ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BOLARAM v AUSTRALIAN CAPITAL TERRITORY AND ORS (Civil Dispute) [2020] ACAT 108

XD 544/2020

Catchwords: **CIVIL DISPUTE** – claim for damages arising out of validly issued stop notice on the grounds that work carried out otherwise than in accordance with approved plans and in breach of the Building Act – subsequent refusal to cancel stop notice – certifier incorrectly assessed development as DA exempt and issued building approval – approval requirements not met because development does not comply with R11 (front setback) of the Single Dwelling Housing Development Code – development exceeds maximum permissible plot ratio of 50% as a result of unauthorised enclosure of veranda after stop notice issued – other unauthorised alterations to alfresco and terrace areas carried out before stop notice was issued may require additional areas to be included in calculation of gross floor area – claim dismissed – turns on its own facts – no issue of principle involved

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008, ss 18, 20
Building Act 2004 ss 29, 30, 32, 53, 55, 128, 149
Civil Law (Wrongs) Act 2002 Chapter 8
Construction Occupations Licensing Act 2004, ss 103, 105
Planning and Development Act 2007 ss 133, Division 7.2.3
Public Sector Management Act 1994 s 21(8)

Subordinate Legislation cited:
Single Dwelling Housing Development Code, R1, R11
Territory Plan - Definitions

Tribunal: Senior Member M Orlov (Presiding)
Senior Member G Trickett

Date of Orders: 11 December 2020
Date of Reasons for Decision: 11 December 2020

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 544/2020

BETWEEN:

VENUMADHAVA RAO BOLARAM
Applicant

AND:

AUSTRALIAN CAPITAL TERRITORY
First Respondent

BEN GREEN
Second Respondent

JADE WALTERS
Third Respondent

TRIBUNAL: Senior Member M Orlov (Presiding)
Senior Member G Trickett

DATE: 11 December 2020

ORDER

The Tribunal orders that:

1. The application is dismissed.

……..
Senior Member M Orlov
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction and overview

1. The applicant, Mr Bolaram, owns a block of land in Lawson with his wife on which he is attempting to complete the construction of a substantial new home as an owner builder. Building approval for the works was suspended on 3 December 2019 when a building inspector working in the Rapid Regulatory Response Team (**RRRT**) of Access Canberra, issued a stop notice under section 53 of the *Building Act 2004* (**Building Act**). An application to the Construction Occupations Registrar for cancellation of the stop notice under section 55 of the Building Act was refused on 21 May 2020. The stop notice remains in force.

2. The applicant claims that the Australian Capital Territory (**Territory**), Access Canberra, Ms Jade Walters (the building inspector who issued the stop notice) and Mr Ben Green (the Construction Occupations Registrar), are liable to him for damages in tort, nuisance, under the *Australian Consumer Law* (**ACL**) and under the Building Act, for loss suffered as a result of continuing delays and additional costs caused by the stop notice remaining in force.

3. Access Canberra is a business unit[1] within the Chief Minister, Treasury and Economic Development Directorate of the Territory. It is not a separate legal entity that can sue or be sued and accordingly, is not a proper party to the application. The proper respondent is the Territory.

4. The second respondent, Mr Ben Green, is the Construction Occupations Registrar (**Registrar**) appointed under section 103 of the *Construction Occupations Licensing Act 2004* (**COL Act**). He is responsible, among other things, for exercising certain functions under the Building Act, including deciding an application by a landowner under section 55 of the Building Act for cancellation of a stop notice. The decision to refuse the application in this case, however, was made by the Deputy Construction Occupations Registrar, Mr Nicholas Lhuede, pursuant to a delegation of the Registrar's functions under section 105 of the COL Act.[2] There is no evidence that Mr Green was involved

[1] *Public Sector Management Act 1994,* section 21(8)
[2] *Construction Occupations (Building) Delegation 2018 (No 1)*

in the initial decision to issue the stop notice, the subsequent decision not to cancel the stop notice, or otherwise had any relevant dealings with the applicant.

5. The third respondent, Ms Jade Walters, is a building inspector appointed under section 128 of the Building Act and at all material times was authorised by section 53(2) to issue a stop notice in the circumstances provided for in section 53(1).

6. Section 149 of the Building Act states:

> *(1) The construction occupations registrar, a building inspector, or a person who was the registrar or an inspector, is not civilly or criminally liable in relation to anything done or omitted to be done honestly by him or her in the exercise of a function under this Act.*
>
> *(2) A civil or criminal liability that would, apart from this section, attach to the construction occupations registrar or a building inspector attaches instead to the Territory.*

7. Section 149 is a complete defence to the applicant's claims against Ms Walters and Mr Green (apart from the fact that Mr Green does not appear to have had any relevant involvement). The applicant does not allege that either respondent failed to act honestly in doing or omitting to do anything in the exercise of their respective functions in relation to issuing, or refusing to cancel, the stop notice. Even if such an allegation had been made, section 149(2) makes it clear that liability would attach to the Territory alone.

8. By an amended Civil Dispute Application dated 19 October 2020, the applicant sought damages quantified at $110,311.48. The tribunal's jurisdiction is limited by section 18(2)(a) of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) to civil dispute applications claiming amounts of not more than $25,000. At the start of the hearing the applicant abandoned the claim for the excess by limiting his claim to $25,000. This is permissible under section 20(2) of the ACAT Act. The Tribunal therefore has jurisdiction to decide the application.

9. The applicant also sought an order in the following terms:

> *I would like to request ACAT to issue a very strong warning and notice to ACCESS CANBERRA and its relevant government departments and Officers to rectify all the Housing Development documents and send all*

> *the inexperienced staff back to appropriate training to follow the rules, regulations, delivering service knowledge, and improve the reading skills to interpret the documents and its contents correctly & more precisely to the public, as they are in a position to deliver the valued public services to the people by representing top state government departments.*

10. The Tribunal does not have jurisdiction to make such an order.

11. The only issue the Tribunal must decide is whether the Territory is liable to pay damages to the applicant for the losses he claims.

12. The Tribunal is satisfied that the claim must be dismissed. The following reasons explain why the Tribunal has come to that conclusion.

Background

13. The applicant and his wife are joint lessees of Block 5 Section 45 Lawson (**the land**). The land fronts onto Dawn Crescent to the north and is separated from the road by a concrete pathway and verge.

14. On the opposite (northern) side of Dawn Crescent, extending in an easterly direction for a short distance and in a westerly direction to the shore of Lake Ginninderra is a 130,785m^2 area of vacant urban approved land[3] comprising Block 1, Section 56 Lawson. The northern boundary of that block adjoins a 1,426,988m^2 area of Commonwealth land (formerly the Belconnen Naval Transmitting Station) comprising Block 2, Section 6 Lawson, part of which Defence Housing Australia proposes to develop as an urban area known as Lawson North.[4] Figure 2 in the Lawson South Concept Plan shows a grassland buffer zone to the north of where Dawson Crescent is now located (although streets are not shown) with a note stating: "Grassland buffer is to apply unless otherwise indicated though a development control plan for Lawson North (Commonwealth land) approved by the National Capital Authority". Figure 2 in the Development Control Plan for Block 2 Section 6 and Block 1 Section 16 Lawson (Belconnen Naval Transmitting Station) approved by the National Capital Authority on 12 February 2013, depicts a strip of land adjoining the northern boundary of Block 1 Section 56 described as an "asset protection

[3] https://app.actmapi.act.gov.au/actmapi/index.html?viewer=basic
[4] https://www.dha.gov.au/development/residential/lawson-act

zone".[5] The area may be used as an Outer Asset Protection Zone for the purpose of providing bushfire protection to adjoining development in Lawson South.[6]

15. We mention these matters because both parties appear to assume that the land on the opposite side of Dawn Crescent is open space, but neither has provided the Tribunal with evidence of the fact. We are satisfied that it is appropriate to treat it as such for the purposes of this application.

16. The applicant's land is 888m^2 in area. The maximum permissible plot ratio for a single dwelling on a large block under R1 of the Single Dwelling Housing Development Code (**SDHDC**) is 50%. The maximum permissible gross floor area (**GFA**) of the building therefore is 444m^2.

17. GFA is defined in the Territory Plan. The relevant part of the definition applicable to this development is "the sum of the area of all floors of the building measured from the external faces of the exterior walls".

18. Arch Space Design prepared plans for a seven-bedroom, two storey home in early March 2018 (**original plans**). The original plans state the internal area of the ground floor, garage and upper level as 444m^2 and the total area under cover as 612m^2, including two alfresco areas (65m^2), two verandas (45m^2), a porch, balcony and covered terrace (40m^2). They also show an open terrace on the upper level (40m^2), which is not included in the covered area calculations.

19. The applicant appointed Mr John Bates as the certifier for the project (**the certifier**). On 24 May 2018, the certifier issued an Exemption Assessment D Notice certifying that the site work shown on the original plans is an exempt development under section 133 of the *Planning and Development Act 2007* (**Planning Act**) – i.e. the development does not require development approval. On the same day, the certifier issued a building approval for the site work under section 29 of the Building Act.

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[5] https://www.nca.gov.au/sites/default/files/DCP-1209-Block-2-Section-6-Block-1-Section-16%20-Lawson-%20Belconnen-Naval-Transmitting%20Station.pdf

[6] See paragraph 4.20 (Precinct D – Desired Planning Outcomes)

20. The applicant was issued with an Owner Builder Licence on 22 June 2018 and subsequently commenced building work.

21. The Construction and Utilities Branch of Access Canberra includes a Construction Audit Team (**CAT**), the functions of which include to inspect building sites around Canberra to determine whether building work is being carried out in accordance with the Building Act. Ms Tamara Blissenden is a building inspector appointed under section 128 of the Building Act and has worked in the CAT since October 2012.

22. On 22 November 2019, Ms Blissenden conducted a routine inspection of the building works on the applicant's land. She identified several changes to the dwelling that were not shown on the approved plans, which she photographed and documented in a building works inspection report. She observed that some areas marked as terraces on the approved plans were enclosed with walls and under the roofline, causing her to be concerned that the areas should be included in the calculation of GFA. Her report includes a recommendation that "a stop notice be issued and the items identified in the report be brought to the attention of the building certifier and builder for appropriate action. In addition an audit against the single dwelling housing development code to be undertaken to verify compliance with total gross floor area."[7] Before finalising the report, Ms Blissenden discussed the proposed recommendations with her supervisor, Mr Brian Connors, who agreed with them. Mr Connors is the Assistant Director of the CAT.

23. Ms Blissenden emailed a copy of the report to the certifier and the applicant on 26 November 2019, noting that any amended plans must be submitted within 14 days unless an extension of time was requested.

24. At about the same time, Mr Connors forwarded the inspection report to the Rapid Regulatory Response Team (**RRRT**) for action. In accordance with internal procedures being trialled at the time, the CAT was responsible for performing inspections and preparing building inspection reports. If further

[7] Exhibit 1 page 9

action was required, including issuing a stop notice, the report was referred to the RRRT for action.

25. The third respondent, Ms Walters, is a building inspector working in the RRRT. She issued a stop notice to the applicant on 3 December 2019. The grounds stated in the notice are that building work is being carried out otherwise than in accordance with the approved plans for the work and contrary to a provision of the Building Act relating to the building work.[8] The notice relevantly states:

> *I, Jade Walters, Building Inspector, hereby* ***prohibit*** *carrying out of* **building work** *(proposed DA exempt single dwelling house) being erected on the above mentioned parcel of land, pursuant to section 53(1) of the Building Act 2004, until following matters have resolved:*
>
> 1. *Building Approval plans amended to show openings on external walls consistent with the as* [sic] *built construction;*
> 2. *Any changes to the terraces, alfresco (if enclosed) areas must be counted against the permissible* Plot ratio *requirements for the block.* (Original emphasis)

26. The stop notice suspended the operation of the building approval issued on 24 May 2018 in relation to all building work under the approval.[9]

27. An internal audit of the original plans by the CAT on 16 December 2019 did not identify any issue with the GFA based on the areas provided on the site plan, but found that the development did not comply with R10 (Bushfire), R11 (front boundary setbacks – all blocks), R12 (side and rear setbacks – all blocks) and R17 (allowable encroachments – setbacks) of the SDHDC.[10]

28. The applicant commissioned a drafting service to prepare amended plans, which are dated 6 December 2019 (**amended plans**), showing changes he had made to the building. On 20 December 2012, the certifier purported to approve the amended plans and amend the building approval under section 32 of the Building Act. The certifier lodged the approved amended building plans with Access Canberra on 23 December 2019.

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[8] Exhibit 1 page 19
[9] See section 53(3) of the Building Act
[10] Exhibit 1 pages 73-81

29. Ms Blissenden audited the amended plans in early January 2020 against the requirements of the SDHDC. She considered that the original issue of non-compliance with the approved original plans was rectified by the amended plans – i.e., the amended plans now showed the work as built – but identified several issues where the development did not comply with the SDHDC, which she brought to the attention of the certifier and the applicant in an email dated 17 January 2020. The email identified the following issues as requiring action:

> *Rule 1 – GFA – GFA has been calculated to exclude alfresco, veranda and terraces. These areas are under the roofline and are substantially enclosed (enclosed on more than 2 sides) and must be included in the GFA.*
>
> *Rule 11 – Front Boundary setback - the upper balcony is not set back 6m. A balcony is not an allowable encroachment under rule 17.*
>
> *Rule 12 – Side and rear setbacks - Upper bed 3 window unscreened, must be 6m setback for unscreened. Window has a sill height of 1.35m, must be 1.7m high to be part of external wall. Eastern upper story has no measurements on plans showing setback.*
>
> *Rule 43 – Water sensitive urban design - 5000L tank required. 4000L tank indicated on plans.*
>
> ***The stop notice will remain in place until all the above issues have been addressed***. [Original emphasis]

30. The applicant sent an email to the CAT on 29 January 2020 with the subject heading "Request to eliminate the Stop Note immediately – Block 5, Section 45 – Lawson"[11] in which he claimed that the amended plans "fully complied" with the SDHDC and that, as the certifier had approved the amended plans and amended the building approval, the CAT should lift the stop notice. He complained that, instead of doing so "the CAT team brought forward 4 more new concerns in which 2 of them are totally irrelevant to the block against the approved plans".

31. The applicant argued that the calculation of GFA correctly excluded alfresco, veranda and terrace areas "as they are external elements per SDHDC" for the following reasons:[12]

[11] Exhibit 1 page 25
[12] Exhibit 1 page 25

1. *Alfresco 1 and Alfresco 2 have 2 openings at East Wall and South Walls, as shown in the plans, which are not enclosed and kept open to meet the planning requirements. Hence, they do not need to be included in the GFA. As per the SDHDC, there is NO particular Rule or Criteria is specified to have certain openings or size for Alfrescos.*
2. *Each Terrace at upper floor have 2 openings, which have minimum of 1.7/1.8 privacy walls/screens as per the planning requirements. As per the SDHDC, there is NO particular Rule or Criteria is specified to have certain openings for Terraces.*
3. *Veranda 1 and Veranda 2 has one side full openings, which is being practical to the building design in consideration with SDHDC. However, per the SDHDC, there is NO particular Rule or Criteria is specified to have certain openings for Verandas*.

32. He stated that the front boundary of the land was to open space, which meant that the minimum upper floor balcony setback was 4m in accordance with Table 2C of R11, and not 6m as the CAT claimed.[13]

33. The applicant advised that the window to bedroom 3 would be screened by plantation shutters or would have frosted glass before a certificate of occupancy was issued, and that a 5000L tank would be installed.[14]

34. The email concluded with a request that the stop notice be lifted immediately and referred to the financial and personal stress the situation was causing him and his family.[15]

35. On 6 February 2020, Mr Connors and Ms Blissenden met with the applicant and the certifier to discuss the issues of non-compliance. Ms Blissenden explained that "even if the areas are described as 'terraces or verandas' on the plans, if they have more than two walls and are under the roofline then they must be included in the gross floor area calculation".[16] The applicant maintained that the CAT's approach to the GFA and front boundary set back issue was based on an incorrect interpretation of the SDHDC.

[13] Exhibit 1 page 26
[14] Exhibit 1 page 27
[15] Exhibit 1 page 27
[16] Exhibit 3 paragraph 36

36. The next day, Mr Connors sought advice from the Territory Plan Section about the front boundary setback issue. Ms Alex Kaucz, who is the Senior Director of the Territory Plan Section in the Planning, Land and Building Division of the Environment, Planning and Sustainable Development Directorate, responded by email on 7 February 2020 relevantly as follows:

> *The dwelling must comply with the standard front boundary setback (i.e. UFL at 6m) as the front boundary is a street frontage. The front boundary is considered to be open space when the boundary directly touches the open space and not if there is a road separating them.*

37. On 2 March 2020, Mr Connors and Ms Blissenden met with the certifier to discuss his proposals to rectify the issues of non-compliance. The certifier advised that he would prepare and submit amended plans setting out his proposals.[17]

38. Mr Connors emailed the certifier on 17 March 2020 to follow up on the proposed plan changes.[18] The certifier replied on 4 April 2020:

> *I would like to send through the proposed plan changes that I discussed with you on 2 March 2020.*
>
> *However, I must firstly obtain the owners permission/agreement and this is not forthcoming.*
>
> *The owner feels that he has been treated unfairly in that the SDHC is not specific on how non habitable areas such as alfrescos, verandas, porches and the like are treated in respect to the GFA calculation. The owner and I did talk to an ACT Government Planner/Architect about it and they were similarly doubtful about interpretation.*
>
> *In the circumstances, I consider that the owner should be given the benefit of the doubt and that my Building Approval should be upheld and the Stop Work Notice should be lifted.*
>
> *There is also the allegation that the decision to issue the Stop Work Notice was tainted and if this is verified it could be very painful for those involved.*

39. The allegation mentioned in the last paragraph of the email concerns a claim by the applicant that Ms Blissenden was related to an electrician with whom the

[17] Exhibit 3, paragraph 41
[18] Exhibit 1 page 41

applicant had been in dispute over "pricing and unethical behaviour"[19]. The Tribunal infers that the applicant was suggesting that this may have influenced her conduct in the matter. Ms Blissenden denied the allegation on oath in her statement and in her oral evidence to the Tribunal.[20] The Tribunal accepts Ms Blissenden's evidence about this.

40. The applicant filed a civil dispute application in the ACAT on 22 April 2020, claiming damages of $24,800 for additional costs incurred due to the stop notice remaining in place.

41. The applicant's email to the CAT dated 29 January 2020, mentioned earlier, was drawn to the attention of the Deputy Construction Occupations Registrar, Mr Nicholas Lhuede, on about 5 May 2020. By then, the Construction and Utilities Branch had decided to treat the applicant's email as an application under section 55 of the Building Act for cancellation of the stop notice.[21]

42. As part of his investigations, Mr Lhuede asked Ms Blissenden to prepare a GFA calculation based on the amended plans. A copy of her calculations is in evidence.[22]

43. On 21 May 2020, Mr Lhuede gave notice to the applicant of his decision not to cancel the stop work notice. The notice gives the following reasons for decision, which it is appropriate to reproduce in full:

> *16. In making a decision on whether or not to cancel the stop notice under section 55, I must consider –*
>
> *(a) The application; and*
> *(b) The reasons why the stop notice was given; and*
> *(c) The current state of the building work to which the notice relates.*
>
> *17. I am satisfied of the following:*
>
> *a. With regard to Rule 1 of the SDHDC, the GFA calculations for the development must include the substantially enclosed alfresco, terraces and balconies. On this basis, the Calculated GFA is 642.94m^2 for a block size of 888m^2. This provides a*

[19] Exhibit A, applicant's letter to the Registrar dated 22 October 2020 (3rd paragraph on the 2nd page)
[20] Exhibit 3 paragraphs 45-46
[21] Exhibit 4 paragraph 14
[22] Exhibit 1 pages 151-153

percentage of 72.4%, therefore the mandatory maximum plot ratio allowance of 50% has been exceeded.

I am satisfied that the development does not meet rule 1 of the SDHDC and as a consequence is not exempt from requiring a development approval under the Planning and Development Act 2007 *unless the development is altered to be compliant.*

b. *With regard to Rule 11 of the SDHDC, the upper balcony faces a roadway and is not set back 6m and does not comply with Table 2C: front boundary setbacks – large blocks in subdivisions approved after 2008.*

I am satisfied that the development does not meet rule 11 of the SDHDC and as a consequence is not exempt from requiring a development approval under the Planning and Development Act 2007 *unless the development is altered to be compliant.*

c. *With regardRule 12 – Side and rear setbacks. Rule 12 has now been met as the certifier provided amended plans on 23 December 2019 that show screens to the windows and setbacks indicated.*

d. *With regard Rule 43 – Water sensitive urban design. Rule 43 has now been met as the certifier has provided amended plans on 23 December 2019 showing a 5000L tank indicated on the plans.*

18. *The reasons given in the application to cancel the stop work notice have been considered and I am satisfied that they have been appropriately addressed both within this decision document and in efforts to engage with the builder and building certifier.*

19. *I am satisfied that the grounds under s53(1)(d) and Section 53(1)(d) to issue a the notice still exist under rules 1 and 11 of the SDHDC. Notwithstanding other matters in the notice were addressed, the issues associated with rules 1 and 11 are of significance and warrant the issuance of this notice in their own right.*

20. *Section 55(4) also gives provides me the discretion to cancel the stop work notice if I am satisfied that the cancellation will not endanger the public or people who will use the building on which the building work is being done, or affect public confidence about the standard of building work in the ACT.*

21. *The matters relating to rules 1 and 11 of the SDHDC do not endanger the public or building users in this case. However revoking the stop notice while the two of the five original grounds for issuance still exist may affect public confidence in the role of the regulator and about the standard of building work in the ACT.*

22. *I have decided that it is not appropriate for me to cancel the stop work notice under section 55(4) of the Building Act* [errors in original]

44. On 27 May 2020, the applicant emailed Mr Lhuede in response to the Notice of Decision, taking issue with Mr Lhuede's reasons for decision and venting his frustration at the process and, as he sees it, the apparent inability of the CAT to understand the meaning of R1 and R11 of the SDHDC as those rules apply to his development.[23] The email ends with the following demands:[24]

> *Not to elaborate anymore further here I request you again to cancel the STOP NOTE immediately which raised against to my approved building plans. All the structures were built based up on the Original building development plans, which were approved in 2018 and the minor amendments I made which were reapproved again by an authorised and experienced Building Certifier, hence I would not need to make any further modifications.*
>
> *Please I request you to respond back by this Thursday COB with the STOP NOTE cancellation, otherwise as I will not be having any other option left, where I will take the issue to the High Court and claim as mentioned compensations from ACCESS Canberra and CAT Employees including the decision makers.*
>
> *Also, I need an apology from your building inspectors, who misbehaved and dis-respected me and took me for granted to drag this issue for longer.*

45. Mr Lhuede did not respond to the email. A mediation held on 27 July 2020 failed to resolve the dispute.

46. In response to an email from the applicant dated 4 August 2020 in which he set out a series of questions,[25] the ACT Government Solicitor wrote to the applicant on 4 September 2020 explaining the Territory's position in relation to the front boundary set back and GFA issues, among other things.

47. With respect to the front boundary setback, the letter states:[26]

> *4. Interpretation of R11 by reference to the subject site: The northern boundary of the subject site adjoins a "road" as defined…[27] and is*

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[23] Exhibit 1 pages 87-97
[24] Exhibit 1 page 97
[25] Exhibit 1 page 273
[26] Exhibit 1 page 289
[27] 'Road' is defined in the Territory Plan to mean "any way or street (so called), whether in existence or under reserve, open to the public which is provided and maintained for the passage of vehicles, persons and animals and which may include footpaths, community paths, bus lay-bys, light rail tracks, or traffic controls."

> *therefore a "front boundary".*[28] *As per Table 2C (which applies to large blocks in subdivisions approved on or after 31 March 2008, and therefore applies to the subject site), the minimum front boundary setback is 4m on the lower floor level and 6m at the upper level. The garage is to be setback 5.5m and a minimum of 1.5m behind the front building line*[29] *except where there is a courtyard wall in the front zone.*

48. Later, the letter states:

> *10. The upper floor level balcony is more than 1.5m above the finished ground level and is therefore part of the building and is used to establish the building line. The upper floor level balcony is setback 4.260m from the northern front boundary. This is less than the minimum 6m required by Rule R11 of the SDHDC.*
>
> *11. Rule R11 has a corresponding criterion (C11) which may be considered subject to the submission of a Merit Track development application (**DA**). This will require you to justify, through the DA, how the upper floor level balcony meets Criteria C11 of the SDHDC (please see more information below on submission of a DA).*

49. With respect to the GFA issue, the letter states:

> *5. The plans as submitted on 23 December 2019 show a Veranda 1, Veranda 2 and an Alfresco 1 on the ground floor and, a roofed terrace with outdoor kitchenette accessed from the living area, a roofed terrace accessed from Bed 3 and a small roofed terrace accessed through the Walk In Robe (**WIR**). Some of these rooms as depicted on the plans are considered to contribute to the GFA because a measurement can be taken between their walls as outlined in the definition of GFA…This therefore takes the total GFA for the development above 444m^2 and exceeds the 50% plot ration in contravention of R1.*
>
> *6. Verandah 1 and Verandah 2 are substantially open to ground level and accessible at grade from the adjacent private open space and are therefore <u>not</u> considered to add to the GFA.*
>
> *7. Alfresco 1 on the ground level will also be excluded from GFA <u>if</u> the 2100mm wide window and supporting wall are removed to ground level to substantially open this space and provide ready access at grade from the adjacent private open space.*

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[28] 'Font boundary' is defined in the Territory Plan to mean "any boundary of a block adjacent to a public road, public reserve or public pedestrian way."

[29] 'Building line' is defined in the Territory Plan to mean "a line drawn parallel to any front boundary along the front face of the building or through the point on a building closest to the front boundary. A terrace, landing, porch, balcony, deck or veranda that is more than 1.5 m above finished ground level or is covered by a roof is deemed to be part of the building. A fence, courtyard wall or retaining wall is not deemed to be part of the building."

8. *The roofed terrace accessed from Bed 3 and the small roofed terrace accessed through the WIR will also be excluded from GFA, subject to replacing the south facing 1.7m high privacy wall for each terrace with a balustrade.*

9. *The roofed terrace with outdoor kitchenette accessed from the living area currently contributes to GFA. To avoid this, both the east and west facing walls should be removed and opened up at grade level with the adjacent open terrace. If this is not possible, and as a compromise, the Territory would accept the south facing privacy wall of this terrace being replaced with a balustrade and the west or east facing wall of the roofed terrace being removed and opened up at grade level with the adjacent open terrace. It is acknowledged supporting columns and beams may be required to support the roof.*

50. The applicant has not lodged a development application and the stop notice remains in place.

51. On 29 October 2020, Mr Jonathan Swale and Mr Joel Muir, both building inspectors working for Access Canberra, inspected the site. They observed that the property was at approximately lock-up stage and was nearing completion. The internal linings, floor coverings other than carpet, kitchen joinery, baths, showers, and most internal fixings were installed. A copy of their report, including photos showing the state of completion, is in evidence.[30]

52. When Ms Blissenden inspected the building work on 22 November 2019, the work was approaching pre-sheet stage; timber framing was fully visible; there was ladder access only to the upper level; external walls were half painted and half bare render and external cladding was incomplete.

53. It is apparent, therefore, that the applicant failed to comply with the stop notice and has continued carry out building work while building approval for the work remains suspended.

54. One of the photographs taken on 29 October 2020 shows that the applicant has fully enclosed Veranda 2.[31] In his oral evidence to the Tribunal, he admitted that internal door access to the enclosed space remains but claimed that he intended closing this off to make the space inaccessible. He claimed this would result in

[30] Exhibit 1 document A11, pages 99 to 150
[31] Exhibit 1 page 138

the space not being counted towards the GFA. Whether or not doing so will produce the desired result is debatable but is not an issue the Tribunal has to decide here. However, the logic of the applicant's decision to enclose Veranda 2 is difficult to understand. Veranda 2 previously did not contribute to the GFA. By enclosing the space, which currently remains internally accessible, it does contribute to GFA. As a result, on any view, the development in its current form exceeds the permissible plot ratio under R1 of the SDHDC.

The determinative issue – front setback

55. The certifier is solely responsible for assessing whether a development is DA exempt. A certifier may issue a building approval for a development that does not have development approval *only* if the development is an exempt development under section 133 of the Planning Act – i.e., if the plans meet all of the relevant codes and design requirements applicable to the development. In this case the relevant code is the SDHDC.

56. Although approved plans must be lodged with Access Canberra, it is not part of the Territory's statutory functions to independently assess the correctness or otherwise of a certifier's assessment at the time of lodgement. If a certifier wrongly issues a building approval in the mistaken belief that a development is DA exempt, building work is not excused from requiring development approval. If, because of an inspection by an authorised building inspector, it is found that building work is being carried out without a valid building approval, the inspector is authorised to issue a stop notice. If the owner suffers loss as a result, the owner may have a right to claim compensation from the certifier. But the owner does not have any right to claim compensation from the Territory in those circumstances.

57. The original and amended plans do not comply with the front setback requirements in Rule R11. Table 2C applies to this development. The minimum front boundary setback is 4m for the lower floor level, 6m for the upper floor level and 5.5m for the garage, which must be a minimum of 1.5m behind the front building line except where there is a courtyard wall in the front zone, which is not the case here. The upper floor level balcony has a 4.26m setback from the front boundary and therefore does not comply.

58. The exception for a "minimum front boundary setback to open space or pedestrian paths wider than 6m", upon which the applicant relies, does not apply. The front boundary is not "*to* open space". The use of the word "to" indicates that the front boundary of the land must be contiguous with the boundary of the open space. The applicant claims that the exception applies where the front boundary "faces to open space".[32] The applicant is mistaken. That is not what the rule states.

59. The development as designed and as built does not comply with R11. Several consequences flow inevitably from that finding, which we set out below.

60. First, the development is not, and never has been, an exempt development within the meaning of section 133 of the Planning Act.

61. Second, the development requires, and always has required, development approval in the merit track under Division 7.2.3 of the Planning Act.

62. Third, neither the original plans nor the amended plans meet the approval requirement in section 29(1)(g) of the Building Act because the plans show site work that, if carried out in accordance with the plans, is not exempt under the Planning Act from requiring development approval. As a result, the certifier was prohibited by section 30 of the Building Act from issuing a building approval for the original plans and later, approving the amended plans.

63. Fourth, there were valid grounds for a stop notice to be issued on 3 December 2019 and subsequently for the stop notice not to be cancelled. The applicant does not dispute that he carried out building work otherwise than in accordance with the approved plans. The submission of amended plans on 23 December 2019 does not mean that the grounds for the stop notice ceased to exist because the building work formed part of a development that required development approval, which the applicant did not have. Neither the original building approval nor the amended building approval was validly issued in accordance with, respectively, section 28 and section 32 of the Building Act.

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[32] Email from the applicant to Mr Lhuede dated 27 May 2020, sent in response to the Notice of Decision refusing to cancel the stop notice – Exhibit 1 at page 95

64. Fifth, unless and until the applicant obtains development approval, building work cannot lawfully continue and the applicant and his family cannot lawfully occupy the house at completion. The applicant's current problems are compounded by the fact that he has continued to carry out building work in breach of the stop notice – i.e., without development approval and without building approval – to the point where the site work appears to be nearing completion.

The GFA issue

65. It is important to observe that this application does not involve an administrative review of the decision to issue the stop notice, or later not to cancel the stop notice. The stop notice was validly issued and remains in force. The only way the applicant can lawfully complete the building work and commence to occupy his new home is to obtain development approval. The unauthorised enclosure of Veranda 2 means that the development exceeds the maximum permissible plot ratio under R1 of the SDHDC, which is a mandatory requirement.

66. It will be apparent from the background facts set out earlier that the question whether unauthorised changes made to the alfresco and terrace areas means that those areas also should be included in the calculation of GFA is likely to be a critical and potentially contentious issue when and if the applicant seeks development approval.

67. If the ACT Planning and Land Authority refuses development consent on the grounds that the development exceeds the maximum permissible plot ratio under R1, it will be open for the applicant to apply to the ACAT for administrative review of the decision. Any views the Tribunal may express on the calculation of GFA in determining the present civil dispute application would not finally determine the issue and would not bind a differently constituted tribunal that may have to determine an application for administrative review of a decision to refuse development consent.

Conclusion

68. Neither party considered the evidentiary and legal requirements set out in Chapter 8 of the *Civil Law (Wrongs) Act 2002*, which governs (and limits) the

civil liability in tort of the Territory. Nor did the applicant identify any legal basis for a claim that the Territory may be held liable to pay compensation under the *Australian Consumer Law* or the Building Act. Having regard to the Tribunal's earlier findings in relation to front setback issue, the failure to do so has no bearing on the outcome. The Tribunal is satisfied, based on those findings, that the application must be dismissed.

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Senior Member M Orlov
For and on behalf of the Tribunal

Date(s) of hearing	23 November 2020
Applicant:	In person
Solicitors for the Respondent:	Ms Z Robens, ACT Government Solicitor