QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Rutherford v Seachange (Land) Pty Ltd as trustee for Seachange (GC) Unit Trust* [2019] QCAT 33
PARTIES:	**NORMAN RUTHERFORD** (applicant) **v** **SEACHANGE (LAND) PTY LTD as trustee for Seachange (GC) Unit Trust** (respondent)
APPLICATION NO/S:	OCL075-17
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	24 January 2019
HEARING DATE:	17 September 2018
HEARD AT:	Brisbane
DECISION OF:	Member McLean Williams
ORDERS:	**1. The Application for approval from the Tribunal for the installation of solar panels for domestic electricity generation is dismissed.** **2. Within 28 days of the date of these reasons the Respondent shall do all acts and things necessary to facilitate the giving of its approval for the Applicants to install solar power generation for their hot water system**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where applicant is resident homeowner in a manufactured homes park – where there are circumstances where applicant wishes to install solar panels for hot water and power generation – whether there are further circumstance where park owners refuse to give necessary consent for the making of changes to the external appearance of the home – whether the validity of aesthetic considerations are a reason for refusal in light of sustainable development amendments to the *Building Act* 1975 (Qld) *Manufactured Homes (Residential Parks) Act* 2003 (Qld), s 98, s 115 *Building Act* 1975 (Qld), s 246M, s 246O

APPEARANCES &
REPRESENTATION:

Applicant:	Self-represented
Respondent:	Self-represented, assisted by M Richards

REASONS FOR DECISION

[1] The Applicant, Mr Norman Rutherford, resides with his wife Anne in a Villa at the 'Seachange' Retirement Community, at Arundel on the Gold Coast ('Seachange').

[2] Seachange is a Manufactured Homes Park operated by the Respondent. Manufactured Homes Parks are regulated pursuant to the *Manufactured Homes (Residential Parks) Act* 2003 (Qld) ('the Act').

[3] Mr and Mrs Rutherford own and occupy Villa 111, pursuant to a site agreement dated 15 January 2015. There are various clauses within the site agreement governing alterations to the external appearance of the home. Clause 5.2.4 provides that the homeowner must not make any alterations that are visible from the outside, or make any additions to the home unless the park owners (i.e. the Respondent) first give written consent. Clause 5.2.6 provides that the consent of the park owner must not be unreasonably refused. Clause 5.2.7 specifies that the homeowners may apply to the Tribunal in the event that they consider a refusal by the park owner to provide written consent to be unreasonable. In this regard, clause 5.2.7 merely mirrors s 115 of the Act, which provides that a party to a residential park dispute may apply to QCAT for the Tribunal to resolve the matter.

[4] As is the case with many retirees, Mr and Mrs Rutherford are worried about their spiralling costs of living. On 29 June 2017, Mr Rutherford wrote to Seachange expressing the view that the cost of natural gas supplied to his Villa was 'outrageous'. He planned to respond by having his home disconnected from the mains gas supply. Mr Rutherford foreshadowed that he would remove the gas hot water system and arrange for the installation of an electric stove, in lieu of the current gas cook top.

[5] The Rutherfords do not require permission from Seachange to effectuate these changes, and have now already done so. Yet, Mr Rutherford further foreshadowed that he intended to link the hot water system to solar generation. In order to do that, Mr Rutherford will need to install a solar panel on the roof of Villa 111. This necessitates a change to the external appearance of the home, and requires the prior permission of the park owner, under both the site agreement, and the Act.[1]

[6] On 17 July 2017 Mr Rutherford commenced the process of making an application to obtain consent from Seachange for the installation of a single solar panel on the North-facing roof of Villa 111 for use in conjunction with the hot water system; and a further 22 panels for domestic electricity generation.

[7] There was an exchange of correspondence between Mr Rutherford and Seachange over a period of many weeks. Eventually, on 10 October 2017, the Seachange Chief

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1 The Act, s 98.

Operations Officer Mr Dean John wrote two letters to Mr and Mrs Rutherford, formally refusing their applications to install solar panels for both hot water and household electricity generation. The reasons given by Mr John for those refusals were:

(a) adverse impact on visual amenity within the Seachange community, as thought to likely be caused by the solar panels;

(b) the fact that the 'embedded' electrical network within Seachange is an older form of technology, and one that does not have the ability to seamlessly enable solar-to-the-grid connection; and

(c) the detrimental impact of Mr and Mrs Rutherford's proposal on the bulk power prices currently able to be obtained by Seachange, on behalf of all residents.

[8] Mr Rutherford does not accept the reasonableness of any of the reasons given by Seachange for its refusal to consent to his installing solar panels. In this sense there is a 'residential park dispute' of the type that s 115 of the Act contemplates that the Tribunal might determine.

[9] On 3 November 2017, Mr Rutherford applied to QCAT seeking orders to enable him to proceed with the installation of solar panels.

Applicant's Arguments

[10] Mr Rutherford contends that his proposal will not impact adversely on visual amenity, on the basis that the proposed location for the solar panels would not be visible at street level from either of the public frontages for Villa 111.

[11] The Villas within the Seachange community are each freestanding, single level residences, built on narrow lots. Villa 111 may only be viewed from the street frontage to the west on Napper Road, or from a pedestrian walkway situated at the rear of the property (facing east) that wends its way from north to south through a landscaped corridor known as the 'Jardin'.

[12] Photographs put into evidence before the Tribunal amply support Mr Rutherford's contention that solar panels on the northern side of his roof would be extraordinarily difficult to see, other than from directly above. Meanwhile, the already installed tank for the hot water system is located within the clothes-drying courtyard of Villa 111, in the exact same position as the recently removed gas hot water tank. The lithium battery system for the proposed photovoltaic system would then be situated out of public sight, within the enclosed garage.

[13] Mr Rutherford also points to s 246O(1)(d) and (3) of the *Building Act* 1975 (Qld), which provides that a 'relevant instrument'[2] can be of no force or effect if it prohibits the installation of a solar hot water system or photovoltaic cell on the roof of a

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2 See: *Building Act* (1975) (Qld), s 246M for the definition of a 'prescribed instrument'. In this instance see specifically subsection 246M(k), '*a contract or other agreement, entered into in relation to a prescribed building, a provision of which includes a prohibition, requirement or restriction mentioned in division 2 that operates to the benefit of, or is enforced by, a person other than the owner or occupier of the building*'.

'prescribed building',[3] to the extent that the prohibition applies merely to enhance or preserve the external appearance of the building. I agree with Mr Rutherford that the effect of this provision is that the Respondent is now precluded from raising aesthetic concerns as the sole bulwark against the installation of solar panels.

[14] In response to the Respondent's assertion that the embedded network within Seachange is old technology, incapable of connection to solar systems, Mr Rutherford submits that this concern is simply not to the point. The system now proposed by the Applicant would be a 'stand alone' system, and any electricity generated by the solar panels would be directed to on-site storage, rather than back to the grid via the embedded network. Villa 111 would still remain grid-connected, yet would only receive electricity from the mains supply in the rare[4] event that stored energy was insufficient. The system would be specifically commissioned and certified to be a 'zero export' system.

Respondent's Evidence

[15] As well as written submissions, the Respondent adduced oral evidence from the following witnesses:

(a) **Mr Alex McMahon**, the Director of Sales and Marketing employed by Pradella Property Ventures Pty Ltd, who are the developers for Seachange. Mr McMahon told the Tribunal that he conducted the sale of Villa 111 to Mr and Mrs Rutherford. Over his many dealings with the Rutherfords between 17 March 2014 and 10 September 2015 they were informed that solar panels were unable to be installed. Mr and Mrs Rutherford however deny they were told this. Ultimately, I do not need to resolve this evidential contest, because Mr McMahon's evidence is not specifically relevant to the matter in dispute.

(b) **Mr Dean Wiltshire**, architect and director of Wiltshire Stevens Architects. Although not one of the design architects for the original development, Mr Wiltshire told the Tribunal that the 'design intent' for the Seachange development was for the creation of 'streetscapes dominated by tropical landscaping, with low reflectivity roofing'. The Rutherfords propose a photovoltaic array of 22 solar panels. There are 415 properties within Seachange at Arundel. If each of these were to similarly install 22 solar panels this would result in 9,130 rooftop solar panels in the community. In Mr Wiltshire's opinion, this would have a 'dramatic impact' on the visual aesthetics of the streetscapes within Seachange. Mr Wiltshire's evidence in that regard is speculative and fanciful, such that I do not accept it. Even more tellingly, it is evidence given in the very teeth of the contrary legislative intent expressed in s 246O of the *Building Ac*t 1975 (Qld).

(c) **Mr Peter Caune**, who is a consulting electrical engineer of Ashburner Francis, Consulting Engineers. Mr Caune told the Tribunal that from a power grid perspective, Seachange was regarded as a single electricity user. Within the Seachange community is an internal 'embedded' network, supported by four high voltage transformers. Although the 6.38kw system now proposed by Mr and Mrs Rutherford is fully compliant with all of Energex's requirements for a

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3 See: *Building Act* (1975) (Qld), s 246M. Villa 111 at Seachange qualifies as a 'Class 1a' building.

4 Expert advice given to Mr Rutherford has been that reliance on mains power would be reduced by approximately 90%.

single residence directly connected to the grid supply, this overlooks the fact that Villa 111 is *not* connected directly to the grid, but via the embedded network. In these situations Mr Caune said that Energex has a mandatory requirement for the installation of protection relays, at an approximate cost of $80,000 per transformer whenever a threshold of 30kw is reached. This applies notwithstanding Mr Rutherford's proposal for a 'zero export' system. The 30kw threshold would be reached whenever four systems of an equivalent size to that proposed by the Rutherfords were to be installed on any one of the four transformers within the embedded network. If the Rutherfords were to be allowed to install their 6.38kw system, then several other residents would be apt to quickly follow, thus imposing the requirement for a significant transformer upgrade cost in the near term future. That significant capital cost would then need to be recouped as a charge on all system users, including the majority of residents who are not in the financial position to be able to install a solar system of their own.

(d) **Mr Drew McKillican**, the Business Development Manager (Energy Solutions) of Flow Systems Pty Ltd. Flow Systems is the electricity wholesale provider and embedded network manager for Seachange. Mr McKillican informed the Tribunal that because there is a single connection between the electricity grid and Seachange, and because Seachange is a sizeable community of 415 residences, it is a large energy consumer and therefore able to use that market presence to purchase energy from the daily energy market at competitive rates, well below those that can be obtained by conventional domestic power consumers. Mr McKillican also informed the Tribunal that individual consumers at Seachange pay a fixed grid connection cost of approximately $1.05 per day, and a daily consumption cost of $0.0145 per kilowatt hour. These rates are determined on the basis of all 415 residences remaining grid-connected. In the event that even so much as one property were to disconnect from the grid supply then the assumptions underpinning the price model would change. The result would become that the fixed connection cost for all properties at Seachange would need to immediately increase, to $1.45 per day, and a new (and dramatically higher) consumption charge would then need to be calculated for those residents who switch to solar power with battery storage who would in future only draw power from the embedded network very intermittently.

Disposition

[16] I accept the evidence of Mr McKillican, which was unable to be challenged in any meaningful sense by the Applicant, Mr Rutherford. It is evidence that is significantly determinative. The net effect of that evidence being, that were Mr and Mrs Rutherford to be allowed by the Tribunal to install (and thus obtain the financial advantages of) a solar power system, then those benefits would be obtained at the expense of a daily detriment to all the other residents: to the tune of forty cents per day, or $146.10 per annum. To impose that burden on other residents for the singular benefit of the Rutherfords would be unconducive to harmonious retirement living. It is not a consequence that will be sanctioned by the Tribunal, and affords a reasonable basis that is unrelated to aesthetic considerations for refusing to authorise the proposed external change to the appearance of Villa 111 that would be caused by the 22 panel solar array.

[17] At first blush it is perverse to think that Mr and Mrs Rutherford may not have the benefits of cheaper solar power, especially in circumstances where they are willing to pay for the installation. Nonetheless, it is a matter caused by the very practical limits within the existing electrical infrastructure at Seachange, then overlayed by the government policy settings as they apply in the case of the market supply of electricity. The outcome in this case may not be applicable in other Manufactured Homes Parks that have different electricity supply infrastructure arrangements to those at Seachange.

[18] Mr and Mrs Rutherford will need to await different government policy settings and/or further technological advancement if they are to achieve their wish for cheaper power in their existing circumstances.

[19] Similar considerations to those expressed in the foregoing paragraphs do not apply in the case of the Rutherford's parallel proposal for the installation of solar hot water. It is the determination of the Tribunal that there are no reasonable grounds to refuse to allow Mr and Mrs Rutherford to install a solar system for hot water. Accordingly, within 28 days of these reasons the Respondent shall do all acts and things necessary to give its approval for the Applicants to install solar power generation sufficient for their hot water system.