

CITATION: *Johnson v Development Consent Authority & Anor* [2017] NTSC 90

PARTIES: JOHNSON, Damien

v

DEVELOPMENT CONSENT
AUTHORITY

and

NT PROJECT SERVICES PTY LTD
(ABN 93 614 141 730)

COURT: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: CAT2 of 2017 (21717786)

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JUDGMENT OF: KELLY J

CATCHWORDS:

APPEAL – Appeal from Civil and Administrative Tribunal – General principles – Application for leave to appeal – Principles relevant to grant of leave to appeal to Supreme Court – Leave to appeal granted – Appeal dismissed – *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 141

PLANNING – Development consent – Right of third party to apply to Civil and Administrative Tribunal for review of determination of

Development Consent Authority – Circumstances where there is no third party right of review – *Planning Act 1999* (NT) s 117, *Planning Regulations 2000* (NT) reg 14

STATUTORY INTERPRETATION – Words and phrases – “any other type of development” – *Planning Regulations 2000* (NT) reg 14(3)(d)

Northern Territory Civil and Administrative Tribunal Act 2014 (NT) s 141,

Planning Act 1999 (NT) s 46, s 47, s 49, s 53(b), s 117, s 117(1), s 117(3), s 117(4)

Planning Regulations 2000 (NT) reg 14(3), reg 14(3)(a), reg 14(3)(b), reg 14(3)(c), reg 14(3)(d),

Supreme Court Rules r 83.23(1)(a)

Collier v Lancer (No 2) [2013] NSWCA 186; *Younan v Queensland Building Services Authority* [2011] QCA 1, referred to

REPRESENTATION:

Counsel:

Applicant:	N Christrup
First Respondent:	H Baddeley
Second Respondent:	T Anderson

Solicitors:

Applicant:	Paul Maher Solicitors
First Respondent:	Solicitor for the Northern Territory
Second Respondent:	Ward Keller

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
AT DARWIN

Johnson v Development Consent Authority & Anor [2017] NTSC 90
No. CAT2 of 2017 (21717786)

IN THE MATTER of an
application for leave to appeal
under s 141 *Northern Territory
Civil and Administrative
Tribunal Act*

BETWEEN:

DAMIEN JOHNSON
Applicant

AND:

**DEVELOPMENT CONSENT
AUTHORITY**
First Respondent

AND:

**NT PROJECT SERVICES PTY
LTD (ABN 93 614 141 730)**
Second Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 13 December 2017)

- [1] On 6 January 2017 the second respondent, NT Project Service Pty Ltd (“NTPS”) applied to the first respondent, the Northern Territory Development Consent Authority (“DCA”), under s 46 of the *Planning Act 1999* (NT) (“the Act”) for consent to carry out a development on

lots 666, 667 and 668 Gap Road, Alice Springs (“the Lots”). The Lots were zoned Tourist Commercial (TC). They were not adjacent to land in a residential zone. Nor were they directly opposite land in a residential zone on the other side of a road with a reserve of 18m or less wide. (The relevance of this appears below.)

- [2] The development involved the construction of 36 two bedroom units in six three story buildings. Before a Development Permit could be issued, it was necessary for DCA to vary certain requirements of the Northern Territory Planning Scheme, allowing two additional dwellings to be constructed (36 instead of 34); allowing an alteration to the layout of the parking; allowing a smaller area of private space per unit; and altering the orientation of the buildings on the land.
- [3] After public notice of the proposed development was given under s 47 of the Act, the applicant, Mr Damien Johnson, filed two sets of written objections with DCA pursuant to s 49 of the Act, which enables members of the public to make submissions to DCA in relation to development applications which have been advertised under s 47.
- [4] On 29 March 2017, DCA issued a determination under s 53(b) of the Act allowing the proposed variations (“the Determination”).

[5] On 11 April 2017, Mr Johnson applied to the Northern Territory Civil and Administrative Appeals Tribunal (“NTCAT”) under s 117(1) of the Act for a review of the Determination.

[6] Section 117(1) of the Act provides:

(1) Subject to the Regulations, a person or local authority who made a submission in accordance with section 49 in relation to a development application may apply to the Tribunal for a review of a determination under section 53(a) or (b):

(a) to consent to the development, as proposed or as altered; or

(b) to impose conditions on the proposed development or proposed altered development, including a condition referred to in section 70(3).

[7] The effect of this is that Mr Johnson had a right to apply to NTCAT for a review of the Determination unless the *Planning Regulations 2000* (NT) (“the Regulations”) provide otherwise. Regulation 14(3) states:

(3) There is no right of review if the determination relates to any of the following proposed developments on land to which a planning control provision applies:

(a) a single dwelling or multiple dwelling not exceeding 2 storeys above ground level;

(b) setbacks for a single dwelling;

(c) any other type of development on land in a residential zone if it complies with all the planning control provisions relating to the development;

- (d) any other type of development on land that is not in a residential zone, or for which no zone is specified, unless the land:
 - (i) is adjacent to land in a residential zone; or
 - (ii) is directly opposite land in a residential zone and is on the other side of a road with a reserve of 18 m or less in width.

[8] On 27 July 2017, NTCAT dismissed Mr Johnson’s application on the ground that it had no jurisdiction to review the Determination. The basis for the decision was that Reg 14(3) provided that there was no right of review in relation to the Determination. The reasoning was as follows:

- 29. Section 117(4) of the Act allows for the Regulations to specify the circumstances under which there is no right to review. This includes referencing “the type of land” for which there is no right of review. One of those proposed developments is “a multiple dwelling not exceeding 2 storeys”.
- 30. By identifying and describing a “multiple dwelling not exceeding 2 storeys above ground level”, regulation 14(3)(a) establishes a distinction between a development of this type and other types of multiple dwelling developments. The wording of the regulation clearly distinguishes between a multiple dwelling in general terms and a multiple dwelling exceeding 2 storeys. They are treated as different types of development. In my view regulation 14(3)(a) does not have the effect of preserving *carte blanche* a right of review for any multiple dwelling exceeding 2 storeys. I am of the view that Regulation 14(3)(d)¹ removes the right of review for a multiple dwelling exceeding 2 storeys in a non-residential zone

¹ The published decision of NTCAT refers here to Reg 14(3)(b) but this is clearly just a typographical error.

unless (i) or (ii) apply. In this matter, neither (i) nor (ii) applies.

31. Accordingly I am satisfied that there is no right of review open to the Applicant. In the context of r 14(3)(d), “any other type of development” means a development other than “a single dwelling or multiple dwelling not exceeding 2 storeys above ground level.” This is the immediate apparent import of the regulation. It is also the interpretation most consistent with the Second Reading speech in relation to third party appeal rights that “they will not be allowed for development in a non-residential zone unless it is on land that interfaces with residential zoned land.” There is no qualification to this restriction of third party appeals. The regulation is intended and designed to significantly curtail the right of review in non-residential zones.

32. While the Second Reading speech also asserts that “Third Party appeals will be allowed for residential developments over two storeys in height ...,” this observation is qualified by reference to the “controversial unit development in Ostermann Street”. I am satisfied that the intention was that there third party appeal rights for residential premises over two storeys in height were preserved where such a development occurs within a residential zone unless the development is otherwise compliant with planning control provisions.²

[9] Mr Johnson has applied for leave to appeal against the decision of NTCAT pursuant to s 141 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT). The application for leave to appeal was brought within the time limited by Rule 83.23(1)(a) of the *Supreme Court Rules*.

² *Johnson v Development Consent Authority & Anor* [2017] NTCAT 572

Principles applicable where leave to appeal is necessary

[10] The onus is on the applicant, Mr Johnson, to show that leave to appeal should be given. In determining whether or not to grant leave to appeal, factors to be taken into account include:

- (a) whether the applicant has shown that the proposed appeal is arguable – that is to say whether the decision is attended with sufficient doubt to warrant leave to appeal being given;
- (b) whether the issue on the proposed appeal is of sufficient public interest to justify the grant of leave to appeal; and
- (c) whether there is likely to be a substantial injustice if leave to appeal is refused.³

[11] Counsel for the respondent submitted that leave to appeal should not be granted on the ground that the proposed appeal was unarguable. While I agree that the decision of NTCAT is correct, I do not consider that the proposed appeal is unarguable. Further, I consider that the issue – namely the correct interpretation of Reg 14(3) – is of sufficient public interest to justify granting leave to appeal. It would be highly desirable for this Court to pronounce on the interpretation of that regulation for the benefit of members of the public who may file submissions under

³ See for example *Younan v Queensland Building Services Authority* [2011] QCA 1 at [7], *Collier v Lancer (No 2)* [2013] NSWCA 186 at [7] and [8] and the discussion in Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (The Federation Press, 2015) at 66

s 49 of the Act in future so that the extent of their right to have a determination of DCA reviewed is made clear.⁴

The appeal

[12] The applicant contended that Reg 14(3)(a) preserves a right of review under s 117 of the Act for multiple dwellings exceeding 2 storeys above ground level. Hence when Reg 14(3)(d) speaks of “any other type of development on land that is not in a residential zone”, it must mean any type of development on land that is not in a residential zone other than a multiple story development [or of a kind referred to in Reg 14(3)(b) or (c)], otherwise the right of review for multiple story developments of greater than two stories specifically preserved by Reg 14(3)(a) would be lost. I do not agree. It seems to me that the plain meaning of the words “any other type of development on land that is not in a residential zone”, coming where it does in the last paragraph of Reg 14(3), is any type of development other than those in Reg (a), (b) and (c).⁵ That is to say, I agree with the conclusion in the NTCAT decision that the Act distinguishes between a multiple dwelling in general terms and a multiple dwelling exceeding 2 storeys and treats them as different types of development.

⁴ It follows from the fact that I consider the Determination to be correct, that I do not think an injustice would result from refusal of leave.

⁵ More accurately, both Regs 14(3)(c) and (d) refer to types of development other than those specified in Regs 14(3)(a) and (b): Reg 14(3)(c) refers to any other type of development in a residential zone and Reg 14(3)(d) to any other type of development outside a residential zone.

[13] The function of Reg 14(3) is not to preserve the right of review but to specify circumstances in which there is no right of review. Section 117(1) confers a right of review for third parties who have made submission under s 49, subject to the Regulations. Sub-section 117(3) provides that a person (or local authority) must not apply under this section (for a review of a determination) for reasons of commercial competition. Sub-section 117(4) provides that the Regulations may specify other circumstances under which there is no right to apply under that section, including by reference to the type of development in conjunction with:

- (a) the zone of the land on which the development is to take place;
- (b) the zone of land adjacent to the land on which the development is to take place; or
- (c) the zone of land referred to in both paragraph (a) and (b).

[14] Regulation 14(3) was made pursuant to s 117(4) and its purpose is to specify “other circumstances” in which there is no right to apply for a review under s 117(1) – not to preserve a right of review. Thus Reg 14(3)(a) specifies that there is to be no right of review in relation to single dwellings or multiple dwelling of not more than two storeys above ground level – in whatever zone they may be. Regulation 14(3)(b) specifies that there is to be no right of review in relation to

setbacks for a single dwelling – in whatever zone they may be.

Regulation 14(3)(c) specifies that there is to be no right of review in relation to any other type of development on land in a residential zone if it complies with all the planning control provisions relating to the development. Regulation 14(3)(d) refers to developments on land that is not in a residential zone, (including that for which no zone is specified). In land which is not zoned residential, Reg 14(3)(d) removes the right of review in relation to all other developments – that is to say developments other than those for which a review has already been excluded under Regs 14(3)(a), (b) or (c) unless sub-paragraph (i) or (ii) applies. The effect of this is that Reg 14(3)(d) removes the right of review for a multiple dwelling exceeding two storeys in a non-residential zone unless either (i) or (ii) applies. I agree with the conclusion in the NTCAT decision that such is the natural meaning of Reg 14(3) and also that it is the meaning which it most closely accords with the remarks of the minister in the second reading speech.

[15] As the proposed development is not in a residential zone, and is not adjacent to or opposite land in a residential zone, Reg 14(3)(d) operates to specify that there is no right to apply for a review under s 117(1) in relation to the Determination.

[16] ORDERS:

(a) Leave to appeal is granted.

(b) The appeal is dismissed.
