CITATION:	*Development Consent Authority v Malcolm Henness* [2023] NTLC 5
PARTIES:	Development Consent Authority v Malcolm Henness
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22029968
DELIVERED ON:	17 March 2023
DELIVERED AT:	Darwin
HEARING DATE(s):	3 June 2021 to 22 August 2022
DECISION OF:	Macdonald LCJ

CATCHWORDS:

Planning Act 1999 (NT) - ss 75 and 76 - NT Planning Scheme – use or develop land in contravention of Planning Scheme.

Planning Act 1999 (NT)
Interpretation Act 1978 (NT)
Evidence (National Uniform Legislation) Act 2011 (NT)
Criminal Code Act 1983 (NT)

REPRESENTATION:

Counsel:

	Complainant:	Mr J Bortoli
	Defendant:	Self

Solicitors:

	Complainant:	Self instructed
	Defendant:	Self

Decision category classification:	B
Decision ID number:	2023 NTLC 5
Number of paragraphs:	18

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA
No. 22029968

BETWEEN:

Development Consent Authority

Complainant

AND:

Malcolm Henness

Defendant

REASONS FOR DECISION

(Delivered 17 March 2023)

JUDGE MACDONALD

The Proceeding

1. On 22 September 2020, the Development Consent Authority (DCA) commenced a prosecution by Complaint against Mr Malcolm Henness (the Defendant) in relation to the use or development of Lot 26 (40) Wells Creek Road, Hundred of Strangways, Virginia (the Premises). The Premises is zoned "RL", being rural living.

2. The proceeding alleges contraventions of the *Planning Act 1999* (NT) (the Act), which must be read and applied in conjunction with the Northern Territory Planning Scheme (the Scheme) provided by section 7 of the Act.[1] The Scheme is a statutory instrument, such that the *Interpretation Act 1978* (NT) applies.[2]

3. The Complaint alleges three counts (including particulars), essentially that the Defendant;

   (i) from 26 February 2020 to 30 July 2020, used or developed the Premises in contravention of the Scheme without holding a permit to do so, contrary to s 75(1) of the Act; and

   (ii) from 31 July 2020 (and continuing), used or developed the Premises in contravention of the Scheme and was reckless in doing so, contrary to s 75(2) of the Act; and

   (iii) from 18 June 2020 (and continuing), having been issued a notice to cease developing or using the Premises (Notice) in contravention of the Scheme, continued to operate the Premises as a hostel in contravention of the Scheme and the Notice, contrary to s 76(5) of the Act.

[1] Which enacts each "zone" then ascribes levels of use, which are conditioned on four processes. Prior to 31 July 2020 those were "*Permitted, Self-Assessable, Discretionary or Prohibited*", and following are "*Permitted, Merit Assessable, Impact Assessable and Prohibited*".

[2] Being made by the relevant Minister, so an "*instrument of administrative character*". See sections 4, 17, 20, 43, 51, 61 and Division 2 of Part VII of the *Interpretation Act 1978* (NT).

4. The proceeding was first heard before the Local Court on 3 June 2021, having been listed for a contested hearing that date. At that time the Defendant was self-represented and agreed a precis of facts with the prosecution, rendering a fully contested hearing unnecessary. The agreed facts became Exhibit P1, and the Notice relied on in relation to count 3 together with a covering letter of service became Exhibit P2.[3] The Defendant also sought to tender an Inspection/Investigation Report (the Report) dated 8 May 2020 and apparently authored by an employee of the Environmental Health area of the Northern Territory Government who attended and inspected the Premises on that date. That Report was originally marked as MFI, but is now admitted as Exhibit P3.[4] Lastly, screenshots from accommodation websites Booking.com, Trivago, Wander and Cycle, apparently from July 2020 and relating to a "Buffalo Beach hostel" at 26 Wells Creek Road were marked as MFI, now admitted as Exhibit P4.

5. The proceeding was then adjourned to 9 July 2021 for further hearing, including to enable the Defendant to obtain legal advice concerning the possibility of giving oral evidence and conducting any other aspect of the proceeding in his defence. The proceeding was also adjourned on various other occasions for a range of reasons, many of which revolved around the Defendant's incapacity or inability to properly deal with the proceedings. The Defendant did engage law firm Ward Keller following the first day of hearing, however leave was then granted on 10 November 2021 to that firm to withdraw.

6. Due to the facts of the allegations being agreed and becoming Exhibit P1, the contest resolved to questions of whether the agreed facts established one or more of the contraventions alleged by the Complaint made 17 September 2020 beyond reasonable doubt. Associated with those questions is whether the Defendant had any defence to the charges.

7. The Defendant gave evidence in the proceeding, much of which was chaotic in its content. That evidence canvassed the way in which the various accommodation, which comprised mostly of demountables, at the Premises evolved over time. The Defendant also spoke about the type and circumstances of people staying at the Premises, and of his aspirations and goals for the Premises and the purpose to which the accommodations there were put. The contents of the Environmental Health Report comprising Exhibit P3 were relevant to this.[5] The Defendant's substantive and repeated position and evidence in relation to the Premises was that the accommodation was not a "*hostel*", had never been a "*hostel*" and that it was in fact a "*share house*". However, there was no doubt that the Defendant always intended to, amongst other things, offer accommodation to guests in return for remuneration.

The Act and the Scheme

8. A dichotomy between the counts exists due to amendments made to the Act effective 31 July 2020. The operation and effect of s 12 of the *Interpretation Act 1978* in relation to prosecutions in respect of repealed rather than extant provisions, is accepted. The Act in force until 30 July 2020, relevant to counts 1 and 3 included:

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[3] Paragraph 13 of the Agreed Facts read: "At no time has the Defendant applied for or obtained, any development permit or any other authorisations under the *Planning Act 1999* (NT)".

[4] The Report, which contained relevant evidence, may be admissible under s 48 of the *Evidence (National Uniform Legislation) Act 2011* (NT), or as a business record under s 69 (noting that section does not appear to be conditioned on the witness through which the document is tendered being part of the business).

[5] The last substantive paragraph of the report reads: "*Advised Malcolm that when he has rooms/accommodation ready for seven people he will call environmental health for further advice* (sic). *Nancy Bird (08) 8922 7479.*"

75 Use or development to comply with permit or order

(1) A person must not use or develop land in contravention of the planning scheme that applies to the land, except in accordance with a permit.

Maximum penalty: In the case of a natural person – 200 penalty units and 4 penalty units default penalty.

And

76 Notice to cease if contravention

(1) If:
(a) land is being used or developed in contravention of the planning scheme that applies to the land; and

(b) the development is not otherwise permitted by or under this Act, the consent authority in respect of the planning scheme may, by notice in writing, require:

(c) the owner or occupier of the land; or

(d) the person apparently using or developing the land in contravention of the planning scheme or interim development control order, to cease using or developing the land in contravention of the planning scheme.

.....

(4) A notice under this section may be served on:

(a) the owner of the land;

(b) an occupier of the land;

(c) a person apparently in charge of premises on the land; or

(d) a person apparently in charge of an activity being carried out on the land.

(5) A person specified in a notice under this section must not contravene, or fail to comply with, the notice.

Maximum penalty: In the case of a natural person – 200 penalty units

9. Other than the reference to "*authorised or permitted*" provided by s 81 of that iteration of the Act, there is no relevant reference to any possible defence in relation to counts 1 and 3. However, ss 26, 30 and 32 of the *Criminal Code Act 1983* (the Code) are generally available, with the intent addressed in s 31 also having to be proven beyond reasonable doubt.[6] In relation to s 81, I consider that provision simply elevates the standard of proof imposed on a defendant

[6] Chronology aside, the Report comprising Exhibit P3 had potential to raise issues under defensive sections of the Code.

from an evidential level to that of balance of probability. The DCA is nonetheless obliged to prove any alleged offence under either Act to the standard of beyond reasonable doubt.

10. In relation to count 2, the Act as at 31 July 2020 relevantly included:

> **75 Use or development contravenes planning scheme**
>
> (1) Land must not be used or developed in contravention of the planning scheme that applies to the land, except in accordance with a permit.
>
> (2) A person commits an offence if:
>
> (a) the person intentionally uses or develops land; and
>
> (b) the use or development contravenes the planning scheme that applies to the land and the person is reckless in relation to that result.
>
> Maximum penalty: 500 penalty units.
>
> Default penalty: 4 penalty units.
>
> (3) It is a defence to a prosecution for an offence against subsection (2) if the use or development is in accordance with a permit.

11. Again, there is no specific reference to any possible defence in the Act which applied from 31 July 2020, so to count 2. However, s 5A of that Act provides that Part IIAA of the Code applies. Section 75 contains no express reference to the nature of liability to be proven under Part IIAA. Resort to s 43AM of the Code is necessary, which prescribes "*intention*" as the fault element for any physical element constituted solely of "*conduct*", and "*recklessness*" where the physical element consists of "*a result or circumstance*". Consistent with count 2 contained in the Complaint, the prosecution position in relation to that alleged contravention was that recklessness rather than intent was a relevant fault element. I am not convinced that "*used or developed*" does not amount to the physical element of "*conduct*" rather than simply "*a result or circumstance*", so consider intent should be the necessary fault element.

12. The operation and application of the relevant provisions of the Act rely heavily on the Scheme earlier referred to, as in force from time to time. That includes having regard to assessment or zoning tables published as part of the Schemes. Extracts of the two Schemes which applied in respect of counts 1 and 3, and then count 2, together with the tables, were provided to the Court at hearing.[7] However, it is of concern that the zoning maps to which the Schemes expressly refer are not included as part of the document comprising the Scheme and are not plainly accessible on the relevant website.[8]

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[7] Which did not include the "*User Guide*" for the previous Scheme or the "*Guidance*" and 5.4.14 portions of the current Scheme.

[8] Clause 2.1 of the first Scheme states "*The zones referred to in this planning scheme of those shown on the zoning maps*", and page (i) of the *User Guide* makes clear that the "*zone*" identified by the maps for any land is a fundamental starting point. However, the Guide simply states that the maps are available on the internet or from NTG offices. Paragraphs 1.5 and 1.6 of the "*Guidance*" publication for the current Scheme are less illuminating. In practice it is necessary to navigate through the website to access the 'NT Atlas' in the hope of accurately identifying the relevant zone applicable to any particular portion of land. Such difficulties could give rise to a defence under s 30(3) of the Code.

13. The "definitions" of various categories of use provide quite generic descriptions of what operation or use falls within any particular category and there is potential for overlap.[9] In some respects a process of definition by exclusion or default appears required.

14. The Complainant's prosecution on counts 1 and 3 rely on a finding that the Premises was operated as a "*hostel*" at the relevant time. It was perhaps arguable that the Premises constituted "*home-based visitor accommodation*" or a "*group home*".[10] However the first alternative relies upon the premises being "*a dwelling*" simpliciter and would also require an "*approved form*" to have been lodged with the relevant Department. The second possibility is conditioned on support or assistance from a benevolent, educative or religious organisation.[11]

15. In relation to count 3, Exhibit P3 was issued to the Defendant on 8 May 2020 the Notice comprising Exhibit P2 was served on the Defendant on 19 May 2020. The commencement date for the alleged contravention in count 3 is 18 June 2020. Despite the possibility that s 43AW might otherwise provide some defence to the Defendant, the chronology of the provision of Exhibits P3 and P2 to the Defendant negate any suggestion that his mistaken understanding of his conduct (or the regulatory processes and requirements) could be found to be "*reasonable*" as required by s 43AW (2) of the Code, or within s 43AY (or that s 26 or 32 could apply to counts 1 or 3).

16. In relation to count 2, the prosecution relies on a finding that the Premises operated as "*rooming accommodation*", which on the basis of the definition of that use in the Scheme, they could certainly be. The Scheme which came into effect on 31 July 2020 renders "*rooming accommodation*" to be a prohibited use of land zoned "RL". It was perhaps arguable that the premises was being operated as a "*dwelling-community residence*" or "*temporary visitor accommodation*".[12]

17. However, the first possibility is conditioned on support or assistance from a benevolent, educative or religious organisation. In relation to the second possibility, the Defendant's evidence was that in excess of six persons resided at the Premises from time to time. The configuration of the premises would also constitute something more than simply a "*dwelling*". Those features apparently exclude "*temporary visitor accommodation*" as a possibility.

18. Due to the exclusions and interpretations through definitions provided in each Scheme, and service and content of the notice comprising Exhibit P2, I find that the Defendant is proven to the necessary standard to have contravened sections 75(1), 75(2), and 76(5) of the Act.

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[9] Clause 3.0 of the first Scheme and Schedule 2 to the second Scheme.

[10] It is accepted that the category of "*supporting accommodation*" cannot apply, including because no relevant "*permit*" was adduced in evidence.

[11] I consider the drafting of the Act and clause 7.10.1 of the Scheme displace the presumption which s 24 of the *Interpretation Act 1978* (NT) establishes concerning singular and plural.

[12] Each being "*Permitted*" uses, with the latter being one of the species permitted within the category of "*home based business*"; clause 5.4.10 of the Scheme refers.