Development Tribunal – Decision Notice

Planning Act 2016, section 255

Declaration Number:	**20-005**
Appellant: (Applicant)	Project BA
Respondent (Assessment Manager):	Sunshine Coast Regional Council
Site Address:	12 Kensington Lane, Tanawha QLD 4556 and described as Lot 2 on SP 305106 ─ the subject site

Application for Declaration

Application for a declaration under section 240 of the *Planning Act 2016* (PA) about whether a certain development application was properly made.

Date and time of hearing:	Written Submissions
Place of hearing:	N/A (application decided on written submissions)
Tribunal:	Judy Brien (Chairperson) Kim Calio (Referee)
Present:	There were no personal appearances

Decision:

The development application lodged with the Council on 11 February 2020 seeking a development permit for building works did not meet the requirements of s. 51(5) of the *Planning Act 2016* (PA) and on that basis was not a properly made application.

Material Considered:

The material considered in arriving at this decision comprises:

1. Decision Notice (including conditions) issued by Sunshine Coast Regional Council (**Council**) on 4 September 2017 relating to a Development Permit to Reconfigure a Lot (1 Lot into 7 Lots) over land described as Lot 11 on RP861565 (REC 17/0070);
2. Bushfire Hazard Assessment and Management Plan v1 dated May 2017;
3. Site-based Stormwater Management Plan and Flood Assessment dated July 2017;
4. Vegetation Clearing Offset Plan dated July 2017;
5. Email dated 11 February 2020 sent by Project BA to Sunshine Coast Regional Council attaching a DA Form 2 (version 1.1 effective 22 June 2018) and raising s. 66(2) of the *Planning Act 2016;*
6. Covering letter dated 11 February 2020 from Project BA to SCRC;
7. Various plans;
8. Action Notice issued to Project BA by the Council on 26 February 2020;
9. Notice of Appeal/Application for Declaration dated 23 March 2020;
10. Grounds for Appeal dated 23 March 2020;
11. Submissions of SCRC dated 11 August 2020; and
12. Submissions of Project BA dated 21 August 2020 attaching unrelated approvals.

Reasons for the Decision

1. By a Notice of Appeal dated 23 March 2020 Project BA seeks relief described as *'Appeal for Declaration – appeal about whether a development application is properly made'.* The initiating document includes both the Applicant's signature as Appellant and the property owners' signatures. The property owners' signatures were included to signify their consent to the proceedings.

2. The relief sought arises from an attempt to lodge a development application by Project BA seeking approval for building works with the Council for the construction of a shed at a property situated at 12 Kensington Lane Tanawha and properly described as Lot 2 on SP305106. The proposal is described as a 'Development Permit for Building Works associated with a Dwelling House (New shed)'.

3. In its covering letter dated 11 February 2020, Project BA identified that the proposed shed will be located outside of the building envelope area approved under a previous approval, namely REC 17/0070, a development permit to reconfigure a lot issued by the SCRC on 4 September 2017. Condition 4 of the that approval is in the following terms:

> *"All future dwellings on the approved lots must be sited and constructed in accordance with the approved building envelopes and dwelling controls (ie. The "Plan of Development") shown on the Approved Plans. A copy of the approved Plan of Development must be included in the contract of sale for the approved lots, together with a clause which requires future dwellings to be constructed in accordance with it."*

4. Project BA requested that the Council approve the application permitting a shed to be constructed outside of the building envelope as identified in condition 4 of REC 17/0070 which would involve imposing a development condition that is inconsistent with the earlier development approval as allowed under s. 66 of the *Planning Act 2016*. Project BA advised that the building envelope was originally created to address site constraints including, ecology/biodiversity areas, flood hazard, bushfire hazard, landslide and steep land and amenity and privacy.

5. By Action Notice dated 26 February 2020 the Council advised Project BA that an application received on 12 February 2020[1] was not properly made pursuant to the *Planning Act 2016*. The stated reasons as to why the application is not properly made and the actions required to make the application properly made are set out in the Action Notice, as follows:

- *The application for a Development Permit for Building Works is the incorrect application for the development due to the higher order approval and plan of the development that prescribes a Building Envelope and the proposed shed is located outside of the Building Envelope. The higher order approval includes a condition requiring all buildings be contained within the envelope. Withdrawal of the current DBW20/0016 application and submission of a Minor Change application to the higher order REC17/0070 approval is required should the applicant wish to proceed with a shed outside the building envelope.*
- *The application has been made on a superseded DA Form. The current form (version 1.2) became effective 7 February 2020. All forms submitted with an application are required to be made on current forms.*

[1] The email from the Applicant to the Council is dated 11 February 2020 at 4.55pm. It is not clear as to why the Action Notice refers to the application being received on 12 February 2020. As the date of lodging of the application is materially not relevant to the issue the subject of the proceeding, this anomaly need not be resolved.

6. The Action Notice advises that pursuant to the Development Assessment Rules, the applicant must take the actions identified above and give notice to the assessment manager that the applicant has complied with the action notice, within 20 business days of this notice or otherwise the application will be taken to have not been made.

7. The stated grounds of appeal are that the application has been properly made under the *Planning Act 2016* on the basis that the application satisfies the requirements of s. 66(2) of the *Planning Act 2016*.

8. The Applicant submits that the Council have jurisdiction to approve the shed outside of the building envelope under a Development Permit for Building Works on the basis that s. 66(2) of the *Planning Act 2016* governs when a development condition is prohibited and a development condition can be inconsistent with an earlier development condition if, both conditions are imposed by the same person, and the applicant and owner agree in writing to the later condition applying.

9. The Applicant submits that the requirements set out in s. 66(2)(a) to(c) of the *Planning Act 2016* are able to be met, although it is noted by the Applicant that the requirement in s. 66(2)(c) requires action that is yet to be taken.

10. The Applicant submits that whilst Division 2, Subdivision 2 of the *Planning Act 2016* outlines the process of making a change application, including a minor change application, it does not:

    a. limit Council's ability to impose conditions that are inconsistent with a development condition of an earlier development approval; or
    b. restrict Council's ability to assess the outbuilding outside of the building envelope as an application other than a minor change application.

11. In the Applicant's submission dated 21 August 2020, it is submitted that the proposed shed located outside of the building envelope does not require a change to the existing ROL approval. In support of that position the Applicant cites three examples where applications other than a change application have been accepted by Logan City Council and approved and the views expressed by officers from Logan City Council. Those examples and views expressed are of no assistance to the present application seeking a declaration as every application must be dealt

with and considered on its own facts and the proper interpretation of the relevant statute.

12. The SCRC filed submissions on 11 August 2020. Council submits that the lot the subject of the relevant building works application was created as a result of a reconfiguring a lot approval issued on 1 September 2017 which included condition 4. It is submitted that 'dwelling' is defined in the Sunshine Coast Planning Scheme to include outbuildings, structures and works normally associated with a dwelling.

13. The Council submits that it is as a result of condition 4 that the Council must approve a change to the reconfiguring a lot approval before the Applicant can apply for a development permit for building works for any works located outside of the building envelope.

14. The Council cites s. 51(1)(a) of the *Planning Act 2016* which requires that a development application must be made in the approved form to the assessment manager. The *Planning Act 2016* defines 'development application' to mean 'an application for a development approval'.

15. Relying on Liquorland (Aust) Pty Ltd v Gold Coast City Council[2], namely that the assessment manager ought to know in precise detail what the development proposal entails with the information coming from accompanying documents, the Council submits that after a review of the DA Form 2 and the accompanying documents it is clear that the approval sought by the application is the approval of changes to the reconfiguring a lot approval and accordingly the application has not been made in the approved form for the approval sought and has not been properly made under s. 51 of the *Planning Act 2016.*

16. In response to the statement by the Applicant that the Council have jurisdiction to approve the shed outside of the building envelope under a development permit for building works as a result of s. 66 of the *Planning Act 2016* the Council submits that it would be an absurd outcome if s. 66 of the *Planning Act 2016* was interpreted to mean that it was the intention of the legislature that a change application and the detailed process for the assessment of them under Chapter 3, Part 5, Division

[2] [2001] 2 Qd R 476 at 486

2 of the *Planning Act 2016* could be circumvented and instead dealt with in a discretionary and ad hoc basis under s. 66 of the *Planning Act 2016.*

17. Council submits that the Applicant submitted the following documents by email on 11 February 2020, cover letter, DA Form 2 (version 1.1), site plan and elevations, and a credit card payment authority form. The Applicant submits that the latest DA Form 2 and written consent from the applicant and owner will be provided in response to the Action Notice if the Tribunal deems the application to be properly made.

18. A person may start proceedings for a declaration by a tribunal by filing an application in the approved form with the Registrar[3]. An Applicant may start proceedings for a declaration about whether a development application is properly made[4].

19. The proceedings concern whether the development application was a properly made application such that it ought to have been accepted, assessed and decided by the Council. Both parties consented to the appeal being determined on the papers.

20. Section 51 of the *Planning Act 2016* provides for the making of development applications. Section 51 relevantly provides:

> *51 Making development applications*
> *(1) A development application must be-*
> *(a) made in the approved form to the assessment manager; and*
> *(b) accompanied by-*
> *(i) the documents required under the form to be attached to, or given with, the application; and*
> *(ii) the required fee.*
>
> *…*
>
> *(4) An assessment manager-*
> *(a) must accept an application that the assessment manager is satisfied complies with subsections (1) to (3); and*
> *(b) ..*
> *(c) may accept an application that does not comply with subsection (1)(a) or (b)(i); and*
> *…*

[3] S. 239(1) *Planning Act 2016*
[4] S. 240(1)(a) *Planning Act 2016*

> *(5) An application that complies with subsections (1) to (3), or that the assessment manager accepts under subsection 4(c) or (d), is a* ***properly made application.***

21. The definition of *'properly made application'* is found in s. 51(5) of the *Planning Act 2016.*[5] Compliance with subsections (1) to (3) or that the assessment manager accepts under ss. (4)(c) or (d) is a properly made application.

22. Section 51(1)(a) requires the development application to be made in the approved form. Section 51(1)(b) imposes a requirement that certain documents accompany the form. Section 51(4)(a) provides that an assessment manager must accept an application that the assessment manager is satisfied complies with s. 51(1) to (3). Section 51(4)(c) provides an assessment manager may accept an application that does not comply with s. 51(1)(a) or (b).

23. The Council's Action Notice indicated two areas of concern. First, a concern that the incorrect type of application had been filed, *i.e*. not a change to the conditions of the reconfiguring a lot approval. Second that the incorrect (outdated) form had been lodged. It is clear that the primary basis that the Council decided to treat the application as not being properly made was the substantive issue relating to the effect of the change being sought.

24. In Trinity Park Investments Pty Ltd & Anor v Cairns Regional Council & Anor [6] Jones J considered a question where the assessment manager was concerned with the level of assessment. He stated:

> *[52]…The approach adopted by the Council misconstrues what constitutes a properly made development application…….As to what is required to make a properly made development application is set out in s. 51 of the Planning Act 2016. That section requires that a development application must be in the approved form to the assessment manager, be accompanied by the required documents, or given with, the application, and the payment of the required fee. …*
>
> *[53] Pursuant to s. 51(4)(a), an assessment manager must accept an application that he is satisfied complies with subsections (1), (2) and (3) and pursuant to subsection (4)(b), must not accept an application unless satisfied that the application complies with subsections (2) and (3). Provided subsections (2) and (3) are complied with, s. 5(4)(c) and (d) provides him a limited discretion to accept an otherwise non-compliant*

[5] Schedule 2 *Planning Act 2016*

[6] [2019] QPEC 68 at [52]

application. Pursuant to s. 51(5), an application that complies with subsections (1), (2) and (3) or, where the discretion is exercised to accept a non-compliant application, it is to be treated as being properly made.

25. Whilst the lodgement of the application on an incorrect form appears to be the secondary compliant of the Council it is that defect that is primarily relevant for s. 51. The Applicant concedes that the latest DA Form 2 and written consent from the applicant and owner will be provided in response to the Action Notice if the Tribunal deems the application to be properly made.

26. As the assessment manager did not exercise its discretion to excuse the non-compliance with s. 51(1)(a) of the *Planning Act 2016,* as allowed pursuant to s. 51(4)(c), the application did not meet the requirement of s. 51(5) and was not a properly made application.

27. The Council raised in its submission concerns about the material filed in support of the application. To the extent that the deficiency of the material filed is said to relate to s. 51(1)(b)(i) of which it is not clear that would also be relevant to the question of whether the application is properly made or not. However, it is not necessary to resolve that matter.

28. Consideration of the question as to whether s. 66 has any operation in relation to the proposed development application being properly made or not, misconstrues what constitutes a properly made development application. The nature of the appropriate application that ought to have been made is beyond the scope of the present application seeking declaration about the status of the application.

Judy Brien

Development Tribunal Chair
Date: 2 November 2020

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