



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	37-18
Appellant:	Craig Seeley
Respondent (Enforcement Authority)	Sunshine Coast Regional Council
Site Address:	104 Landsborough Parade Golden Beach and described as Lot 435 on RP 65499 – the subject site

Appeal

Appeal against an Enforcement Notice issued by Sunshine Coast Regional Council under section 168 of the *Planning Act 2016* on the basis that certain building work, was allegedly carried out without building development approval being in effect and conflicts with the requirements of the House Code-Performance outcome PO2 (Carports and Sheds).

Date and time of hearing:	Wednesday 19 th December 2018 at 11.00am.
Place of hearing:	The subject site
Tribunal:	James McPherson– Chair Stuart Smith – Member
Present:	Craig Seeley – Appellant Peter Chamberlain – Sunshine Coast Council Scott Buchanan – Sunshine Coast Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **replaces** the decision of the Council to give an Enforcement Notice dated 6 September 2018 to the Appellant for an alleged development offence pursuant to section 163 of the *Planning Act 2016* (PA), with a decision not to issue that Enforcement Notice.

Accordingly the appeal is upheld and the Enforcement Notice is set aside.

Background

The subject site is a 792 sqm. allotment located at 104 Landsborough Parade, Golden Beach and is zoned Low Density Residential under the Sunshine Coast Regional Council (SCRC) Planning Scheme 2014. The allotment is a rectangular corner allotment with street frontages of approximately 15.4m to Landsborough Parade and approximately 51.5m to Birdwood Street, Golden Beach

The existing dwelling is a single detached house which appears compliant with the setback provisions of the SCRC Planning Scheme 2014 and the Queensland Development Code MP1.2 and is not subject to the current notice and appeal.

The subject of the notice and appeal is a partly completed construction in the back yard facing Birdwood Street to provide a dual purpose, as follows:

- A large framed structure proposed to house boats;
 - one large yacht and
 - a smaller power launch
- Shipping containers proposed to be a secondary dwelling.

Background: Advisory Letter

On 7 June 2018 the SCRC issued an Offender Advisory Letter which states:

- *“Under the provisions of the Qld Building Act 1975 and Planning Act 2016 the building work for the shed is assessable development that requires a building development approval. Carrying out assessable development without an approval is a development offence pursuant to Section 162 of the Planning Act 2016. Council has a responsibility to enforce these legislative requirements and has issued you with a Show Cause Notice (attached).*
- *The Show Cause Notice precedes an Enforcement Notice and provides you with the opportunity to give reasons why Council should not issue you with an Enforcement Notice. Please read the notice carefully and provide Council with a response by the date stated in the notice.*
- *To address the matter you will need to obtain building development approval for the shed from a private building certifier; or; remove the unlawful building work. Before a building development approval can be obtained from a private certifier however, the shed presently does not comply with the following Acceptable Outcomes of the Sunshine Coast Planning Scheme 2014 – Dwelling House Code:*
- **AO2.1** – *Where located on a lot in a residential zone, a garage carport or shed:-*
 - *Is setback at least 6 metres from any road frontage;*
 - *Does not exceed a height of 3.6 metre; and*

- *Has a total floor area that does not exceed 56m2.*

Background: Show Cause Notice

SCRC attached the following Show Cause Notice (SCN) to the Appellant which stated:

1. *“An inspection by a Council officer carried out on 06 June 2018 observed a structure consisting of metal roof frame with two (2) shipping container bases under construction at 104 Landsborough Parade, Golden Beach.*
2. *On 07 June 2018 you advised Council the structure is intended for use as a boat shed with one of the shipping containers to be used as a dwelling unit.*
3. *Under the Building Act 1975 and Planning Act 2016 the construction of the boat shed and dwelling unit is building work.*
4. *Pursuant to Section 21 of the Building Act 1975 all building work is assessable development for the Planning Act unless the building work is accepted development under 21(2) or a regulation made under the Planning Act.*
5. *The building work for the boat shed and dwelling unit is assessable development for the Planning Act because it is not prescribed under the Building Regulation 2006 as accepted development and the building work does not comply with the relevant provisions of the Sunshine Coast Planning Scheme 2014 and Qld Development Code (QDC).*
6. *The boat shed does not comply with the Sunshine Coast Planning Scheme 2014 – Dwelling House Code – Acceptable Outcome **AO2.1** which requires in a residential that a garage, carport or shed is setback at least 6 metres away from any road frontage; does not exceed a height of 3.6 metres and has a total floor area that does not exceed 56m2.*
7. *The boat shed and dwelling unit do not comply with the QDC Part MP1.2 – Acceptable Solution **A2(a)(ii)** which requires a side and rear boundary clearance of 2 metres for a part of a building or structure where the height of that part is more than 4.5 metres but less than 7.5 metres.*
8. *A search of Council records found no evidence that a building development approval was obtained authorising the commencement of the building work for the boat shed and dwelling unit.”*

Background: Appellant Response

On 14 June 2018 the Appellant provided a response to the SCN. The Appellant refers to “extraneous circumstances” which led to the works starting. This is as follows:

- The Appellant required the work to be completed by his departure date of 15 July 2018. The Appellant states some hurdles:
 - *“(The Appellant) didn’t have time to sell my L:ARC V and Yacht as buyers aren’t readily available;*

- *(The Appellant) couldn't leave the yacht unattended in the water and had no one to mind it raising a huge liability issue;*
 - *(The Appellant) couldn't afford storage of the yacht in a shipyard plus security risk and damage risk;*
 - *To keep our mooring which took over 20 years to get we needed to keep the boat [for us this is the only affordable way we can keep a yacht something I'm sure you would understand as a career Master Mariner I'm quite passionate and meticulous].*
 - *(The Appellant) needed to store our possessions as we can't take them with us."*
- The Appellant states:
 - *"I did run my plans past a certifier and effectively was told there is no way council would have enough time to even consider (the) proposal so with this in mind (The Appellant) with great stress and duress decided to act as far as possible to get to a stage where the vessel is safely stored on a hard stand and the structure was preferably ready to be built to lock up stage before (The Appellant) departs and hope at that point (The Appellant) would be able to gain approval."*

Background: Enforcement Notice

On 6 September 2018 the SCRC issued an Enforcement Notice to the Appellant which stated:

- *"SCRC received your representations dated 15 June 2018 in response to the show cause notice issued to you on 7 June 2018.*
- *The Sunshine Coast Council has considered these representations and believes that an enforcement notice should be given to (the Appellant) because you have committed a development offence pursuant to the Planning Act 2016 Section 163: Carrying out assessable development without permit- in that building work for a shed and shipping container structure, which is assessable development under Schedule 9 of the Planning Regulation 2017, was carried out without building development approval being in effect."*

The Council requested the following actions:

- *"Council considers the shed and shipping container structure does not comply, or can be conditioned to comply, with the Sunshine Coast Planning Scheme 2014- Dwelling House Code- Acceptable Outcomes (AO) 2.1.*
- *Consequently you are required to remove the shed and shipping container structure from the premises by 5pm Tuesday 9 October 2018."*

Background: Appeal Application

On 24 September 2018 the Appellant filed a Form 10- Application for Appeal at the Development Tribunal. The Appellant provides (amongst other statements) the following statements for the Appeal:

- *“All works to date were purely to get the structure to a point where it could safely store items unable to be sold in the time period allocated and still allow me to remotely get tradesman to complete the structure as required around my prized possession a historically significant 37ft yacht which has to be stored on a hard stand area.*
- *My intention after talking to Scott Buchanan on the 6th September was to procure the services of a certifier and commence working my way through the approval process remotely from Christmas Island. Having received this Enforcement Notice the following day though has caused me to put this on hold unless instructed to do so by this process. I am at your disposal as to whether it is worth my while to instigate this process at this point in time? Having already spent \$60,000 on this structure I could not afford to see further expenditure if the project is to be abandoned by Enforcement Notice.”*

Hearing

A hearing was conducted at the subject site at 11am on the 19th December 2018.

During the hearing the following representations were made:

The Appellant

- The Appellant presented his case and admitted conducting works without making appropriate relevant applications for Planning and a Building Permit, indicating that advice from a Private Certifier was that Council would not have time to assess any Development Applications submitted prior to the appellant moving to Christmas Island for work purposes and within the timeframe the Appellant required the structures to be completed.
- The Appellant stated the work proceeded as time was paramount in an effort to protect his boats from the elements whilst he left the country. The Appellant states he stopped working on the structure when the enforcement notice was served. The Appellant attached self-drawn plans to his response to the Enforcement Notice but failed to include a Development Application.
- The Appellant stated at the completion of the Tribunal Hearing that he is now prepared to follow whatever procedures are necessary to obtain the required approvals.

Co-Respondent (Council):

- Council representatives Mr Peter Chamberlain and Mr Scott Buchanan presented Council's case. Mr Chamberlain and Mr Buchanan stated there have been a number of complaints received from the public that drew the matter to the attention of Council. Based on the above

complaints received, Mr Chamberlain and Mr Buchanan state Council Officers initiated the Enforcement Notice and the Appellant was served with this notice.

- Mr Chamberlain and Mr Buchanan referred at the hearing to the House Code citing Performance Outcome (PO)2: Carports and Sheds with specific mention of setback requirements (6 m from road frontage of Birdwood St, height restrictions of 3.6m and floor area of 55m²).
- Mr Chamberlain and Mr Buchanan also referred to the SCRC Strategic Policy 'Assessment of amenity and aesthetic considerations for particular building work – shipping containers'. The policy provides an assessment framework for the consideration of amenity and aesthetic impacts associated with building work for shipping containers or other metal storage containers.
- Mr Chamberlain and Mr Buchanan representatives further referred to Performance Outcome (PO)11 Secondary Dwellings and suggested that the appellant submit an application for a secondary dwelling and seek relevant relaxations.
- Further submissions were requested regarding the Rates Notice and the Development Application which has been submitted by the Appellant since this Tribunal Hearing. It is the understanding of the Tribunal Members that this application has since been refused and the Appellant will need to follow appropriate process in relation to this decision which sits outside of the parameters of the current appeal. At the completion of this decision, the Tribunal believes adequate information has been provided for a decision in relation to this appeal relating to the Enforcement Notice to be issued.

Jurisdiction

The tribunal is satisfied that it has jurisdiction to hear this appeal having regard to the PA section 229 as well as schedule 1, section 1, table 1, item 6. The tribunal notes that the requirement of section 1(2)(h)(i) is satisfied, as the matter is under paragraph (g) of section 1(2) of schedule 1. More specifically, the matter involves building work, namely erection of a shed and shipping container structure, that may have required assessment against the 'building assessment provisions' under the *Building Act*.

Decision framework

It is noted that:

- The onus rests on the respondent to establish that the appeal should be dismissed (s253(3) of the PA) and accordingly that the Enforcement Notice should stand;
- 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 (s253(4) of the PA);

- The tribunal may nevertheless (but need not) consider other evidence present by a party with leave of the tribunal or any information provided under s246 of the PA (pursuant to which the registrar may require information for tribunal proceedings);
- The tribunal is required to decide the appeal in one of the ways mentioned in s254(2) of the PA.

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 24 September 2018.
2. Offender Advisory Letter and attached Show Cause Notice dated 07 June 2018
3. The Appellant letter of response dated 14 June 2018
4. SCRC – Enforcement Notice dated 6 September 2018
5. Letter of appeal dated 24 September 2018
6. 104 Landsborough Parade Letter to CEO
7. Drawings and Plans submitted by Applicant in response to Show Cause Notice
8. House Code-Performance outcome PO2 Carports and sheds
9. SCRC response to the request for additional information dated 9 April 2019 (introduced with the tribunal's leave)
10. The Planning Act 2016 (PA);
11. The Planning Regulation 2017 (PR);
12. The Building Act 1975 (BA);
13. The Building Regulation 2006 (BR).
14. Decision made in *Benfer v Sunshine Coast Regional Council* (2019)
15. *Katherine Lalis v Bundaberg Regional Council* [2018] QPEC 26
16. Rates Notice dated 22/01/2019 (introduced with the tribunal's leave)
17. Development Application submitted by the Appellant dated 10 January 2019 (introduced with the tribunal's leave)

18. Refusal of Development Application by SCRC dated 20 March 2019 (introduced with the tribunal's leave)

Findings of Fact

The tribunal makes the following findings of fact:

1. The subject site is a 792sqm. allotment located at 104 Landsborough Parade, Golden Beach and is zoned Low Density Residential under the SCRC Planning Scheme 2014. The allotment is a rectangular corner allotment with street frontages of approximately 15.4m to Landsborough Parade and approximately 51.5m to Birdwood Street;
2. The existing dwelling is a single detached house which appears compliant with the setback provisions of the SCRC Planning Scheme 2014 and the Queensland Development Code MP1.2 and is not subject to the current notice and appeal.
3. The subject of the Enforcement Notice and Appeal is with respect to a large incomplete framed structure and associated shipping containers in the backyard facing Birdwood Street.
4. The partly completed structure appears to be ***inconsistent*** with the following planning and building requirements.
 - a) Located within the required setback distances.
 - b) Exceeds height limits within setback areas.
 - c) Use of shipping containers for permanent use.
 - d) Failure to make a planning application.
 - e) Failure to make a building application.
5. The SCRC Planning Scheme 2014 section 6.2.1.2 states the purpose of the low-density residential zone code is to provide for predominantly low-density low rise residential activities in conventional sized urban residential lots.
 - a) Section 2 (a) states "development provides for an attractive, open and low-density form of urban residential living." The Appellant required a structure which he would generally be able to access in suitably zoned land. The Appellant in his own admission was seeking to gain a financially beneficial solution to the storage of his boat.
 - b) Section 2 (b) "development provides for low density housing types, primarily in the form of dwelling houses." On the Appellants own admission, he is seeking the erection of this structure to house his show piece yacht.
 - c) Section 2 (g) {development is designed and located in a manner which makes contribution to the streetscape and is sympathetic to the existing and intended scale

and character of surrounding development.” This structure clearly dominates the streetscape which has been raised in multiple complaints made to the Council.

6. The partly completed structure appears to be located within the required setback distances and the shipping containers do not comply with permanent use, specifically for use as a dual occupancy. Specifically, the SCRC Planning Scheme Dwelling House Code (Section 9.3.6) states:
 - a) “PO2 (a) preserve the amenity of adjacent land and dwelling houses.” The structure dominates the adjacent land and dwellings in both height and site coverage. The neighbouring properties are shadowed by the structures and the the adjacent land and dwellings are not preserved.
 - b) “PO2 (b) do not dominate the streetscape.” The structure is noticeable from at least 50m from the site and is intrusive to the visual attributes of the general community.
 - c) “PO2 (d) maintain the visual continuity and pattern of buildings and landscape elements within elements within the street.” It is fact that the no other structure similar to this is seen in the local street, nor in any area in the vicinity of this street. The visual continuity and pattern of all other buildings is not in excessive of a dual story home and is generally compliant with boundary relaxations.
7. The structure observed on site does not satisfy the Acceptable Outcomes AO2.1 (a) (b) and (c).
8. The Appellant raised the need to proceed quickly without approval. In addition:
 - a) The Appellant advised in his response to the Show Cause Notice that his reason for proceeding without making appropriate relevant applications for development was based on his being stationed away from home and as follows.
 - b) The Appellant required secure storage of his property, namely boats, so that they were not only within his own property rather than in the water, but that they were protected from the elements and possible damage. It appears that he saw the opportunity to include a container as a possible part of the development for a secondary dwelling while constructing the structure over the boats.
 - c) The Appellant stated he sought advice from a Certifier, which from correspondence, suggests that advice was given that development approval was required. The Appellant advised that he did not accept that advice because the certifier apparently also stated that there may have been insufficient time to obtain relevant approvals in time before the Appellant departed for his employment elsewhere. The Appellant has apparently proceeded to carry out construction on the assumption that the development was accepted development, but has kept records anyway in case development approval was required. This is evidenced by the Appellants responses which are in writing and verbal during the hearing;

- d) The Appellant was aware that development approval was required, but proceeded anyway to satisfy his own needs, such as control, cost and urgency and kept records on the basis that he could make a development application in the future, if necessary. The Appellant required the work to be constructed expeditiously he started the works in the hope of obtaining retrospective approval
9. Section 167 of the PA provides the process for issuing Show Cause Notice (SCN). It is not disputed that the SCRC, being the enforcement authority, duly gave to the Appellant on 7 June 2018 a SCN. The tribunal is satisfied that the SCN met the requirements of section 167(2) and in the Tribunal's view was valid in all respects.
10. The Appellant provided a written response to the Show Cause Notice. This written response was dated 14 June 2018 and sent via email dated 15 June 2018. (The Enforcement Notice itself refers to the response as being dated 15 June 2018.).
11. At the time of deciding to give the Enforcement Notice, the SCRC 'reasonably believed' that the Appellant had committed, or was committing, a development offence. The Enforcement Notice itself refers only to an alleged offence under section 163 of the PA.

The key elements of the offence under section 163 of the PA are that a 'person' carries out 'assessable development' and that at the time of doing so all 'necessary permits' were not in effect for the development. Subsection (2) of section 163 contains certain exclusions, none of which is relevant in this case. i.e. the following provisions do not appear relevant.

- a) Section 29(10)(a) refers to an application made under a superseded planning scheme. There appears to be no reference to an application being made at all, let alone a superseded planning scheme.
- b) Section 46 refers to Exemption Certificates. There appears to be no reference to an exemption certificate applying to this property.
- c) Section 88(3) refers to lapsing of development approval with respect to security payment made to complete the development. The enforcement notice is about there being no development application to which a development approval or security would apply.
12. It is accepted there is no building development approval in effect for the shed and shipping container structure at the time of its construction. The SCRC Officers gave evidence at the hearing that no such approval was in place and this was not at all contested by the Appellant. It is accepted that the construction of the shed and shipping container structure was 'carried out' by the Appellant. This is clear from his written response to the Show Cause Notice and was not disputed at the hearing.
13. The *Building Act* 1975, section 20, provides that all building work is assessable development, unless the building work is accepted development under section 21(2) or a regulation made under the [*Planning Act 2016*]. The work of constructing the shed and shipping container structure in this instance was undoubtedly 'building work' and the Appellant did not raise any argument that it was accepted development under the *Building Act* 1975 section 21(2), or a regulation made under the PA.

14. The PA, section 168(1), requires that the Enforcement Notice be given to 'the person' who committed, or is committing, the offence and if the offence involves premises and the person is not the owner of the premises, the owner of the premises. Here the notice was given to the Appellant and a Ms M.L. Panzram. These two people were joint owners of the relevant property at 104 Landsborough Parade, Golden Beach where the construction took place. This appears from a copy of the Rates Notice to be the case and was not contested by the Appellant at the hearing. So, the tribunal considers that the notice was correctly given to the person reasonably believed to have committed the offence (namely the Appellant) and also to the owner of the premises (the Appellant and Ms Panzram).

15. The PA, section 168(2), provides that an Enforcement Notice is a notice that requires a person to do either or both of the following:

- a) to refrain from committing a development offence;
- b) to remedy the effect of a development offence in a stated way.

In this instance, paragraph (b) was adopted in that the SCRC required the Appellant to remove the shed and shipping container structure from the premises by a stated time, namely, 5pm on Tuesday 9th October 2018. It will be noticed that one of the examples given under section 168 (2) is 'to demolish or remove development'.

16. The PA, section 168(4), 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 either to make the development accepted development, or to make the works comply with a development approval, or, if the works are dangerous, to remove the danger. It is convenient to step through these three aspects in turn.

- a) Paragraph (a) refers to the ability to make the development 'accepted development'. In this case Council stated in the SCN dated 7 June 2018 that the development was assessable. This is considered 'accepted development' and it is clear the current proposed structure in this form would be unlikely to be 'accepted development' in the future.
- b) Paragraph (b) refers to the ability to make the development comply with a development approval. There was no relevant development approval in this instance.
- c) Paragraph (c) applies if the works are dangerous. In this case, the Council has not asserted that the works are dangerous.

17. The Council has relied on statutory requirements and proper procedures for development, for example:

- a) what is Accepted Development,
- b) what is Assessable Development, and

c) compliance with relevant statutory requirements and legislative procedures.

18. Section 168(3) of the PA prescribes various requirements for an Enforcement Notice in paragraphs (a) – (d). It is convenient to deal with these paragraphs in turn.

a) Paragraph (a)

- The notice must state the nature of the alleged offence. Here the notice clearly states that the alleged offence is the offence under section 163 of the PA, namely, carrying out assessable development without all necessary development permits in effect for the development.

b) Paragraph (b)

- This provision applies if the notice requires a person ‘not to do an act’ and so does not apply here.

c) Paragraph (c)

- This provision applies if the notice requires a person ‘to do an act’, as is the case here. The notice must state the details of the act and the period within which the act must be done. The notice complies with this requirement as it requires the recipient to ‘... remove the shed and shipping container structure from the premises by 5pm Tuesday 9th October 2018.’

d) Paragraph (d)

- The notice must state that the person has an appeal right against the giving of the notice. This aspect is dealt with in the notice under the heading ‘Appeal Rights’ and the attachment to the notice being extracts from the PA.

Reasons for the Decision

Section 168(4) of the PA provides as follows:

(4) The 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.’

As pointed out in the case of *Benfer v Sunshine Coast Regional Council* (2019) QPEC 6 (at paragraph 138), the Planning Bill 2015 Explanatory Notes explains the rationale behind this limitation, as follows:

“Subclause (4) is a limitation on a notice requiring the demolition or removal of all or part of a work. The effect of this subclause is to require an enforcement authority to consider reasonable alternatives before ordering demolition or removal of all or part of a building or other works in which there may be significant investment.”

The Tribunal is not satisfied on the available evidence that it was not possible or practical to take steps to make the works comply with a development approval by means of reasonable alternatives.

Following a request for further submissions by the Tribunal, Council provided the details of a Development Application lodged on 10 January 2019 (well after the hearing.) The Tribunal notes Council’s refusal of that application, however this has not changed the Tribunal’s view about the available evidence at the time the Enforcement Notice was issued.

The Tribunal is also concerned that the Enforcement Notice did not contain any assertion that the relevant work was not ‘accepted development’, which was an element of the alleged offence under section 163 of the PA. Further, the Enforcement Notice did not contain any details setting out reasons why the relevant work was not ‘accepted development’.

The assertion concerning the work not being ‘accepted development’ was made in the Show Cause Notice (paragraph 5 on page 2). In this regard, the Tribunal notes the comment by Kefford DCJ in the Benfer Case, (para 94), as follows.

“The notice [*i.e.* the enforcement notice] should enable the recipient to know the nature of the alleged offence that he or she is called on to meet. It should identify the essential factual ingredients of the offence.” (words in square brackets added).

Conclusion

The tribunal is not satisfied that the decision to issue the Enforcement Notice dated 6 September 2018, was properly made. Accordingly, the appeal is upheld and the Enforcement Notice is set aside.

James McPherson

Development Tribunal
Chair Date: 12/07/2019

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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