



RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Citation: D Leitch v Glenorchy City Council [2017] TASRMPAT 3

Parties: *Appellant:* D Leitch
Respondent: Glenorchy City Council

Subject Land: 37 Sixth Avenue, West Moonah

Appeal No: 107/16B

Jurisdiction: Planning Appeal

Hearing Date(s): 28 February 2017

Decision Date: 2 March 2017

Delivered At: Hobart

Before: GP Geason, Chairman

Representation: *Appellants:* Self-represented
Respondent: F Cangelosi, Simmons Wolfhagen

Catchwords: *Building Act 2000* - Building Code of Australia- Interpretation of classifications between private dwelling and boarding house

REASONS FOR DECISION

Introduction

1. This is an appeal against a decision of the Glenorchy City Council (the Council) to issue a Building Order pursuant to s170(3) of the *Building Act 2000* (the Act).
2. An appeal may be made to the Building Appeals Board pursuant to s211¹ and in accordance with s219² of the Act.
3. The Tribunal is satisfied that the appeal is valid, has been brought in time and invokes grounds which fall within the parameters of such right of appeal.
4. The challenged Building Order was served upon the Appellant as the registered proprietor of the subject address, 37 Sixth Avenue, West Moonah.
5. The Building Order directed the Appellant to carry out specified building work as follows:
 - 1) *Obtain an Occupancy Permit from an accredited building surveyor to address the change in building classification.*

If the engaged building surveyor determines that building work is required to be completed as part of the change of use (from a Class 1a to a Class 1b), you are to comply with s171(2) of the Building Act 2000 as detailed below:

S171(2)

Under the above Section of the Act you are required to adhere to the following:-

- a) *To demolish the building work or building;*
- b) *If the building work is not completed, obtain the following:-*
 - (i) *A certificate to proceed;*
 - (ii) *A permit to proceed;*
 - (iii) *An occupancy permit;*
 - (iv) *A certificate of final inspection;*
 - (v) *A certificate of completion (building work); or*
- c) *If the building work is already completed, obtain the following:-*

¹ **211. Appeal relating to orders**

An owner of a building, temporary structure or land affected by an emergency order, a building order or plumbing order may appeal to the Appeal Tribunal against –

- (a) the order; or
- (b) a failure to notify under [section 199\(2\)\(a\)](#).

² **Division 3 - Procedures 219. Form of applications**

(1) An application to the Appeal Tribunal is to be –

- (a) in the approved form; and
- (b) made within the specified period; and
- (c) accompanied by the prescribed fee.

(2) The Appeal Tribunal may extend the specified period referred to in subsection (1) if it considers it appropriate.

- (i) A certificate of substantial compliance;
- (ii) A permit of substantial compliance;
- (iii) An occupancy permit, if required;
- (iv) A certificate of final inspection;
- (v) A certificate of completion (building work)

The Issues

6. The resolution of this appeal turns on the classification of the Appellant's home. Pursuant to the Act, it is to be classified in accordance with the Building Code of Australia (the Code). It is an agreed fact that the approved use of the dwelling is as a private dwelling. Under the Code a private dwelling attracts classification "1a".
7. It is the Council's contention that, having regard to the use carried on at the Appellant's home, the proper classification is that of a "boarding house, guest house, hostel or the like". Under the Code, such use attracts classification 1b.
8. According to the Code³, "classification is a process for understanding risks in a building or part, according to its use." The purpose of the Code is to appropriately determine and respond to likely risk levels based upon the use.
9. The Code indicates that in circumstances where classification is not clear, authorities have a discretion to determine the correct classification. The Code says⁴, "they will take into account the likely fire load. Plus the likely consequences of any risks to the safety, health and amenity of people using the building."
10. Mr Cangelosi, for the Council, explained to the Tribunal that the Building Order which had been served upon the Appellant had the effect of requiring the Appellant to engage with a building surveyor to assess such risks and identify appropriate responses thereto. In that sense, the Building Order did not specify the particular works required, but merely established a process which would do so.
11. The Tribunal ascertained from the Appellant that his primary concern was one of principle, and the avoidance of open-ended obligations in relation to the use of his home. He characterises the arrangements at his home as being the same as that of a large family. He submits the living arrangements of a large family are not characterised as falling within Class 1b, even though to all intents and purposes the risk profile may be the same. He submits that a large family is not required to implement safety measures of the sort he fears might be imposed upon him.
12. For the purposes of the appeal, the parties agreed certain facts. It is not necessary to set out all those facts, but materially, in terms of arriving at a classification of the use which is carried on at the Appellant's home, the following was agreed:-
 - a) From 1999 to the present date, the Appellant has lived in the property and intermittently so have persons who:-

³ A3.2 Classifications.

⁴ A3.2

- (i) Have not been in a “significant relationship” as that expression is defined in the *Relationships Act 2003*, s4;
 - (ii) Have not been in a “caring relationship” as that expression is defined in the *Relationships Act 2003*, s5;
 - (iii) Have not been in a “family relationship” as that expression is defined in the *Relationships Act 2003*, s7.
- b) Notwithstanding paragraphs (ii) and (iii) above, the relationship between the Appellant and persons who have lived at the property has been one of:-
- (i) Mutual emotional and spiritual support, particularly provided by the Appellant to the residents;
 - (ii) The imposition of training by the Appellant to the residents to increase their employability and ability to live independently;
 - (iii) The sharing between the Appellant and other residents (generally but not invariably) of domestic costs through residents’ payments which are levied at fixed rates per week or fortnight and designed “board and lodgings”;
 - (iv) Shopping expeditions whereby the Appellant and, generally, one or more other residents choose what to purchase, the payment being drawn from the “board and lodgings” fund (as mentioned in (iii) above);
 - (v) The sharing of domestic duties, usually amongst the other residents rather than the Appellant; and

Further, the relationship between the Appellant and the persons who have lived at the property has not been one of:

- (vi) Personal care, beyond the provision of lodgings, food, emotional and spiritual support and training;
 - (vii) Financial dependence or interdependence;
 - (viii) The ownership, use, and acquisition of property by the Appellant and the residents; or
- c) The property is not a public utility, and the living arrangements at the property neither are designed for, nor in fact achieves, any profit for the Appellant.

Interpretation of the Code Provision for category 1b

13. It is submitted by the Council that the words “or the like” should be interpreted according to the principle of construction known as *ejusdem generis*. According to that principle, those general words take their colour from the specific words which precede them. It is the Council’s contention that those specific words – boarding house, guest house, hostel – create a class relating to the provision of accommodation for guests at a relatively low cost, though not necessarily for financial gain. The Tribunal accepts that submission.

14. It is submitted by the Council that the use of the premises conforms with the description of boarding house, guest house or hostel or, alternatively, to a use similar to those things (and is thus within the category created by the words “or the like”).
15. The Appellant disputes this.
16. The Tribunal invited the Appellant to explain the nature of the arrangements at his home. He told the Tribunal that ordinarily three people reside there, but on occasions it may be up to five people. They comprise people known to the Appellant, and those who have a need for his help and support, but are not otherwise known to him. He advised the Tribunal that the average length of stay is one to two years, though some have stayed longer. The Appellant told the Tribunal that he provided instruction to the residents in such matters as managing their finances, cleaning, thriftiness, relationships, bible studies and prayer. He told the Tribunal that he led prayer services on occasions.
17. It is not in dispute that the Appellant receives payment for the occupation of his home in most instances, though he told the Tribunal that on occasions he will provide accommodation without requiring payment. It is not contended that the Appellant profits from the process and it appears to the Tribunal that the facts support a conclusion that the payments which are made are applied to the cost of living and general maintenance expenses. The Tribunal holds that it is not necessary that a profit be derived for the purposes of concluding that the Appellant’s home is used for a purpose falling within Class 1b.
18. It is clear to the Tribunal that the occupation of the premises by third parties occurs as a result of the Appellant’s invitation, whether explicit or implicit, and that he exercises a degree of control over the duration of their stay, and the activities pursued there. The Tribunal finds that the occupation of the Appellant’s premises by the residents, is conditional upon their engagement in the instructional support provided by the Appellant. The Tribunal considers that the provision of instruction and the corresponding obligation to engage in that instruction, is inconsistent with the Appellant’s contention that the use is that which is typical for a big family. That conclusion is further enhanced because of the requirement, typically at least, for payment for residential occupation. That conclusion is further enhanced because the occupation is essentially at the will of the Appellant, but in any event, is typically of finite duration.
19. Whilst some of these characteristics might exist in a family situation, they are not typical of it and any overlap of characteristics is immaterial to the Tribunal’s conclusion.

Conclusions

20. The Tribunal is satisfied that the correct classification of the Appellant’s home falls within Class 1b of the Code. The Tribunal is satisfied that the Appellant provides lodgings to third parties in return for a contribution to living expenses, and participation in instructional programs intended to achieve their personal betterment. The Tribunal is satisfied that the arrangements are not in the nature of a private dwelling.
21. It follows that the Tribunal is satisfied that the Building Order was properly issued and is valid and enforceable.
22. Accordingly, the appeal is dismissed.
23. S28(1) of the *Resource Management & Planning Appeal Tribunal Act 1993* directs that each party to this appeal is to pay its own costs. The Tribunal will consider an application for a costs order under s28(2) if it is made in writing with supporting submissions within 14 days

of the date of this decision. If an application is made, the operation of s28(1) is stayed until further order.

24. If requested, the Tribunal will reconvene to hear any evidence in respect of any matter bearing upon an order for costs.