the tribunal has only considered the submissions and facts relevant to jurisdiction and has not considered the substantive issue of planning requirements for the current use of the land.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 10 October 2018.
2. The Council's submissions in relation to jurisdiction dated 1 March 2019.
3. The Appellant's submissions in relation to jurisdiction dated 1 March 2019.
4. The Appellant's further submissions in relation to jurisdiction dated 8 March 2019.
5. The Council's supplementary submissions in relation to jurisdiction dated 15 March 2019.
6. Planning Act Chapter 6, Division 3 and Schedule 1.

Findings of Fact

The facts in this matter as set out in the background section of this decision notice are not in dispute between the parties. The two matters in dispute are:-

- a) Whether the use of the existing dwelling on the land for short term accommodation requires a development approval for a material change of use for short term accommodation from the Council; and
- b) Whether the tribunal has jurisdiction under the PA to hear the Appellant's appeal against the Council's enforcement notice requiring her to cease using the premises to provide short term accommodation unless and until all necessary development permits are in

effect for the making of a material change of use for the premises for short term accommodation.

The appeal cannot be heard until a decision is made on point b. The submissions on jurisdiction made by both parties are broadly summarised below.

Given the importance of the interpretation of PA Schedule 1 to the submissions of both parties and the ultimate decision on tribunal jurisdiction, for clarity, PA schedule 1, section 1(1) and section 1(2) and table 1 item 6, are set out below.

Schedule 1 Appeals

Section 229

1 Appeal rights and parties to appeals

- (1) Table 1 states the matters that may be appealed to—
 - (a) the P&E court; or
 - (b) a tribunal.
- (2) However, table 1 applies to a tribunal only if the matter involves—
 - (a) the refusal, or deemed refusal of a development application, for—
 - (i) a material change of use for a classified building; or
 - (ii) operational work associated with building work, a retaining wall, or a tennis court; or
 - (b) a provision of a development approval for—
 - (i) a material change of use for a classified building; or
 - (ii) operational work associated with building work, a retaining wall, or a tennis court; or
 - (c) if a development permit was applied for—the decision to give a preliminary approval for—
 - (i) a material change of use for a classified building; or
 - (ii) operational work associated with building work, a retaining wall, or a tennis court; or
 - (d) a development condition if—
 - (i) 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; and
 - (ii) the building is, or is proposed to be, not more than 3 storeys; and
 - (iii) the proposed development is for not more than 60 sole-occupancy units; or
 - (e) 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; or
 - (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
 - (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; or

- (h) a decision to give an enforcement notice—
 - (i) in relation to a matter under paragraphs (a) to (g); or
 - (ii) under the Plumbing and Drainage Act; or
- (i) an infrastructure charges notice; or
- (j) the refusal, or deemed refusal, of a conversion application; or
- (l) a matter prescribed by regulation.

Table 1 Appeals to the P&E Court and, for certain matters, to a tribunal			
6. Enforcement notices An appeal may be made against the decision to give an enforcement notice.			
Column 1 Appellant	Column 2 Respondent	Column 3 Co-respondent (if any)	Column 4 Co-respondent by election (if any)
The person given the enforcement notice	The enforcement authority	—	If the enforcement authority is not the local government for the premises in relation to which the offence is alleged to have happened—the local government

Submissions on Jurisdiction

The Council's initial submissions

After setting out the facts of the matter, the Council approaches the issue of jurisdiction with a statement that a Tribunal's jurisdiction is confined by the PA which provides in section 229(1)(a) that the matters that may be appealed to a tribunal are stated in schedule 1.¹

Proceeding to an overview of Schedule 1, the Council's submission first identifies the relevance of Table 1, Item 6 which states that an appeal may be made against the decision to give an enforcement notice to the P & E Court, and, for certain matters, to a Tribunal. The submission then paraphrases Schedule 1, section (1)(2)(h) which prescribes matters for which an appeal about a decision to give an enforcement notice may be made to a tribunal.

The Council then argues that, apart from an enforcement notice under the *Plumbing and Drainage Act*, paragraph (h) provides that a decision to give an enforcement notice is a matter that may be appealed to a tribunal only if the enforcement notice is ***in relation to a matter under paragraphs (a) to (g)***.

Moving on to a discussion of the correct construction of paragraphs (a) to (g), the Council asserts the following:

- That the scope of the paragraphs should be understood by reading each paragraph in its entirety;
- That the leading words in each paragraph frame the scope of the "matter" under each paragraph, and in doing so create an exhaustive and decisive test²;
- Citing recent decisions, that as a general principle courts are not at liberty to consider any statutory word or sentence as superfluous or insignificant;

¹ Council's initial submission p. 5 paragraphs 12 and 13

² Council's initial submission p.9 paragraph 25

- That the appropriate approach to statutory construction was explained by the High Court in *Project Blue Sky Inc v Australia Broadcasting Authority* [1998] HCA 28 at [68]-[78]:
 '[71] ... a court construing a statutory provision must strive to give meaning to every word of the provision. In *Commonwealth v Baume Griffith CJ* cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."

The Council then construes each of the paragraphs (a) to (g), arguing that the enforcement notice was not in relation to any of the matters under those paragraphs as there was no relevant development application, development approval for a material change of use or development permit, and the *Building Act 1975* is not involved. The Council's submission concludes this section by asserting that the decision to give the enforcement notice was for carrying out a material change of use of premises without the necessary development permit which it argues is not a matter under paragraphs (a) to (g).

Finally, the submission deals with an alternative interpretation of paragraph (b) in which a *matter* under that paragraph could be read as a material change of use for a classified building generally, disregarding the leading words *a provision of a development approval for*. While asserting that such an interpretation would be incorrect under established rules of statutory interpretation, the submission argues that even if it were correct, the enforcement notice was issued in respect of an alleged material change in the use **of** the building not a change **for** the building, such as an increase in its scale or intensity.

The Appellant's Initial Submission

The Appellant's initial submissions, made through Zone Planning Group, and dated 1 March 2019, were brief, contending that there was an existing approval for a dwelling and that as the enforcement notice related to an alleged contravention of the existing approval, the tribunal had jurisdiction to hear the appeal.

The Appellant contends that while the PA in Schedule 1 section 1(2) (g) confers jurisdiction for the Tribunal to hear appeals regarding enforcement notices issued in regard to a matter under the *Building Act*, it is ambiguous as to how an enforcement notice may be relevant to paragraphs (a) to (f) of subsection 2.³ However the Appellant goes on to assert that the appeal relates to the alleged unlawful use of the premises which contravenes an existing approval for a detached dwelling on the site *per section 1(2)(b)(i)*.⁴ The Appellant's initial submission provides no further details of that existing approval or the provision of that approval to which the enforcement notice relates.

The basis of the Appellant's submission appears to be the following:-

On the basis that the appeal concerns an Enforcement Notice relating to the alleged contravention of the existing approval relating to the use of the site for a dwelling, it is contended that the Tribunal has jurisdiction to hear the appeal.⁵

The Appellant's Further Submissions

The Appellant's further submissions, also made through Zone Planning Group, and dated 8 March 2019, were made in response to the Council's initial submissions after a request to make further submissions was approved by the tribunal.

The further submissions acknowledge that when the dwelling was constructed no formal application for Council's consent was required for a material change of use for a dwelling house under the planning scheme in force at the time. The Appellant goes on to assert that such use was authorised by way of the building work approval. The Appellant then

³ Appellant's submission dated 1 March 2019, page 1, sixth paragraph

⁴ Appellant's submission dated 1 March 2019, page 1, seventh paragraph.

⁵ Appellant's submissions dated 1 March 2019, page 2.

reiterates her initial argument that *the enforcement notice can be considered to allege non-compliance with the existing approval provided with respect to a dwelling house use. That being the case it is contended that jurisdiction is conferred by Schedule 1, Section 1(2)(h)(i) and 1(2)(b)(i).*⁶

The Appellant raises two further arguments in support of tribunal jurisdiction –

1. That in appeal 14-13 to the Building and Dispute Resolution Committee, the Committee considered it had jurisdiction to hear an appeal against a Brisbane City Council enforcement notice issued in relation to the alleged use of a dwelling as a Multi Unit Dwelling in contravention of the existing approval for a single house. The appellant argues that there appear to be similarities between the issues in dispute in Appeal 14-13 and the current appeal.
2. That Schedule 6 Part 2 Section 2(2) of the *Planning Regulation 2017* in providing that certain development for Class 1 buildings cannot be made assessable by a local planning scheme identifies such development as being a material change of use of the premises while not requiring a formal development approval. This argument appears to be presented as another basis for asserting that the building approval for the dwelling operates as a development approval for a material change of use, therefore bringing the appeal within the ambit of PA Schedule 1, Section 1(2)(b)(i).

Supplementary Submissions of the Council

On 15 March 2019, the Council provided supplementary submissions in response to the Appellant's further submissions. The Council states that they are to be read together with the its initial submissions.

The Council disputes the Appellant's assertion that jurisdiction is conferred by Schedule 1, Section 1(2)(h)(i) and 1(2)(b)(i) because the enforcement notice can be considered to allege non-compliance with the existing (building) approval provided with respect to a dwelling house use.

The Council points out that Section 1(2)(b)(i) refers to a provision of a development approval for a material change of use for a classified building, not a development approval for building work, and argues that an enforcement notice for a contravention of a development approval for building work would fall within paragraph (g), not (b).

The Council goes on to argue that the enforcement notice is *specifically and solely* for the offence of carrying out assessable development without a permit, and does not allege a contravention of a development approval.

In reiterating the limited jurisdiction of the tribunal, and its predecessor the Building and Development Dispute Resolution Committee, the Council cites two committee decisions after Appeal 14-13, where a committee decided that they did not have jurisdiction to hear an appeal against the lawfulness of the use or where the enforcement notice was in relation to the development offence of carrying out a material change of use of premises without the requisite development permit.

In discussing the committee decision in Appeal 14-13, the Council states that the circumstances are different to this appeal, and there is no indication on the face of the decision as to whether jurisdiction was considered by the committee. The Council further argues that *at best all that can be said is that there may have been an assumption of jurisdiction and that assumption may or may not have been correct.*

Regarding the Appellant's argument that Schedule 6 Part 2 Section 2(2) of the *Planning Regulation 2017* is another basis for bringing the appeal within the ambit of PA Schedule 1, Section 1(2)(b)(i), the Council responds that a contravention of a provision of a development approval for material change of use (the required "matter" for the operation of paragraph b(i)), could not arise because there is no development approval.

⁶ Appellant's further submissions dated 8 March 2019, page 3.

Reasons for the Decision

The jurisdiction of the Tribunal under the Planning Act

The PA defines and constrains the jurisdiction of development tribunals⁷, in contrast to the broad and inclusive jurisdiction for appeals to the P & E court. This is expressly recognised in the Council's initial submission and tacitly recognised in the Appellant's submissions.

Both parties' submissions identify Schedule 1, section (1)(2) and in particular paragraphs (b) and (h)(i), as fundamental PA provisions determining whether the tribunal has jurisdiction to hear this appeal.

The tribunal agrees with the Council's outline of the jurisdiction of a development tribunal to hear an appeal against a decision to give an enforcement notice, identifying first that Schedule 1 Table 1, Item 6 is the source of the jurisdiction for an appeal to be made against the decision to give an enforcement notice, and secondly, that Schedule 1, section (1)(2)(h) prescribes the matters for which such an appeal may be made to a tribunal. The importance of Schedule 1, section (1)(2)(h) in determining jurisdiction for this appeal is also stated in the Appellant's supplementary submissions.

Interpretation and Application of Schedule 1, section 1(2), paragraphs (a) to (h).

The tribunal agrees with the Council's submission that the scope of the paragraphs should be understood by reading each paragraph in its entirety, and that the leading words in each paragraph frame the scope of the *matter* under each paragraph.

The tribunal also agrees with the Council's submission that there needs to be a nexus between the leading words in each paragraph and the following sub-paragraphs and that all the words of the paragraphs should be considered in determining their meaning and application.

Following this approach, the tribunal does not support the contention of the Appellant that: -

- a. jurisdiction is conferred by Schedule 1, Sections 1(2)(h)(i) and 1(2)(b)(i) because the use of the premises was authorised by way of the building work approval when the existing dwelling was constructed; and
- b. therefore the enforcement notice can be considered to allege non-compliance with the existing approval provided with respect to a dwelling house use.

The tribunal considers that this construction strays too far from the ordinary meaning of the words in paragraph (b)(i). The tribunal agrees with the Council that for the Appellant's argument on this point to have merit, paragraph (b)(i) would have needed to refer to a provision of a development approval for building work rather than *a provision of a development approval for a material change of use for a classified building*.

In addition the tribunal considers that the limitations the PA places on the jurisdiction of development tribunals does not support a construction of Schedule 1 which extends that jurisdiction beyond the ordinary meaning of the words used in the Schedule. The Tribunal also considers that Schedule 6 Part 2 Section 2(2) of the *Planning Regulation 2017* cannot operate to provide an alternative link to paragraph (b)(i) because if it applied, the requirement for the enforcement notice to relate to a provision of a development approval for a material change of use would not be met.

The tribunal finds the careful analysis of paragraphs (a) to (h) presented by the Council persuasive and agrees that the Council's decision to give the enforcement notice was not in relation to any of the matters in paragraphs (a) to (g).

Therefore the tribunal does not have jurisdiction under PA section 229(1)(a) and Schedule 1 to hear this appeal. The Council's decision is a matter which must be appealed to the Planning and Environment Court.

⁷ PA s.229 and Schedule 1

The application of previous Committee decisions

The tribunal agrees with the Council that committee decision 14-13 is not persuasive on the question of committee/tribunal jurisdiction to hear appeals about enforcement notices because the matter of jurisdiction appears not to have been considered in that decision. The tribunal agrees with the Council's conclusion about Appeal 14-13 that *at best all that can be said is that there may have been an assumption of jurisdiction and that assumption may or may not have been correct.*

In Committee appeals 23-15 and 35-15 under the *Sustainable Planning Act 2009* the Committee ruled that it did not have jurisdiction to decide an appeal about an enforcement notice issued in respect of the use of premises.

Beverley Homel
Development Tribunal Chair
Date: 24 May 2019

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:

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