PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Tokyo 2 Pty Ltd v Brisbane City Council* [2020] QPEC 23
PARTIES:	**TOKYO 2 PTY LTD** (Applicant) **V** **BRISBANE CITY COUNCIL** (Respondent)
FILE NO/S:	613 of 2020
DIVISION:	Planning and Environment Court, Brisbane
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	5 May 2020, *ex tempore*
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2020
JUDGE:	Everson DCJ
ORDER:	**Application for minor change is allowed in part**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – whether changes to a development application are a minor change – whether changes to a development application result in a substantially different development – what consideration is given to properly made submissions
LEGISLATION:	*Planning Act 2016* (Qld)
CASES:	*Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 19 *Northbrook Corp Pty Ltd v Noosa Shire Council* [2015] QPELR 664
COUNSEL:	R Yuen for the applicant N Batty (solicitor) for the respondent
SOLICITORS:	Thynne + Macartney for the applicant City Legal for the respondent

[1] This is an application made pursuant to section 78 of the *Planning Act 2016* ("PA"). It seeks orders that changes to a development approval are a minor change as defined in Schedule 2 of the PA. The development approval was issued on 3 May 2018 by the court, being a material change of use for 17 multiple dwellings and reconfiguring four into six lots at Jenkinson Street and Carinya Street, Indooroopilly.

[2] The only contentious issue for determination is whether the changes come within the definition of a minor change in schedule 2 of the PA and, in particular, whether any of the changes would result in a substantially different development. The respondent does not oppose the order sought but does not make any submissions either way.

[3] Of concern in respect of this application is the fact that there were 300 properly made submissions when the development application was publically notified. Many of the submissions focused upon landscape and vegetation issues. Pursuant to section 81 of the PA, I must consider a number of things in assessing an application for a minor change to a development approval. These considerations include, pursuant to section 81(2)(b) of the PA, any properly made submissions.

[4] The court, being the responsible entity in determining an application such as this, needs to be cognisant of the fact that while submitters have a right to be heard in respect of an appeal concerning a development application such as this, they are not accorded any further rights to be heard should an application be brought seeking a minor change to the resulting development approval.

[5] In a case such as this where there were a significant number of submissions and submitters were actively involved in the subsequent appeal and the resolution of it, their concerns and interests need to be accorded significant weight in the exercise of the discretion of the court in determining the outcome of an application seeking to change the development approval.

[6] As to what constitutes a "minor change," this is a matter of fact and degree and guidance can be found in Schedule 1 of the Development Assessment Rules in

circumstances where both quantitative and qualitative matters may be of relevance.[1] Ultimately, it is necessary to give the words "minor change" their ordinary meaning. In *Northbrook Corp Pty Ltd v Noosa Shire Council*, I observed:

> "The starting point for the assessment of whether the changes result in a substantially different development is the words of the relevant statutory provision. "Substantial" is defined in the Macquarie Concise Dictionary as, inter alia, "essential, material or important." The question for determination is whether the proposed changes fall within this definition in the context of the development application." [2]

[7] Most of the changes which are sought to the development approval concern matters of internal design and detailed engineering. The changes themselves are summarised in the affidavit of Mr Nguyen filed on 24 February 2020. I am content that each of the changes enumerated therein comes within the definition of a "minor change" with the exception of the removal of living significant trees at the rear of lots 1 and 2 and the considerable reduction of the identified environmental protection zone at the rear of both of these lots.

[8] The applicant relies upon an affidavit of a qualified arborist, Mr Clowes, in justifying the alteration of the designated environmental protection zone. Mr Clowes deposes that of the three significant trees at the rear of each of these lots, one is dead and the remaining two "are impracticable to be retained based on the existing encumbrances located within the tree protection zone, which will impact upon the stability of these trees".[3]

[9] I am content that the dead tree can be removed, however, Mr Clowes does not explain either in the body of his affidavit or in his exhibited material precisely how these "encumbrances", which are identified as retaining walls and an in-ground pool, are such that it is impossible for the identified living trees to be retained and for the environmental protection zone to be retained. I have not been provided with any engineering evidence which confirms that, with appropriate processes, this cannot occur. Instead, what is proposed is that each of these 350m² lots will have a significantly reduced environmental protection zone along the rear boundary with

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1 *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 19 at [14].
2 [2015] QPELR 664 at [13].
3 Affidavit of Mr Clowes, filed 5 March 2020, para 23(d).

six new trees planted therein. This is a very different outcome to what was intended in the approved plans.

[10] It is a very different outcome, both environmentally and aesthetically, for adjoining owners as lot 2 is at the boundary of the land the subject of the development approval. Two small lots that were given significant environmental protection are effectively able to be razed, with potential future building areas substantially increased such that the built form may well cover a much greater part of each lot than was contemplated in the approved plans.

[11] My intention is drawn to various conditions of the development approval which include condition 17, enabling changes to the protection of existing trees in circumstances where a submission by a suitably qualified arborist is accepted by the respondent. My attention is also drawn to condition 59, which states that the final extent and boundaries of the environmental protection zone are to be determined on site in consultation with the "Project Arborist."

[12] Reading the approval as a whole, it is clear that these conditions are not intended to justify an outcome which is other than that development be generally in accordance with the approved drawings and documents as specified in condition 2. What is contemplated in the substantial reduction of the environmental protection zone at the rear of lots 1 and 2 and the removal of the identified significant vegetation does not constitute carrying out the approved development in accordance with the approved plans and, therefore, has brought about the need for this proposed change to be the subject of the application before me today.

[13] I am of the view that these particular changes will result in a substantially different development in circumstances where the significant vegetation in a large environmental protection zone will be removed and then reconstituted to a much lesser degree by new planting along the rear boundary. Given the legitimate aesthetic and ecological concerns of nearby residents, the proposed changes in this regard will result in a materially and importantly different development and they are not themselves minor changes.

[14] I therefore find that each of the changes, other than the changes to the environmental protection zone discussed above, constitute a “minor change” as defined in the PA. The result is the application is allowed in part.