



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-021
Appellant:	Russel May
Respondent (Enforcement authority):	Toowoomba Regional Council
Site Address:	1-3 William Street, Clifton, formally described as Lots 16 and 17 on RP18287 (together, '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 decision of Council to give an enforcement notice in relation to building works undertaken by the appellant within the subject site.

Date and time of site inspection (no hearing):	Thursday 12 November 2020 at 11:30am
Place of hearing:	No hearing was held
Tribunal:	Neil de Bruyn – Chairperson Stafford Hopewell – Member
Present:	Russel May – Appellant Kevern Hay – Council Representative Matthew Whittaker – 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 Council to give the enforcement notice dated 23 April 2019 with a decision to not give the enforcement notice.

Background:

1. On 18 February 2019, an "offsite" inspection of the subject site, by a representative or representatives of Council, identified that the following buildings or structures had been constructed within the subject site:
 - a) a two-storey extension on the northern side of an existing, approved shed; and
 - b) a fence over 2 metres in height along parts of the northern and eastern boundaries of the subject site.

2. Council issued a show cause notice under section 167 of the PA. This notice was dated 20 February 2019 and issued under cover of Council's letter of the same date. This notice stated that a search of Council's records had located the following documents:
 - a) A Notice of Engagement and development approval dated 4 February 2002, relating to a caretaker's cottage and including approved plans for a single storey dwelling to be established on stumps;
 - b) a Notice of Engagement submitted by BCERT Consulting Pty Ltd ('BCERT'), private certifiers, and received by Council on 26 November 2015, relating to a two-storey caretaker's cottage; and
 - c) a Notice of Discontinuance of Engagement submitted by BCERT and received by Council on 15 December 2016, relating to the aforementioned two-storey caretaker's cottage.
3. The show cause notice also stated that no application for development approval for the two-storey extension, or caretaker's cottage, had been lodged with Council, and no Notice of Engagement for these building works had been received following receipt of the above-mentioned Notice of Discontinuance. The show cause notice also went on to state that no development approval or Notice of Engagement had been received in relation to the boundary fence exceeding 2 metres in height.
4. The show cause notice stated that the above-mentioned building works constituted the carrying out of assessable development without a development permit, and invited the appellant to make representations as to why Council should not issue an enforcement notice pursuant to section 168(1) of the PA, requiring the appellant to refrain from committing a development offence and to remedy such offence by:
 - a) Ceasing all works immediately; and
 - b) obtaining development approvals for building works for the two-storey extension and the fence exceeding 2 metres in height, or by:
 - i. demolishing both the extension and the fence; or by
 - ii. demolishing the extension and reducing the height of the fence to less than 2 metres above natural ground level.
5. The show cause notice provided that the appellant's representations were to be received prior to 4pm on Thursday 28 March 2019. The appellant made written representations in an undated letter, stated by Council to have been received on 22 March 2019.
6. The appellant's letter included the following representations pertinent to this appeal:
 - a) The show cause notice was believed to be illegal as the signatory, Council's Mr Kevern Hay, was not considered to hold the qualifications to issue such a notice;
 - b) the appellant's building (not specifically identified) has all the necessary documents, including a Form 16 (used for, among other purposes, an inspection certificate); and
 - c) Council's development department had advised Mr Hay that the building (again, not specifically identified) was self-assessable.
7. The appellant's representations did not include documentation constituting, or providing evidence of the existence of, a development approval, or approvals, for the two-storey extension or for the boundary fence alleged to exceed 2m in height.
8. A further offsite inspection by a Council representative, or representatives, on 15 April 2019 concluded that the two-storey extension and boundary fence exceeding 2 metres in height

remained within the subject site, and a further search of Council records failed to locate any Notices of Engagement or development approvals for these works. Accordingly, Council issued an enforcement notice dated 23 April 2019 under cover of a letter of the same date.

9. This enforcement notice acknowledged the representations that had been made by the appellant but concluded that such representations had failed to provide evidence confirming that an approval, or approvals, had been obtained for the assessable development referred to in the show cause notice. The enforcement notice directed the appellant to do the following by 4pm on 4 June 2019:
 - a) Cease all building and/or development works onsite immediately until such time as the below items have been met; and/or
 - b) Obtain development approval for building work for the two storey extension established on the northern side of the shed;
 - c) Obtain a development approval for building work for the fence greater than 2 metres in height; or
 - d) Reduce the height of the fence so that it is less than 2 metres in height.
10. On 8 May 2019, the appellant lodged this appeal against the aforementioned enforcement notice. Following the lodgement of the appeal and establishment of this tribunal, the appellant agreed that a site inspection was to be held but requested, in correspondence dated 15 October 2020, that all arguments by the parties be by way of written submissions rather than by way of a formal hearing. No objection was raised by Council to this request, which was agreed to by the tribunal.
11. The site inspection was held at 11.30am on 12 November 2020.
12. At the site inspection, the tribunal observed the following building and structure on the subject site:
 - a) a partly completed, two-storey building ("the building") attached to the northern side of an existing shed located on Lot 16 on RP18287 and facing William Street; and
 - b) a structure, comprising a fence ("the fence") extending over the northern boundary of Lot 16 (the frontage to William Street) and the northern part of the western boundary shared with a neighbouring lot.
13. The building is variously referred to as an "extension" to the existing shed or a two-storey building intended to be used as caretaker's accommodation or a caretaker's cottage in different documents. For consistency, this is referred to as the building in this decision.
14. Following the site inspection, and on 20 November 2020, the tribunal issued the following directions to the parties:

The Tribunal undertook a site inspection on 12 November 2020. At the inspection, the Tribunal confirmed that, as previously agreed, arguments by the parties were to be in writing, following the inspection, and that a "terms of reference" detailing key aspects on which each party's submissions would be required, would be issued via the Registrar by the Tribunal. The Tribunal accordingly makes the following directions:

1. *The Tribunal has undertaken a preliminary review of the enforcement notice in regard to compliance with section 168 of the Planning Act and considers that the enforcement notice is potentially deficient. Toowoomba Regional Council as the enforcement authority is requested to provide submissions addressing the requirements of section 168 of the Planning Act, including:*
 - *The type of development alleged to be (sic) have been carried out;*

- *the provisions of the planning scheme (or other relevant regulation) triggering the need for a development permit for the development alleged to have been carried out;*
- *details of the dates, times or period of times on which the alleged offences was committed;*

2. *The Tribunal also request the Toowoomba Regional Council to provide submissions in relation to:*

- *Whether demolition or removal of all or part of works is justified under section 168(4) of the Planning Act;*
- *timeframes for compliance with the requirement of the notices (e.g. timeframes for obtaining development approval or demolition or modification of the works);*
- *evidence relied upon to prove the alleged offences.*

The above submissions are to be provided to the Registry and Mr May by email by 4.00pm on 4 December 2020.

3. *The Tribunal has undertaken a preliminary review of the notice of appeal, including the grounds of appeal, and considers that the notice of appeal potentially lacks relevant grounds. Mr May as the appellant is requested to provide submissions in response to the submissions made by Toowoomba Regional Council referred to above and any other grounds or evidence he wishes to rely on as to why the appeal should be upheld.*

4. *The Tribunal also request Mr May to provide submissions in relation to:*

- *Full details of the intended use of the two-storey extension to the existing shed located on the site;*
- *evidence relied upon as to whether, or not, the construction of the two-storey extension and a boundary fence, acknowledged by Mr May at the site inspection to be at least 2m in height, constitute assessable building works under section 20 of the Building Act 1975 and therefore require a building works development permit; and*
- *if applicable, evidence relied upon confirming that any necessary building works development permit(s) were obtained for the construction of the two-storey extension and 2m boundary fence.*

The above submissions from Mr May are to be provided to the Registry and Toowoomba Regional Council by email by 4.00pm on 18 December 2020.¹

15. On 3 December 2020, Council provided its responding submissions, which in summary stated:

- a. The building had been constructed on the subject site sometime between 28 July 2016 and 18 August 2017;
- b. The fence had not been constructed on the subject site as at 18 August 2017 but had been constructed as at 31 May 2018;
- c. The building was assessable development under section 20 of the *Building Act 1975* and Schedule 3, Part 1, Table 1 of the Sustainable Planning Regulation 2009 (SPR);
- d. The fence was assessable development under Schedule 9, Part 1 of the PA;

¹ This is a direct quote from the email from the Registry to the parties. The reference to the height of the fence is dealt with further in the reasons for the decision.

e. Council has no record of any relevant development approval for the building or fence.

16. Council in its submissions, and in response to a preliminary issue raised by the tribunal about compliance with the requirements of section 168 of the PA in respect of the enforcement notice, requested the tribunal, pursuant to section 254(2)(b) of the PA, to replace the enforcement notice with the amended enforcement notice as set out in Annexure F of Council's responding submissions.

17. Council concluded in its responding submissions that it considered it is appropriate for the tribunal to make the decision to replace the enforcement notice as the appellant has committed a development offence and enforcement action is both warranted and necessary in these circumstances.

18. By letter and email dated 16 December 2020, the appellant requested an extension of the deadline for his responding submissions to 21 December 2020, citing an illness as his reason for this request. This request was agreed to by the tribunal and Council was also notified of the agreed extension.

19. The appellant's written submissions were received on 21 December 2020. On the questions listed in the tribunal's directions of 20 November 2020, the appellant submitted as summarised below:

a) *Full details of the intended use of the two-storey extension to the existing shed located on the site.*

On this aspect, the appellant refers to Council's show cause notice of 20 February 2019 which, in turn, makes reference to BCERT's notice of engagement received by Council on 26 November 2016 (this is taken to be a typographical error, and as a reference to the notice of engagement dated 26 November 2015 referred to in the original show cause notice) and which describes the development as a two-storey caretaker's cottage.

b) *Evidence relied upon as to whether, or not, the construction of the two-storey extension and a boundary fence, acknowledged by Mr May at the site inspection to be at least 2m in height, constitute assessable building works under section 20 of the Building Act 1975 and therefore require a building works development permit.*

On this aspect, the appellant submits, in relation to the building (caretaker's residence), that:

i. This aspect does not constitute assessable building works, and references a document entitled *Application Requirements for New Dwelling* that was apparently attached to BCERT's aforementioned notice of engagement and which apparently stated that the development met the requirements for self-assessable development.

This document was not included in the appellant's submissions and is also not included in the evidence provided by either party to the tribunal.

- ii. The building certifier received a full set of "for construction" architectural plans.
- iii. An application for compliance assessment of plumbing, drainage and on-site sewerage works was lodged with Council on 22 December 2015.
- iv. A letter dated 29 November 2017 from Osborne Engineers Pty Ltd confirmed, based on a visual assessment, the structural adequacy of the slab and foundations previously constructed without the certification or inspection of a professional engineer.

This part of the appellant's submissions does not respond to the tribunal's directions in relation to the fence.

- c) *If applicable, evidence relied upon confirming that any necessary building works development permit(s) were obtained for the construction of the two-storey extension and 2m boundary fence.*

On this aspect, the appellant again references Council's show cause notice which, in turn, refers to a notice of engagement and development approval dated 4 February 2002 regarding a caretaker's cottage.

On this point, it is noted that the show cause notice states that this notice of engagement and development approval, dated 4 February 2002, included approved plans showing a single storey dwelling established on stumps. Copies of this notice of engagement and development approval and associated approved plans have not been provided to the tribunal by either party.

The appellant's response to this item of the tribunal's directions goes on, in great detail, to comment on the tribunal's directions to Council regarding the potential deficiency of the enforcement notice dated 23 April 2019. Much of the appellant's submission in this regard is in the form of quotes from the judgment of Her Honour Judge Kefford in the Planning and Environment Court decision of *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6 (*Benfer*) in which Her Honour comprehensively addressed the requirements for enforcement notices under the PA.

20. On 12 February 2021, the tribunal issued the following further directions to the parties:

During the course of the tribunal's deliberations on this appeal, it has become apparent that insufficient evidence has been provided to the tribunal regarding the actual height of the boundary fence traversing part of the site's frontage to William Street and part of the western side boundary. The actual height of the fence is a critical factor in determining whether the erection of the fence constituted assessable building works, or not (with specific reference to schedule 1, section 1(a) of the Building Regulation 2006 ("BR")).

Accordingly, the tribunal requests the Toowoomba Regional Council ("Council") to provide further evidence as to the actual height of the fence above the existing ground surface the site, and along its full length (e.g. in the form of a series of photographs clearly showing both ends of a tape measure extending from the top of the fence to the ground level below, in which the height measurements are clearly legible, or a plan(s) certified by a licensed surveyor, showing a series of spot levels for the top of the fence and the ground surface below), and to provide evidence as to the extent to which the existing ground surface of the site along the line of the fence is, or is not, representative of the natural ground surface, as defined under the BR.

*Council's above-mentioned submissions are to be provided to the Registry by email by **4.00pm on 19 February 2021**, so that they can be immediately forwarded by the Registry to the appellant.*

The tribunal also requests that the appellant review the above-mentioned submissions by Council and provides his response, including any additional evidence regarding the height of the fence and the extent to which the existing ground level along the full length of the fence is, or is not, representative to the level of natural ground surface, as defined under the BR.

*The appellant's above-mentioned submissions are to be provided to the Registry by email by **4.00pm on 26 February 2021**.*

21. Council's further submissions were received by the Registrar at 3:56pm on 19 February 2021. These submissions contained a series of photographs taken from within the road

reserve of William Street and showing measurements of the height of the fence by way of a staff held vertically over the face of the fence and with its base firmly against the existing ground surface. The graduations marked on the staff clearly show that the height of the fence, as so measured, exceeds 2 metres and is generally approximately 2.3 metres in height above existing ground level.

22. The tribunal notes the Council's submissions to the effect that requests for access to the subject site and to the adjacent property to the west of the subject site, to measure the height of that part of the fence traversing the subject site's western boundary, were declined by the appellant and the adjoining landowner, respectively.
23. The evidence provided by Council in the further submissions did not address the question as to whether the existing ground surface of the site along the line of the fence is, or is not, representative of the natural ground surface, as defined under the BR.
24. The appellant's further submissions were received by the registrar on 26 February 2021. These submissions identify that Council's further submissions did not address the height of the fence relative to natural ground surface, as defined, and did not therefore establish that the height of the fence renders it assessable development and that the appeal should therefore be dismissed in relation to the fence.

Jurisdiction:

25. 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.
26. 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).
27. 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 under paragraphs (a) to (g) of section 1(2). Section 1(2)(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. Table 1 thus applies to the tribunal in this matter.
28. Item 6 of Table 1 provides that an appeal may be made to a tribunal against a decision by an enforcement authority (in this case, Council) to give an enforcement notice.
29. Accordingly, the tribunal is satisfied that it has jurisdiction to hear and decide this appeal.

Decision Framework:

30. For this appeal, the onus rests on the Council as the enforcement authority that gave the enforcement notice to establish that the appeal should be dismissed (section 253(3) of PA).
31. 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.

32. 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:

33. The following hardcopy material:

- a) 'Form 10 – Notice of Appeal' lodged by the appellant with the tribunal's registrar on 8 May 2019, and the following attachments:
 - i. A copy of Council's letter to the appellant dated 20 February 2019 and attached show cause notice of the same date,
 - ii. a copy of the appellant's undated response to the show cause notice,
 - iii. a copy of Council's letter to the appellant dated 23 April 2019 and attached enforcement notice of the same date,
 - iv. a copy of Form 1 – Compliance Assessment Application for Plumbing Drainage and On-Site Sewerage Work, including a Council receipt for the payment, on 22 December 2015, of the associated fee of \$936,
 - v. a copy of QBCC Confirmation of Insurance, dated 4 December 2015, in relation to the appellant,
 - vi. a copy of a BCERT Notice of Engagement by May Building dated 16 June 2015 for building work described as "Caretaker's Residence,"
 - vii. a copy of Form 22 – Notice of Discontinuance of Engagement of BCERT by the appellant and dated 7 December 2016,
 - viii. a copy of Form 15 – Compliance Certificate for Building Design or Specification, dated 11 December 2017, and
 - ix. a copy of Form 16 – Inspection Certificate/Aspect Certificate/QBCC Licensee Aspect Certificate, dated 20 September 2018.
- b) Tribunal directions issued by email on 20 November 2020.
- c) Written submissions made in response to the tribunal's directions of 20 November 2020, received from Council by email on 3 December 2020.
- d) Written submissions made in response to the tribunal's directions of 20 November 2020, received from the appellant by email on 21 December 2020.
- e) Tribunal directions issued by email on 12 February 2021.
- f) Written submissions made in response to the tribunal's directions of 12 February 2021, received from Council by email on 19 February 2021;
- g) Written submissions made in response to the tribunal's directions of 12 February 2021, received from the appellant by email on 26 February 2021.
- h) The *Planning Act 2016* and *Planning Regulation 2017*.
- i) The *Sustainable Planning Act 2009* and *Sustainable Planning Regulation 2009*.
- j) The *Building Act 1975* and the *Building Regulation 2006*.

Findings of Fact:

34. The tribunal makes the following findings of fact:

Building Work

35. A building is defined under the PA as follows:

- a) *a fixed structure that is wholly or partly enclosed by walls and is roofed; or*
- b) *a floating building; or*
- c) *any part of a building.*

- 36. The BA definition is substantially the same as that under the PA.
- 37. A structure is defined under the BA as including a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure.
- 38. Building works is defined under both the PA and the BA to include the building, repairing, altering, underpinning, moving or demolishing of a building or other structure.
- 39. The term “development” is defined under the PA to include the carrying out of building work.
- 40. The tribunal therefore finds that the building and the fence on the subject site respectively constitute a building (the building), and a structure (the fence) and the construction of the building and fence constitute carrying out building works and therefore development, as defined by the PA. It is therefore necessary to establish whether or not the development of the building and fence is assessable development requiring development approval.

Assessable Development

- 41. Section 44(5) of the PA provides that a categorising instrument may categorise development as prohibited, assessable or accepted development, and section 44(6) provides that if no categorising instrument categorises particular development, that development is accepted development (for which a development approval is not required).
- 42. The Building Regulation 2006 (“the BR”) and the Planning Regulation 2017 (“the PR”) are categorising instruments.
- 43. Section 20(1) and Schedules 9 and 10 of the PR identify development that is assessable development. Schedule 9, Part 1, section 1 of the PR states that building work under the BA is assessable development unless the work is accepted development under Schedule 7 of the PR, which provides that building work declared under section 21 of the BA is accepted development, along with building work by or for the State or a public sector entity.
- 44. Section 20 of the BA provides that all building work is assessable development unless the building work is accepted development under section 21(2) or the PR. Schedules 1 and 2 of the BR identify building work that is accepted development.
- 45. Schedule 1, section 1 of the BR identifies that building work for a fence is accepted development if the fence is no higher than 2m above the fence’s natural ground surface.
- 46. No other building work identified as accepted development by these two schedules is relevant to this appeal.
- 47. As the building work for the building is not identified as accepted development under either the PR or the BR, the tribunal finds that the building work for the building is assessable development requiring a development approval in the form of a development permit for building work.
- 48. However, the building work for the building is only assessable development under the PA to the extent that the building work has been carried out under the PA which commenced on 3 July 2017.
- 49. The enforcement notice does not state when the building work for the building is alleged to have been carried out. However, in Council's submissions of 3 December 2020, it is asserted that based on aerial imagery the building was not constructed as at 28 July 2016 but was constructed on the subject site by 18 August 2017.

50. The building work for the building was therefore carried out sometime between 29 July 2016 and 18 August 2017. The aerial imagery of 18 August 2017 is not clear, but it shows a change to the subject site which may be the slab or roof of the building. An aerial image of 31 May 2018 is clearer and shows the roof form of the building.
51. The timing of the building work for the building is significant as the PA commenced and repealed the SPA on 3 July 2017. This means that building work carried out prior to 3 July 2017 was regulated under the SPA, whereas building work carried out from 3 July 2017 is regulated by the PA.
52. To the extent building work for the building was carried out prior to 3 July 2017, it was assessable development under the SPA having regard to schedule 3, part 1, table 1 of the Sustainable Planning Regulation 2009 ("the SPR").
53. The tribunal finds that the building work for the building carried out before 3 July 2017 is assessable development under the SPA.
54. Turning to the building work for the fence, schedule 1 of the BR identifies that building work for a fence is accepted development if the fence is no higher than 2 metres above the fence's natural ground surface and is not for a regulated pool. Conversely, a fence that is more than 2 metres in height above the fence's natural ground surface is categorised as assessable development.
55. Under the BR, the term "natural ground surface" is defined as: "... the ground surface located at site of the building or structure on the day the first plan of survey showing the relevant allotment was first registered."
56. The submissions provided by Council in response to the tribunal's direction of 12 February 2021 shows that the height of the fence is more than 2 metres above the existing ground surface. However, the submissions provided by Council do not include any evidence regarding the height of the fence relative to "natural ground surface", as defined under the BR.
57. Accordingly, the tribunal finds that Council has not established, for schedule 1, section (1) of the BR, that the fence is higher than 2 metres above the natural ground surface and therefore assessable development when the building work for the fence was carried out.

Development Permit for Assessable Development

58. The tribunal finds that there is no evidence of the required development permit for building work for the building.
59. Section 49(1) of the PA defines a development approval as a preliminary approval, a development permit or a combination of both. A development permit is the part of a decision notice that authorises the carrying out of assessable development. Section 243 of the SPA provided that a development permit authorises assessable development under the SPA.
60. The show cause notice issued by Council outlined the documentation relevant to the subject site and the building identified by a search of Council records, and it is notable that only a "development approval dated 4 February 2002, relating to a caretaker's cottage and including approved plans for a single storey dwelling to be established on stumps" was located. The tribunal finds that this development approval was for a different building to the building the subject of the enforcement notice, which is a two-storey building supported on a concrete slab, and therefore that this 2002 development approval is not relevant to this appeal.
61. Significantly, no decision notice or development permit for the building work for the building was found in Council's records. The appellant's response to the show cause notice also did not provide a copy of a decision notice or development permit for this work.

62. The tribunal's directions of 20 November 2020 gave the appellant another opportunity to provide evidence that the building works for the building have the required development approval. Again, the appellant's submissions do not provide any evidence that establishes that the relevant building works have the necessary development approval.
63. On the basis outlined above, the tribunal finds that no development approval, in the form of a decision notice including a development permit for the building works, exists for the building.

Reasons for the Decision:

64. Council as the enforcement authority must establish that the appeal should be dismissed.
65. The enforcement notice given by Council alleges that a development offence has been or is being committed under section 163 of the PA in relation to the construction of the building and erection of the fence.² The development offence under section 163(1) of the PA is:

A person must not carry out assessable development, unless all necessary development permits are in effect for the development.

66. For Council to prove the alleged offence, it must establish that the alleged works are assessable development and all necessary development permits required for the development are not in effect.

Enforcement Notice

67. The enforcement notice is required to comply with section 168 of the PA. This includes that the enforcement must particularise the nature of the alleged offence under section 168(3)(a) of the PA.

68. The enforcement notice stated:

Toowoomba Regional Council, as the enforcement authority reasonably believed that you have committed or are committing a development offence under section 163 (Carrying out assessable development without permit) of the Planning Act 2016, namely construction of two story [sic] building with gross floor area exceeding 10m² and overall height exceeding 2.4m and erection of a fence over 2 metres in height.

69. In the requirements section of the enforcement notice, it was stated that "a development approval for building work" was required to be obtained for the "two story [sic] extension" and "the fence greater than 2 metres in height".

70. The enforcement notice did not identify:

- a. the type of development alleged to have been carried out without a development permit;
- b. the specific regulatory provisions which make the development assessable development for which a development permit is required on which the alleged development offence was committed;
- c. the dates, times or periods of time on which the alleged development offences were committed.

71. The enforcement notice did refer to the construction of a two storey building with a gross floor area exceeding 10m² and overall height exceeding 2.4m and erection of a fence over

² Although Council has used different terminology in relation to the 'construction' of the building and 'erection' of the fence, nothing turns on this and the relevant works are 'building work' as defined in the PA.

2 metres in height in relation to the alleged development offence under section 163 of the PA and did state a development approval for building work needed to be obtained for the building and fence.

- 72.** The enforcement notice however did not expressly identify that the building work for the building and fence was assessable development in the form of building work nor the basis upon which the building work was assessable development.
- 73.** The enforcement notice is also confusing in relation to the relevance of the description of the building work.
- 74.** In relation to the fence, this aspect of the alleged offence is described as being the "erection of a fence over 2 metres in height". Although the relevance of the height of the fence is not explained in the enforcement notice, having regard to the BR, the height of the fence is integral to whether the building work for the fence is assessable development (*i.e.* a fence not more than 2 metres in height above natural ground surface is accepted development).
- 75.** In contrast, the alleged offence in respect of the building is described as "construction of a two-story [sic] building with gross floor area exceeding 10m² and overall height exceeding 2.4m". Again, the relevance of these details is not explained in the enforcement and having regard to what is assessable development under the PA (or SPA), these aspects of the building are of no relevance or significance, although this is unclear on the face of the enforcement notice.
- 76.** Further, the enforcement notice did not identify when the building work in relation to the building and fence was alleged to have been carried out. This is particularly important in light of the further submissions made by Council in relation to the building.
- 77.** In *Benfer*, Judge Kefford addressed the level of particularity with which the nature of the alleged offence should be identified.³ Judge Kefford identified three relevant matters being:
- a. the identification of the nature of the alleged offence is the foundation on which the enforcement notice is given and informs the legitimacy of the actions that the enforcement notice requires the recipient to take;
 - b. giving the recipient sufficient indication of what is the alleged offence the person and the occasion when the person is said to have committed the offence. This includes identifying the essential factual ingredients of the offence alleged;
 - c. the enforcement notice should set out the nature of the alleged offence, and details of the actions required with respect to it, with sufficient certainty and particularity so that a person of ordinary intelligence and experience can ascertain from the document exactly what is required.
- 78.** In the tribunal's opinion, Council enforcement notice does not adequately particularise the alleged offences and is materially deficient in not complying with the requirements prescribed by section 168(3)(a) of the PA.
- 79.** This was conceded by Council in its submissions to the tribunal dated 3 December 2020 with Council requesting that the tribunal replace the enforcement notice with an amended enforcement notice as set out in Annexure F of the Council's submissions. This proposed that the enforcement notice be amended to state:
- a. the enforcement notice is given under section 310 of the PA in addition to section 168 of the PA;
 - b. the enforcement notice is in relation to two separate alleged offences in respect of the building and fence;

³ See paragraphs [90] to [95].

- c. the alleged offence in relation to the building was committed under section 578 of the SPA between 28 July 2016 and 3 July 2017;
- d. the alleged offence in relation to the fence was committed between 18 August 2017 and 31 May 2018;
- e. the works are building works under the *Building Act 1975* and made assessable development by section 20 of the *Building Act 1975* and schedule 3, part 1 of the *Sustainable Planning Regulation* with respect to the building and schedule 9, part 1 of the PA with respect to the fence;
- f. review of Council's records reveals that there is no development approval in effect for the building works.

80. Changes were also proposed to the requirements of the notice.

81. In *Benfer*, the Planning and Environment Court set aside the enforcement notice the subject of the appeal due to the failure to sufficiently identify the nature of the alleged offence.

82. The tribunal considers the deficiencies in the Council enforcement notice in this appeal are similar in nature and extent to those in *Benfer* and but for the submission of Council requesting changes to the enforcement notice would have no hesitation in setting aside the enforcement notice.

83. However, the tribunal notes that in *Benfer* the respondent council sought to defend the appeal on the basis the enforcement notice in that case was valid and should not be set aside. In this case, Council has acknowledged the deficiencies in the enforcement notice and submits that the tribunal should change the enforcement notice.

84. This raises the question as to the power of the tribunal to change or replace the enforcement notice and the factors to be considered by the tribunal in making this decision.

85. The tribunal's decision making powers are set out in section 254 of the PA and the tribunal must decide the appeal by:

- a. confirming the decision; or
- b. changing the decision; or
- c. replacing the decision with another decision; or
- d. setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time;

86. The Tribunal considers that the scope of amendments proposed by the Council addresses some of the deficiencies in the enforcement notice. In particular, the changes proposed by Council seek to address the legislative basis as why the building works for the building and fence are assessable development and when the alleged offences were carried out.

87. However, changes requested by Council also raise some fundamental issues. In particular, the further submissions and changes proposed by Council in relation to the building works for the building assert that the offence in relation to the building is under the SPA and not the PA.

88. Council now submits the alleged offence in relation to the building occurred under the SPA and prior to the commencement of the PA on 3 July 2017. Council has referred to section 310 of the PA which empowered Council to give an enforcement notice under the PA for an offence under the SPA. While the PA provides that an enforcement notice may be issued in relation to an offence committed under the SPA, care needs to be taken in considering whether this is an appropriate change to make.

89. This issue was considered in some detail by Judge Kefford in *Benfer*,⁴ who concluded:

*I am not satisfied that the absence of reference to s 578 of the Sustainable Planning Act 2009 coupled with the absence of references to dates, times or periods of time during which the development offence was alleged to have been committed do not warrant setting aside the enforcement notice.*⁵

- 90.** In the tribunal's opinion, the nature of the issues raised in *Benfer* are similar to those of this appeal and the failure to identify the alleged offence under the SPA is a serious omission and fundamental to the alleged offence in relation to the building.
- 91.** The tribunal has concerns about whether the scope of its power to change or replace the decision extends to making such material changes, which effectively amount to issuing a materially new and different enforcement notice.
- 92.** Compared to the Planning and Environment Court, development tribunals have a more limited jurisdiction and an appeal to a tribunal is not a hearing anew. Rather, the tribunal is required to hear and decide the appeal in accordance with section 253 of the PA, and particularly subsection (4) of that section.
- 93.** Therefore, if the tribunal has the power to change or replace the enforcement notice as proposed by Council, the tribunal declines to do so. This is on the basis that it is considered that the appellant is materially prejudiced by Council's omissions and the failure to adequately particularise the nature of the alleged offence in the enforcement notice should not be excused by the tribunal.
- 94.** The show cause notice and enforcement notice as given make no reference to any offence under the SPA, nor particularise the time periods of the alleged offences.
- 95.** These details are central to the alleged offence in relation to the building and their omission materially affects the appellant's ability to both understand and respond to the allegations made by Council.
- 96.** The enforcement notice does identify the aspects of the alleged building work being the building and fence in detail and it is considered that the parties reasonably understood the building works in question. However, the failure to identify why the building works in question were assessable is a serious omission. This is particularly so where, in this appeal there appeared (at least on the appellant's behalf) to be some confusion as to whether Council was asserting the building was assessable under its planning scheme, when based on the Council's submissions of 3 December 2020, it became clear that the building works were asserted to be assessable under the now repealed SPA.
- 97.** The tribunal considers that in relation to the building, the enforcement notice should be set aside and the appeal upheld.
- 98.** In relation to the fence, the tribunal is not satisfied that Council has established that the fence exceeds 2 metres in height above the natural ground surface which is a precondition to the fence being assessable development under the PA.
- 99.** Council has provided further material establishing that the fence as at 19 February 2021 exceeds 2 metres in height above the current ground level. However, the further information provided by Council did not address the height of the fence above the natural ground surface.

⁴ See paragraphs [97] to [119].

⁵ At paragraph [119].

100. Having regard to the evidence provided to the tribunal, it is not satisfied that the fence is assessable development, as it has not been established to the tribunal's satisfaction that the height of the fence exceeds 2 metres above the natural ground surface.
101. The tribunal also wishes to clarify the nature of the site inspection and the correspondence from the Registry to the parties. In this appeal, the parties requested that the hearing be by written submissions and this was agreed by the tribunal. The tribunal requested a site inspection with the parties to view the development the subject of the enforcement notice. However, the purpose of the site inspection was to assist in the understanding the evidence to be provided by written submissions and the site inspection did not itself constitute the evidence to be relied upon by the parties.
102. On this basis, it is also not appropriate for the tribunal to rely upon or have regard to statements made by the parties during the site inspection. For this reason, the tribunal has disregarded any statements or references made about the height of the fence during the site inspection, including those mentioned in the Registry's correspondence of 20 November 2020 to the parties.
103. To ensure natural justice and fairness to the parties, the tribunal has based its decision solely on the written submissions of the parties and other materials referred to in the decision.
104. Furthermore, even if the tribunal was to rely on statements made at the site inspection, in relation to the height of the fence, these did not address the height of the fence above the natural surface level and do not assist the Council in proving the elements of the alleged offence in relation to the fence.
105. Having regard to all of the above, the tribunal is not satisfied that a development offence has been committed in relation to the fence.

Neil de Bruyn

Development Tribunal Chair
Date: 30 March 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