

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**AUSSIE BUGGY ADVENTURES PTY LTD ACN 635 969 247 v
ACT PLANNING AND LAND AUTHORITY & ANOR
(Administrative Review) [2020] ACAT 104**

AT 47/2020

Catchwords:

ADMINISTRATIVE REVIEW – decision to issue a prohibition notice pursuant to section 377 of the *Planning and Development Act 2007* – whether use of premises for an off-road buggy hire and drive business is inconsistent with the Crown lease – whether the buggy business could be construed as ancillary to the purpose of the Crown lease being agriculture

Legislation cited:

ACT Civil and Administrative Act 2008 ss 26, 68
Planning and Development Act 2007 ss 247, 377, 408A, sch 1

Tribunal:

Senior Member D Kerslake (Presiding)
Senior Member A Davey

Date of Orders:

9 December 2020

Date of Reasons for Decision:

9 December 2020

**AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL**

AT 47/2020

BETWEEN:

AUSSIE BUGGY ADVENTURES PTY LTD ACN 635 969 247
Applicant

AND:

ACT PLANNING AND LAND AUTHORITY
Respondent

AND:

ANDREW GEIKIE
Party Joined

TRIBUNAL: Senior Member D Kerslake (Presiding)
Senior Member A Davey

DATE: 9 December 2020

ORDER

The Tribunal orders that:

1. The decision under review dated 11 June 2020 is confirmed.

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Senior Member D Kerslake
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. On 11 June 2020, a delegate of the ACT Planning and Land Authority (**the Authority**) made a decision to issue a prohibition notice¹ under section 377 of the *Planning and Development Act 2007* (**PD Act**) to Aussie Buggy Adventures Pty Ltd ACN 635 969 247 (**the applicant**).
2. The decision to issue the prohibition notice is a reviewable decision, and Aussie Buggy Adventures Pty Ltd, represented by Mr Brendan Read, submitted an application for review to the Tribunal on 26 June 2020.
3. The matter under review relates to an off-road buggy business at the property “South Lanyon”, held as Crown lease Block 1188 District 000 Tuggeranong (**the premises**)² by Brian Raymond Read and Helen Aline Read (**the lessees**). The lessees have held the Crown lease on the premises since 18 July 2003.
4. Brendan Read, as representative of the applicant, is a son of the lessees, and one of the principals of Aussie Buggy Adventures.
5. The prohibition notice provides that **the activity** of operating the buggy business at the premises:

*...must not be carried on by you until such time as the Crown lease is varied to the extent necessary to permit the activity to be carried on in relation to the premises*³

on the basis that the use of the premises for off road buggy hire and drive is not consistent with the provisions of the Crown lease.

6. The notice of decision⁴ accompanying the issue of the prohibition notice also outlined complaints that had been received by Access Canberra about the activity, and inspections undertaken by Access Canberra staff, together with the reasons that:

16. The conduct of off-road buggy hire and drive activity is in breach of the provisions of the Crown lease.

¹ T documents pages 30-32

² Register book Vol 1668, folio 69, issued 25 September 2003; T documents pages 35-46

³ T documents pages 30-32

⁴ T documents pages 33-34

17. *The activity contravenes:*

Planning and Development Act 2007, Planning and Development Regulations 2008, Schedule 2, part 3(a) - undertaking a development for which development approval is required without approval.

18. The Crown lease 'Purpose' clause (cl 3(a)) provides the permissible use of the premises under the Crown lease. The operation of the off-road buggy hire and drive activity is not permissible under the Crown lease.⁵

7. The issue of the prohibition notice on 11 June 2020 had been preceded by two warning letters, the first sent on 14 January 2020⁶ and the second on 24 April 2020.⁷ These letters advised that the activity was not consistent with the provisions of the Crown lease and that either the activity needed to cease, or a development application seeking approval for a compliant lease variation needed to be submitted within 10 days.
8. According to the further statement of reasons⁸ provided by the respondent on 14 August 2020, the applicant had advised Access Canberra staff on 29 April 2020 that a development application was in preparation,⁹ but that further complaints had been received about the activity¹⁰ and there was no evidence of a development application having been submitted.¹¹
9. By directions dated 14 August 2020, the Tribunal ordered that Mr Andrew Geikie, who is a neighbour of the premises, be made a party joined. Mr Geikie was self-represented in the tribunal proceedings.
10. The Tribunal's hearing of this matter took place on 6 October 2020, commencing with an on-site inspection of the premises and continuing with a formal hearing at the tribunal attended by all parties.

Relevant legislation

11. Section 247 of the PD Act provides that:

⁵ T documents page 34

⁶ Supplementary T documents pages 138-139

⁷ Supplementary T documents pages 143-144

⁸ Further statement of reasons dated 14 August 2020, filed with the Tribunal 14 August 2020

⁹ Further statement of reasons dated 14 August 2020, paragraph 20

¹⁰ Further statement of reasons dated 14 August 2020, paragraph 21

¹¹ Further statement of reasons dated 14 August 2020, paragraph 22

(1) Territory land, or a building or structure on the land, in relation to which a lease is granted, whether before or after commencement of this part, must not be used for a purpose other than a purpose authorised by the lease.

Note Beginning a use of land, or a building or structure on the land, is development and may require development approval (see s.7 def "development", par (d) and s 8, def use, par (a)).

12. Section 377 of the PD Act states:

*(1) This section applies if the planning and land authority believes, on reasonable grounds, that the giving of a notice under this section (a **prohibition notice**) is necessary—*

(a) to prevent an entity starting, or continuing, to undertake prohibited development; or

(b) to prevent an entity from continuing to undertake development if:

(i) the entity has started to undertake the development; and

(ii) the development requires development approval; and

(iii) there is no development approval for the development; or

(c) to prevent an entity from continuing to undertake development other than in accordance with the conditions of a development approval if—

(i) the entity has started to undertake a development; and

(ii) there is development approval for the development; and

(iii) the development undertaken is not in accordance with the conditions of the development approval.

(2) Also, this section applies to an activity under subsection (1) whether or not—

(a) a controlled activity order has been made, or is proposed to be made, in relation to the activity; or

(b) a proceeding for an offence against this chapter in relation to the activity has begun or is about to begin.

(3) The planning and land authority may give a prohibition notice to 1 or both of the following:

(a) the lessee or occupier of premises to which the activity mentioned in subsection (1) relates;

(b) an entity by which or on behalf of which the activity—

(i) was, is being, or is to be, conducted; or

(ii) is likely to be conducted...

(4) The prohibition notice must state—

(a) that it is a prohibition notice under this Act; and

(b) each entity to which it is directed; and

(c) that the notice takes effect when it is given to an entity to which it is directed; and

(d) the grounds on which the notice is given; and

(e) the activity, and the premises, in relation to which the notice applies; and

(f) that the activity—

(i) must not be carried on by the entity; or

(ii) must not be carried on by the entity except in accordance with the notice; and

(g) when the notice ends (including, for example, on the happening of an event stated in the notice).

(5) A prohibition notice takes effect when it is given to an entity to which it is directed.

13. Section 408A of the PD Act entitles an eligible entity to apply to the Tribunal for a review of a “reviewable decision”.
14. Item 47 of Schedule 1 of the PD Act specifies that such an application may be made by the lessee or occupant of the premises in respect of which a prohibition notice is issued or a person against whom such a notice is directed.
15. Section 26 of the *ACT Civil and Administrative Act 2008* (**ACAT Act**) provides that in reviewing a decision:

The Tribunal may inform itself in any way it considers appropriate in the circumstances.

16. Section 68 of the ACAT Act provides that after reviewing a decision the Tribunal must either confirm, vary or remit the original decision, or set aside the decision and substitute a fresh decision.

Issue for determination

17. Under section 377 of the PD Act the Authority is vested with a discretion as to whether or not to issue prohibition notices. It falls to the Tribunal to determine whether the issue of such a notice in this particular instance was the correct or preferable decision.

The applicant's evidence and contentions

18. The applicant contends that in all the circumstances the issue of a prohibition notice was unnecessary and unreasonable.
19. By way of background, the applicant told the Tribunal that in 2019 he had sought assistance from Mr Tim Liston to repair a buggy. He and Mr Liston subsequently entered a partnership to conduct a buggy tour business at the premises.
20. The applicant further advised the Tribunal that even though they purchased some buggies in January 2020, they were unable to commence operations at that time because of bushfires in the area. When they did commence operations – on 21 March 2020 – they had to close shortly afterwards because of COVID 19.
21. On two separate occasions (14 January 2020 and 29 April 2020) the Authority wrote to the applicant's parents advising that the business operation was in contravention of the Crown lease and that the business could not operate at the premises without approval to vary the terms of the lease.
22. The applicant submitted that his understanding was that that a buggy tour operation could properly be considered as farm tourism and therefore an "ancillary" use under the terms of the lease, because his parents were still farming and had no intention of not farming.

*It's a working farm. It's got livestock in rotation, or in paddocks that get rotated through, with which we drive. If we open a gate, we shut it; if the gate is open, we drive through it, we don't close it, all those types of things that would probably indicate that it's an activity on a farm. We thought that that would be reasonably considered farm tourism.*¹²

¹² Transcript of proceedings 6 October 2020 page 4

23. He stated that while his father commenced a process for varying the lease, they thought it would be permissible to continue to operate the business in the meantime.

I guess, from our perspective, [we] thought that we would be okay to continue to trial a business whilst the correct approvals - whilst we work[ed] our way through exactly what we need[ed] to provide on a 3,300 acre farm.¹³

24. The applicant further submitted that the issue of a prohibition notice was “heavy handed”.¹⁴ They would have appreciated:

the actual opportunity to trial a business and see if it works prior to going through everything, submitting Crown lease variations and other parts.¹⁵

25. He also said that on the two occasions when control letters were issued the business was not actually in operation at those particular times.

We started operating again on - so we started operating for the first time, yes, I think it was 27 May, or whatever the date was. We've actually had 17 days where we've been operational for a trial of this business. So we actually haven't really trialled it at all but we think it's something that the public of the ACT would actually like, based on the bookings and on...people wanting to be involved, I guess.¹⁶

26. He explained that the reason they did operate during the period he described was in order to honour bookings already received.¹⁷ When they received an infringement notice as a result of continuing to operate, the notice was numbered 005, indicating that few such notices are handed out. He expressed the view that the apparent rarity of such notices was further evidence that the issue of a notice in this instance was heavy handed.

27. Mr Brendan Read, representing the applicant, called as witnesses Mr Timothy Liston, the other principal of Aussie Buggy Adventures and the person who runs its operations, and Mr Brian Read, a lessee and land manager of the premises.

¹³ Transcript of proceedings 6 October 2020 page 5

¹⁴ Transcript of proceedings 6 October 2020 page 12

¹⁵ Transcript of proceedings 6 October 2020 page 4

¹⁶ Transcript of proceedings 6 October 2020 page 5

¹⁷ Transcript of proceedings 6 October 2020 page 6

28. In evidence Mr Liston advised that his initial role was to obtain the right vehicles, plan a possible layout for tracks and develop a website, while his partner Brendan Read focussed on finance and insurance. Mr Read's father was to focus on his Land Management Agreement for the premises, arranging any necessary changes. Mr Liston stated that Mr Brian Read had told him that meetings had been held with the relevant authority to discuss changes to the Land Management Agreement and that they had been assured this would be a formality.¹⁸
29. Mr Brian Read accepted, under cross-examination, that the use of the premises for a hire and drive buggy business was not consistent with the terms of the Crown lease but stated that he had believed that an arrangement would be able to be worked out with the ACT Government that would allow the activity to proceed while they "were getting [their] Crown lease varied".¹⁹

The respondent's evidence and contentions

30. The respondent submitted that the issue of a notice was the correct or preferable decision.²⁰ In summary:
- (a) Section 377 of the PD Act provides that the Authority may issue a prohibition notice if it believes, on reasonable grounds, that the giving of a notice is necessary to prevent the commencement or continuation of a prohibited activity.
 - (b) Section 247 provides that Territory land must not be used for a purpose other than a purpose authorised by the lease.
 - (c) The terms of the Crown lease as to the use of the premises are clear and unequivocal.²¹ Under Clause 3(a) of the lease the premises may be used

only for the purpose of agriculture not including the agistment of horses and ancillary thereto keeping a maximum of eight (8) horses for personal use and one (1) dwelling.

¹⁸ T documents page 10

¹⁹ Transcript of proceedings 6 October 2020 page 50

²⁰ Transcript of proceedings 6 October 2020 page 81

²¹ Submissions for the respondent paragraph 62

This clause should be interpreted as meaning that the predominant purpose of land use is agriculture. Any ancillary use is limited to the keeping of up to eight horses for personal use.²²

- (d) A non-compliant activity had been undertaken despite two very clear letters of warning and with no approvals in place.²³
- (e) There is no reasonable interpretation under which that activity (the use of four-wheel drive buggies for tourism) could meet the predominant purpose set out in the lease or be ancillary to that purpose.²⁴
- (f) It is not a true reflection of the business being undertaken to say that these were farm tours.²⁵
- (g) There are sound public policy reasons for the Authority to exercise its discretion to issue a prohibition notice. Ensuring that any development that occurs on the premises has been through an appropriate approval process will ensure that the development is orderly and sustainable.²⁶

The party joined

31. In his written submission Mr Andrew Geikie, the party joined, stated that the applicant was advertising his buggy business online from February 2019 and continued to operate the business even after letters of warning were issued. He submitted that if the prohibition notice were to be set aside, the activity would continue despite there being no Crown Lease variation or planning approvals in place.²⁷ In his view the prohibition notice should remain in place pending the outcome of any approval process.

Consideration of issues

32. The applicant has sought review of a decision by the ACT Planning and Land Authority to issue a prohibition notice preventing the Crown lessees and Aussie Buggy Adventures from operating an off-road buggy hire business at the

²² Submissions for the respondent paragraphs 42 and 43

²³ Transcript of proceedings 6 October 2020 page 80; Submissions for the respondent paragraph 66

²⁴ Submissions for the respondent paragraph 63

²⁵ Transcript of proceedings 6 October 2020 page 79

²⁶ Submissions for the respondent paragraphs 54 and 55

premises until such time as the Crown lease is varied to the extent necessary as would permit conduct of the activity.

33. It is common ground between the parties that the Authority has discretion under the PD Act to determine whether (or not) to issue a prohibition notice. The issue for the Tribunal's consideration is whether the issue of such a notice in this particular case, on 11 June 2020, was reasonably necessary, or whether some other course of action (or no action at all) was to be preferred.
34. It is worthwhile at this point to reiterate relevant terms of the Crown lease for the premises. Clause 3(a) states that the premises may be used

only for the purpose of Agriculture not including the agistment of horses and ancillary thereto keeping a maximum of eight (8) horses for personal use and one (1) dwelling.

35. Part 1 of the Crown lease defines ancillary to mean "associated with and directly related to, but incidental and subordinate to the predominant use."
36. Clause 1 of the lease defines agriculture to mean "broad acre animal farming, crop and pasture production, and horticulture for commercial wholesale production." Horticulture is defined, in turn, as "the use of land for intensive plant production such as fruit vegetable or flower production (including berries and vines)."
37. The Tribunal is of the view that the activity of buggy hire and drive as described by the applicant cannot fit within the meaning of agriculture or horticulture. That is clear from the ordinary meaning of the definitions set out above.
38. The Tribunal next needs to consider whether the activity could be construed as ancillary to the purpose of agriculture. The Tribunal agrees with the respondent's contention that the reference to "ancillary" should not be taken to mean that *any* use ancillary to agriculture is permissible on the premises. This is clear from the definition of ancillary in Part 1 of the Crown lease – it "means associated with and directly related to, but incidental and subordinate to the predominant use" (which in this case is agriculture).
39. The Tribunal is of the view that it was reasonably open to the Authority to categorise the activity as not being directly related but incidental and

subordinate to agriculture. The buggies were being driven on off-road tracks at the premises at speeds noted to be up to 60 kilometres per hour,²⁸ a use that would more appropriately be categorised as a recreational activity rather than one that meets the purpose of agriculture or is ancillary to that purpose.

40. The Tribunal further notes that the current Land Management Agreement for the lease, dated November 2001²⁹ provides for a mechanism³⁰ for a lessee to notify the Territory of an intention to seek a variation to include (among a list of other activities, all of which are evidently excluded by the current lease purpose clause) “tourism facility or farm-stay accommodation”, which if granted also then requires both an updated Land Management Plan and a specific Land Action Plan for the proposed additional activity to be prepared. Under “proposed enterprise(s)”, the current Land Management Agreement does not identify any tourism or other facility on the property as being proposed.³¹
41. It finally remains to consider whether the issue of a prohibition notice, as a consequence of this activity, was the correct or preferable decision in all the circumstances set out above.
42. Prior to issuing the prohibition notices the Authority sent warning notices to the lessees of the premises on two occasions, 14 January 2020 and 29 April 2020. Notwithstanding the applicant’s contention that the business was not in fact operational at either stage, the letters provided reasonable notice that the intended use of the premises for buggy hire would constitute a breach of the terms of the Territory lease. The applicant was also alerted through personal discussions with officers of the Authority - on more than one occasion - that the activity could not proceed without an approved lease variation. The Tribunal notes the applicant’s evidence about the difficulty in obtaining professional advice and assistance but neither this, nor the time which may be taken to process a development application, obviates the need to lodge an application in the first instance.

²⁸ Evidence of Mr. Liston, transcript of proceedings 6 October 2020 page 17

²⁹ T documents pages 47-89

³⁰ T documents page 52, in paragraph 3c under the heading “Review”

³¹ T documents page 57

43. Despite all of the above, the applicant contends that it was still unnecessary for the Authority to go so far as to issue a prohibition notice. The Tribunal does not agree. In the Tribunal's view, the Authority had a reasonable apprehension that the activity – in breach of lease conditions – was highly likely to persist if a prohibition notice was not issued. It is clear from the evidence presented to the Tribunal that, despite the issue of warning notices on two occasions, the buggy hire business subsequently operated on 16 different days. Albeit that the applicant felt obliged to honour bookings already made, it is equally clear that this continued activity was in breach of the lease provisions. The applicant also acknowledges that no development application concerning a variation to the Crown lease had been lodged by the date on which the prohibition notice had been issued.
44. In such circumstances it is difficult for the Tribunal to conclude other than that the Authority had reasonable grounds for the issue of a prohibition notice. In addition to reasonable concerns about non-compliance, by ensuring that the activity ceased until such time as a development approval application was submitted and decided the issue of a prohibition notice also served to ensure that members of the broader community would have the opportunity to exercise their right to comment on any application variation to the lease conditions. This was an important public policy consideration.
45. For the reasons outlined above, the Tribunal has concluded that the issue of the prohibition notice was the correct or preferable decision.
46. The decision is confirmed.

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Senior Member D Kerslake
For and on behalf of the Tribunal

Date(s) of hearing

6 October 2020

Applicant:

Mr B Read, authorised representative

Counsel for the Respondent:

Ms K Musgrove, ACT Government Solicitor

Party Joined:

In person