PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 15
PARTIES:	**HIGHGATE PARTNERS QLD PTY LTD** **ACN 618 183 761** (applicant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (respondent)
FILE NO/S:	173/2020
PROCEEDING:	Originating Application
DELIVERED ON:	8 February 2021 (orders) 16 March 2021 (reasons)
DELIVERED AT:	Maroochydore
HEARING DATE:	24 November, 11 and 14 December 2020 (with last further written submissions received on 4 January 2021)
JUDGE:	Long SC, DCJ
ORDER:	**As per draft, allowing change to development approval**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – Where the applicant was successful in obtaining a development approval granted by order of this Court on 17 October 2008, for staged sub-division of land at Burnside – Where that development approval has previously been changed by order of this Court on three occasions: on 29 April 2011, 24 June 2016 and 13 April 2017, with a result of 53 separately owned subdivided lots and a yet to be sub-divided balance lot – Where the applicant now seeks that the development approval be changed to facilitate the further staged subdivision of the balance lot – Where the application is considered to be for a "minor change" within the meaning of s 78A of the *Planning Act* 2016 – Whether the applicant has satisfied all of the requirements of s 79 of the *Planning Act* 2016 – Whether s 79(1A) of the *Planning Act* 2016 requires the consent of all the owners – Whether the 53 previously subdivided residential lots are "excluded premises" within the meaning of s 79(1A) and Schedule 2 of the *Planning Act* 2016 – Whether the application should be approved upon assessment pursuant to s 81 of the *Planning Act* 2016

LEGISLATION:	*Acts Interpretation Act* 1954 (Qld), ss 14, 14B *Building Act* 1975 (Qld), s 65 *Integrated Planning Act* 1997 (Qld), ss 3.5.33(3), 4.1.5A *Planning Act* 2016 (Qld), ss 31, 35, 51, 73, 78, 78A(2), 79, 81, 84, 86, 280, Schedule 2 *Planning and Environment Court Act* 2016 (Qld), s 37 *Planning Bill* 2015 (Qld) *Sustainable Planning Act* 2009 (Qld), ss 200, 245, 263, 367, 371, 379, 383, 440, 704
CASES:	*AAD Design Pty Ltd v Brisbane City Council* [2013] 1 Qd R 1 *Bielby v Moreton Bay Regional Council* [2018] QPEC 50 *Bigini Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 1 *Evans v Gold Coast City Council & Anor* [2004] QPEC 19 *Highgate Developments Pty Ltd v Sunshine Coast Regional Council* [2017] QPEC 37 *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 19 *ISPT Pty Ltd v Brisbane City Council* [2017] QPELR 1117 *Kelly v R* [2004] 218 CLR 216 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *R v A2* (2019) ALJR 1106 *Tom Dooley Developments v Brisbane City Council & Anor* [2004] QPEC 95 *Zappala Family Co Pty Ltd v Brisbane City Council* 2014 QPELR 686
COUNSEL:	R Ansen (Solicitor) and A Williams (Solicitor) for the applicant P De Waard (Solicitor) and M Birks (Solicitor) for the respondent
SOLICITORS:	P&E Law for the applicant Sunshine Coast Council Legal Services for the respondent

Introduction

[1] By originating application filed on 12 October 2020, the applicant seeks to change a development approval granted by this Court on 17 October 2008. That approval provided for a staged subdivision of land originally described as Lot 3 on RP229635, Lot 1 on RP173438 and Lot 401 on CG5012 and situated at Burnside.

[2] That development approval has previously been changed by order of the Court on three occasions: on 29 April 2011, 24 June 2016 and 13 April 2017. For present purposes it is only necessary to note that pursuant to the development approval, as

changed, the land has been subdivided into 53 residential lots and a balance lot described as Lot 501 on SP 297925.

[3] What follows are the reasons for the decision of the Court, made by orders given on 8 February 2021 allowing the further minor change to development approval.

The application

[4] This application is brought mainly with a view to changing the development approval so as to facilitate the further staged subdivision of the balance lot. Incidentally, it was also sought to include as change to this approval and so as to represent the actual approved sub-division, both as to the present extent of development and also as further proposed, on the land to which the approval attaches, some reconfiguration of individual lots as previously obtained by separate approval.[1] Those considerations may be largely put aside as they are simply intended to be included for clarification, in the event that the change application is otherwise allowed. They are not otherwise required because of their separate approval and do not raise any additional considerations.

[5] However and unlike the earlier approved applications, it is brought pursuant to s 78 of the *Planning Act* 2016 ("*PA*"). Because it is contended that the application is for a minor change to the development approval, which was given and changed by this Court and the original development application attracted properly made submissions, pursuant to s 78A(2) this Court is the responsible entity for deciding this application.

[6] However this is not the first such application to change the development approval which has been brought pursuant to the *PA*. It is, in reality, a revival of such an application filed on 18 February 2020 and refused by this Court on 31 March 2020: see *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council*[2]. Primarily, that application was refused because of the inability of the Court to be satisfied that the proposal was a minor change, due to:

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1 See applicant's written submissions filed on 24/11/2019 at [40] and Affidavit of B W Bell filed 12/10/20 at [20].

2 [2020] QPEC 19.

(a) the absence of sufficient evidence to demonstrate that the proposed change did not introduce new geotechnical impacts or increase the severity of known geotechnical impacts;[3] and

(b) a problem created by the proposal to further divide the approved Stage 3B into stages 3B, 3C and 3D, in circumstances which would not ensure the dedication, to Council, of all of the land along vegetated water courses, in conjunction with the drainage reserve function proposed to be served by lots identified as Lots 100, 101 and 102, if the proposed stages 3C and 3D did not proceed.[4] In short and in circumstances where there was nothing to ensure that all of the proposed stages would proceed, the Court was "not persuaded that the deferral of dedication of the land along the vegetated water courses to subsequent stages was inconsequential, nor that its deferral does not result in a substantially different development".[5]

[7] As is described in the applicant's submissions, the further proposed changes (modified to address the issues identified by the Court) are:

> "(a) rearranging lot boundaries within approved Stage 3B to:
>
> (i) facilitate the inclusion of two new lots;
>
> (ii) include Lot 37 and Lot 38 approved but not yet created under REC 17/0064 (which are located in proposed sub-stage 3D); and
>
> (iii) include Lot 3 on SP 299289 and Lot 36 on SP 299289 approved and created under RAL17/2053 as part of Stage 3a;
>
> (b) introduction of sub-staging within approved Stage 3B as follows:
>
> Stage 3B: Lot 14-20
>
> Stage 3C: Lots 21-25
>
> Stage 3D: Lots 26-35 and Lots 37-38;
>
> (c) the dedication of Lots 100, 101 and 102 as part of Stage 3B;
>
> (d) minor changes to the sizes of lots to facilitate the inclusion of the new lots; and

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3 Ibid at [31].
4 Ibid at [25] – [28].
5 Ibid at [28].

(e) consequential changes to the conditions of the Development Approval and the list of approved plans, including:

(i) updating the reference from 73 lots to 77 lots;

(ii) adding a new proposed plan for Stage 3 as part of the list of approved plans; and

(iii) adding a revised Geotechnical Assessment for Stage 3 dated 15 May 2020 as part of the approved document.[6]

[8] As well, the parties have addressed the issue in respect of the dedication of land to Council, in that:

(a) the dedication of Lots 100, 101 and 102 is to occur as part of Stage 3B; and

(b) although the rehabilitation of each lot will occur respectively during each of the stages 3B, 3C and 3D, the parties have entered into an infrastructure agreement which requires the owner of Lot 501 to carry out the rehabilitation of the reserves described as Lots 101 and 102, if Stages 3C or 3D do not proceed within 10 years.

[9] Also and in order to address a further or alternative reason for the refusal of the earlier 2020 application, additional evidence has been provided for the purpose of the assessment required by s 81 of the *PA*.[7]

[10] The additional material filed in support of this application would appropriately allow for a conclusion that what is sought is a minor change to the development approval. Minor change, for a development approval, is defined in the PA as follows:

"***minor change*** means a change that—

…

(b) for a development approval—

(i) would not result in substantially different development; and

(ii) if a development application for the development, including the change, were made when the change application is made would not cause—

(A) the inclusion of prohibited development in the application; or

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6 Applicant's written submissions filed 24/11/2019 at [43].

7 See [2020] QPEC 19 at [29] and [40].

(B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application; or
(C) referral to extra referral agencies, other than to the chief executive; or
(D) a referral agency to assess the application against, or have regard to, matters prescribed by regulation under section 55(2), other than matters the referral agency must have assessed the application against, or have had regard to, when the application was made; or
(E) public notification if public notification was not required for the development application."

[11] With the benefit of the evidence of a town planner,[8] it may be accepted, as was the common position of the parties, that none of the circumstances set out in sub-paragraph (b)(ii) of that definition, are engaged by the proposed change,[9] and also that what is proposed "would not result in substantially different development". That test is unchanged from the requirements for a "permissible change for a development approval" pursuant to s 367(1)(a) of the repealed *SPA,* including in respect of the guidance to be now obtained from Schedule 1 of the Development Assessment Rules,[10] which relevantly states:

"3. In determining whether the proposed change would result in substantially different development, the assessment manager or referral agency must consider the individual circumstances of the development, in the context of the change proposed.
4. A change may be considered to result in a substantially different development if the proposed change:
(a) involves a new use; or
(b) results in the application applying to a new parcel of land; or
(c) dramatically changes the built form in terms of scale, bulk and appearance; or
(d) changes the ability of the proposed development to operate as intended; or
(e) removes a component that is integral to the operation of the development; or
(f) significantly impacts on traffic flow and the transport network, such as increasing traffic to the site; or
(g) introduces new impacts or increase the severity of known impacts; or

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8 Affidavit of B W Bell filed 12/10/20.
9 Ibid at [36].
10 As made pursuant to s 68(2)(e) of the *PA* and prescribed pursuant to s44 of the *Planning Regulation 2017*, see: *G8C Pty Ltd ATF Crick Family Trust v Sunshine Coast Regional Council* [2017] QPEC 77 at [12]; *GBW Investments Pty Ltd v Brisbane City Council* [2018] QPEC 33 at [49].

(h) removes an incentive or offset component that would have balanced a negative impact of the development; or
(i) impacts on infrastructure provisions."

[12] It is only necessary to note that, as was also common ground and supported by the evidence, there is no impediment to the conclusion that approval of the change (considered in entirety) would not result in substantially different development. In particular it may be noted that:

(a) This development has historically been staged to enable the progressive development of the site and pursuant to existing Condition 3A, any road access and infrastructure services required to service a sub-stage is to be constructed within that sub-stage and dedicated to Council. As shown by comparing the Current Layout Plan with the New Plan:
    (i) the additional lots can be accommodated with no changes to the approved road layout, with a vehicle turnaround to be provided at the front of Lot 23 as part of proposed Stage 3B to service stages 3B and 3C and to provide access; and
    (ii) the location and size of the drainage reserves remains the same;[11]

(b) An absence of any significant impact on traffic flow and the transport network flows from understanding that the access road for the further development of the balance lot will be an extension of an access road which pursuant to an existing development condition, requires construction to an access street standard, and that even with the proposed change, the number of lots accessing that street will be substantially less than the lot catchment maximum provided as an acceptable measure in table 8.2.3 of the Maroochy Plan 2000;[12]

(c) In addition to what has already been noted as to the dedication of land and infrastructure agreement issues, in the context of a purpose to achieve environmental conservation outcomes along the watercourse and vegetated areas, rather than providing recreation values, it is noted that other vegetation which is to be preserved by way of vegetation covenants in stage 3C is mapped as a native vegetation area under the current *Sunshine Coast Planning Scheme 2014* and that any risk of interim clearing is minimised by the requirement that

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11 Affidavit of B W Bell filed 12/10/20, at [41].
12 Ibid at [37(d)] and BWB-13.

any clearing would need approval from Council, by a type of application which would be inconsistent with the Development Approval;[13] and

(d) Any issue as to introduction of new impacts or increase in the severity of know impacts relating to lot size and geotechnical matters are adequately addressed in the revised Geotechnical Assessment, Stage 3, Pope Avenue, Burnside, which has been prepared by Tectonic and dated 15 May 2020 and is proposed to be included in the approved documents together with two earlier such reports already noted as approved documents. The conclusion of that assessment of the proposed changed development is that there remains, as earlier assessed, a low risk of slope instability affecting stage 3 of the development.[14]

[13] Similarly, this material would warrant an assessment that the proposed change should be approved. The assessment of what is, in the circumstances which have been noted, to be properly regarded as an application for minor change of a development approval, is required to be in accordance with s 81(2) of the *PA*. Here that assessment by the Court is to occur in the context of a response notice, issued by *SARA*, advising that it has no objections to the proposed changes.[15] Also Council, as a party to this proceeding, has indicated its consent to the change.

[14] Except in one respect, it is unnecessary to rehearse in any particular detail, the assistance which is provided to such conclusion, by the evidence of the town planner. As the application for the development approval was originally and properly made on 8 November 2005, s 81(4) requires assessment against the *South East Queensland Regional Plan* 2005-2006, where the land was in the Urban Footprint, and the *Maroochy Plan* 2000, where the land was included in the Nambour Landscape Residential (Hillslope Residential) area (Precinct 6) and the development application was impact assessable. As identified by the town planner, the assessment relevantly requires regard to the following parts of the *Maroochy Plan* 2000:

(a) Part 3.2- Planning Area Number 2 – Nambour

(b) Code for Waterways and Wetlands;

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13 Ibid at [47].
14 Affidavit of A C Davey filed 12/10/20 and AD-3 at p 25
15 S 81(2)(c); see Affidavit of A R Pitcher filed 17/11/20, EX. ARP-1.

(c) Code for Development on Steep or Unstable Land;

(d) Code for Development in Bushfire Prone Areas;

(e) Code for Nature Conservation Management and Biodiversity Protection;

(f) Code for Landscaping Design;

(g) Parking Code;

(h) Code for Operational Works – Site Development;

(i) Code for the Development of Detached Houses and Display Homes;

(j) Code for Reconfiguring of Lots for Residential Purposes;

(k) Code for Operational Works – Engineering; and

(l) Code for Traffic Impact and Access Management.

[15] As also identified by the town planner, an issue does arise from the proposed changes, in that the proposed resizing of lots 16 and 17[16] will mean that at a size of 1500m^2, they will not comply with the acceptable measure or outcome of a minimum lot size of 2000m^2 for lots with a slope of 25%.[17] The relevant performance criteria to which such acceptable measure is referable are:

> "P1 Lots must have the appropriate area, physical characteristics and dimensions for the siting and construction of a dwelling (or dual occupancy or multiple dwelling units) and ancillary outbuildings, the provision of private outdoor space, convenient vehicle access and parking.
>
> P2 Lot size, shape and dimensions take into account the slope of the land and the desirability of minimising the need for earthworks and/or retaining walls associated with Building Works or Operational Works.
>
> P3 Lots must have an area, dimension and shape that clearly demonstrates:
>
> - Protection of natural or cultural features from any possible adverse impacts;
>
> - Accommodation of all site constraints and other matters relevant to a lot including, but not limited to land stability, bushfire risk, on site waste disposal areas, water quality treatment measures, flooding,

16 See Affidavit of B W Bell filed 12/10/20, at p 159

17 Ibid at [52] and see table 8.2.5 of the Maroochy Plan 2000, at p 220.

erosion, improvements, drainage and buffers to incompatible land uses and topography; and

- Preservation of special features (even external to the site) such as views to and from the site, lookouts, and the like, and

P4 Lot sizes must meet the projected requirements of people with different housing needs, and provide housing diversity and choice."[18]

[16] As further identified by the town planner, in later versions of the *Maroochy Plan* 2000 and also the current planning scheme, the *Sunshine Coast Planning Scheme* 2014, that minimum lot size, as an acceptable measure, has been reduced to 1500m$^{2.}$ Pursuant to s 81(5)(a) of the *PA*, it is appropriate that weight be given to that circumstance, as at the time this change application was made and in support of acceptance of the opinion of the town planner that:

> "Having regard to Mr Davey's assessment and given the compliance with the current laws and policies relating to lot sizes under the Current Planning Scheme in my opinion, Lots 16 and 17 meet that performance criteria of the Maroochy Plan by providing a safe and sufficient area for a suitable building envelope, vehicle access and usable open space despite not meeting the 2000m^2 lot size under the Maroochy Plan."[19]

[17] Otherwise and having regard to what has already been noted as to the additional materials relating to geotechnical issues and the proposed conditions and infrastructure agreement in order to provide for and preserve habitat and landscape values and the assistance gained from the evidence of the town planner in the necessary assessment, including in respect of issues raised in properly made submissions in the public notification period for the original development application,[20] an appropriate conclusion would be to allow this change application. In short, here is nothing identified as to any unacceptable impact of doing so.

[18] However and despite such conclusions and notwithstanding the support which the applications made to achieve such change to the development approval, have enjoyed from the respondent, the difficulty has been in satisfaction of all of the requirements of s 79 of the *Planning Act* 2016 ("*PA")* which provides:

> "79 **Requirements for change applications**
> (1) A change application must be—

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18 Ibid at p 218-219.
19 Affidavit of B W Bell filed 12/10/20 at [62].
20 Ibid at [64]-[107].

> (a) made in the approved form; and
> (b) accompanied by—
> (i) the required fee; and
> (ii) for an application for a minor change—a copy of any pre-request response notice for the application.
>
> (1A) Also, a change application must be accompanied by the written consent of the owner of the premises the subject of the application to the extent—
> (a) the applicant is not the owner; and
> (b) the application is in relation to—
> (i) a material change of use of premises or reconfiguring a lot; or
> (ii) works on premises that are below high-water mark and outside a canal; and
> (c) the premises are not excluded premises.
>
> (2) The responsible entity—
> (a) must accept an application that the responsible entity is satisfied complies with subsections (1) and (1A); and
> (b) must not accept an application unless the responsible entity is satisfied the application complies with subsection (1A); and
> (c) may accept an application that does not comply with subsection (1)(a) or (b)(ii); and
> (d) may accept an application that does not comply with subsection (1)(b)(i) to the extent the required fee has been waived under section 109(b)."

The issue as to the application of s 79(1A) was noted but not determined, as a further issue potentially preventing the acceptance of the application made in February 2020.[21]

Application of s 79 of the *Planning Act*

[19] From the outset, the applicant has sought to address the requirements of s 79(1A) of the *PA* on the basis that it is the owner of the balance lot and that otherwise, the 53 previously subdivided residential lots are "excluded premises".[22] Although a question originally raised was for the Court to "find that the 53 previously developed lots … are 'excluded premises' for the purposes of s 79(1A)(c)",[23] there was also an early and, as will be confirmed below, correct, concession that "the

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21 See [2020] QPEC 19, at [34].
22 Applicant's written submissions filed 24/11/2019 at [35] – [42].
23 See Ibid at [21] – [29].

premises the subject of the application", as referred to subsection 1(A), encompasses the entirety of the land to which the development approval attaches and which approval is the subject of this change application.[24] And that this is so, notwithstanding that the change sought is for the purpose of and to facilitate only the further development of the balance lot and therefore only of direct effect in respect of land owned by the applicant.

[20] As subsequently noted for the applicant, the reference to "change application" in s 79 is to what is provided in s 78 as to permission of "an application to change a development approval". Also and pursuant to s 280 of the *PA* and "unless the contrary intention appears", a reference in that Act to "the premises" is, "[f]or a development approval", defined as a reference to "the premises that are the subject of the approval". Otherwise the concept of "premises" is defined in Schedule 2 of the PA, as follows:

> "**Premises** means –
>
> (a) a building or other structure; or
>
> (b) land, whether or not a building or other structure is on the land."

[21] This statutory context may be noted to be, at face value, substantially different to that which previously applied under the *Sustainable Planning Act* 2009 ("*SPA*") and which was applied in the approval of the most recent of the applications to change the subject development approval: *Highgate Developments Pty Ltd v Sunshine Coast Regional Council*.[25] In that instance, the applicant was allowed to make permissible changes to the development approval, pursuant to s 367 of the *SPA*. Those changes were sought in order to facilitate Stages 2 and 3 of the approved development and to be effected on land which was owned by the applicant. However, Stage 1 had been completed and subdivided into 20 individually and separately owned allotments. Relevantly, the Court's approach was recorded as follows:

> "In this instance, the applicant is the owner of the lot which will be the subject of stage 3 of the development. The land which is to be the subject of stage 2 is owned by a related company and the consent of that

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24 Applicant's supplementary written submissions filed 3/12/2020, at [17] – [21].
25 [2017] QPEC 37.

> owner is in evidence. However, stage 1 has been completed with 20 individual owners of subdivided lots and the applicant seeks to invoke the exception in section 371(e) of *SPA*. In circumstances where, as will appear, it may be accepted that the requested change does not materially affect the land of those owners, it is appropriate to also apply the example given for that paragraph and that because of the number of owners of that land, it is not practicable to obtain the owner's consent. It can be noted that the requirement is as to practicability and accordingly, issues as to the potential cost and delay in informing the separate owners and obtaining their consent, are to be considered in the context of whether there is any discernible impact in terms of material effect on those lots."[26]

That determination was referrable to the following terms of s 371 of the *SPA*:

> "**371 When owner's consent required for request**
>
> If the person making the request is not the owner of the land to which the development approval attaches, the request must be accompanied by the owner's consent unless—
>
> (a) the approval relates to land that was acquisition land to which section 263(2)(b) applied when the application for the approval was made; or
>
> (b) the approval is for building work or operational work for the supply of community infrastructure on land designated for the community infrastructure; or
>
> (c) the consent of the owner would not be required under section 263(1) if a development application were made for the requested change; or
>
> (d) the responsible entity is satisfied that—
>
> (i) having regard to the nature of the proposed change, the owner has unreasonably withheld consent; and
>
> (ii) the requested change does not materially affect the owner's land; or
>
> (e) the responsible entity is satisfied that—
>
> (i) because of the number of owners of the land, it is not practicable to obtain the owners' consent; and
>
> (ii) the requested change does not materially affect the owners' land.
>
> *Example for paragraph (e)(i)—*
> It may not be practicable to obtain the consent of all the owners of land if the land was subdivided, after the development approval was given, and is subsequently owned by multiple persons."

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26 Ibid at p 3.25-36.

[22] It may be observed that notwithstanding the applicant's concession that s 79(1A) of the *PA* is engaged on the basis that the "premises the subject of the application" comprises of the entirety of the land to which the development approval applied, the approach towards establishing that the premises were "excluded premises" within the meaning of that term in s 79(1A)(c), remained largely reflective of the requirements of s 371 of the *SPA*, in that it was contended that:

(a) because of the number of owners it is impracticable to get their consent;

(b) there is no material affect of the land owned by those other persons; and

(c) such was the appropriate conclusion notwithstanding a concession that the change application did involve material affect in respect of the lot layout of the balance lot.[27]

[23] The more detailed submissions as to the absence of material affect in respect of the 53 already developed residential lots, are that:

(a) there is no proposed change to the layout of the previously subdivided lots "so that the existing owners/occupants are not directly effected";

(b) there is no introduction of any new traffic impacts "or any increase in severity of known traffic impacts";

(c) the early dedication of reserves associated with the lots described as 100 from 101 to 102, ensures the environmental outcomes of the development will be realised for the benefit of the community including the owners of the 53 developed lots, even if the proposed Stages 3C and 3D do not proceed; and

(d) to the extent that the changes to the development approval will reflect lot 3 on SP 299289 and lot 36 on SP 299289, this is to simply reflect the "as constructed layout for administrative efficiency", as occurred pursuant to a separate development approval; RAL 17/2053.

[24] Further and as supported by the additional evidence filed in support of this application, a finding of impracticability as to obtaining the consents of the owners of the 53 developed residential lots, is sought, in reliance upon not just the number

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27 Applicant's written submissions filed 24/11/2019 at [40] – [42].

of consents to be obtained but also the practicalities and costs and potential delay of doing so. The additional evidence included that the nature of the development is understood to have been weighted towards the ownership of the existing residential lots, being towards investors and occupation by tenants, as opposed to owner occupiers.[28] In that context, reliance is placed on the costs and delays potentially involved in;

(a) confirming the current ownership of each lot, by site enquiry or search of title or council records; and

(b) the distribution and management of the necessary requests for consent, including in provision of any necessary information in explanation of and in order to enable informed consents as to the proposed change.

[25] It is of course necessary to understand that what must be established is impracticability rather than inconvenience, but neither is it necessary to establish impossibility of obtaining such consents. It is also necessary to note that there is allowance in sub-paragraph (b)(ii) of the definition of "excluded premises", for the prospect of seeking a finding that requisite consent has been "unreasonably withheld." Either determination will depend upon the circumstances of individual cases and will necessarily be influenced by the necessity for an accompanying finding as to absence of material affect in respect of the relevant premises. That is, the relevantly inchoate nature of the concept of impracticability may well be influenced by the accompanying considerations as to material affect. For instance and as may be noted from the passage extracted above, from the reasoning in the prior instance of approval of a change to this development application under the *SPA*,[29] such an approach allows for identification of a point at which the level of inconvenience in obtaining the relevant consents becomes impracticable because of the apparent lack of any sufficient utility in doing so.

[26] However, that approach was there adopted in particular reflection of the expressed requirements of s 371(e) of the *SPA* and therefore in expressed reference to consideration of absence of any material affect upon "the owner's land". Further and in the context of the example provided for the application of s 371(e), it is clear

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28 Affidavit of AR Pitcher, filed 3/12/20, at [3]-[8].

29 See paragraph [21], above.

that the requirements for obtaining the consents of multiple owners extends beyond such instances where divided land which remains to be developed may be the subject of co-ownership and extends to any situation where part development has effected subdivision of other land under the development approval and therefore multiple owners of such sub-divisions.[30] The further context to such conclusion was to be found in the expressed basis upon which s 371 applied:

> "If the person making the request is not the owner of the land to which the development approval attaches"

And the following provisions of s 245 of the *SPA*:

> **"245 Development approval attaches to land**
> (1) A development approval—
> (a) attaches to the land the subject of the application to which the approval relates; and
> (b) binds the owner, the owner's successors in title and any occupier of the land.
> (2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured."

Accordingly, the clear focus in s 371(e) was upon the consent of any owner of any part of the land to which the development approval, which was sought to be permissibly changed, attached or applied and was expressly concerned with absence of any material affect upon the land, so separately owned.

[27] It may be noted that whilst a similar example appears in the definition of "excluded premises" in Schedule 2 of the *PA*, there are differences in the expression of the similar considerations, so as to, at least, not contain the same clarity of effect and to raise a question as to the approach of the applicant in having regard only to any material affect upon any separately owned land. That definition is in the following terms;

> ***"excluded premises*** means—
> (a) generally—

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30 That is, in recognition of the principles of statutory interpretation, that an example is to be regarded in a non-exhaustive sense and allowing for clarification and illustration of the application of a provision, so as may extend but not limit the meaning of the provision but not so as to be inconsistent with it: see s14D *Acts Interpretation Act* 1954.

(i) premises that are a servient tenement for an easement, if the development is consistent with the easement's terms; or
(ii) premises that are acquisition land, if the application or development approval relates to the purpose for which the land is to be taken or acquired; or

(b) for a change application or extension application— premises in relation to which 1 or more of the following apply for the application—
(i) the development approval to which the approval relates is for building work for supplying infrastructure on designated premises; or
(ii) the responsible entity or assessment manager considers the application does not materially affect the premises and that, given the nature of the change, the owner of the premises has unreasonably withheld consent; or
(iii) the responsible entity or assessment manager considers the application does not materially affect the premises and that because of the number of owners, it is impracticable to get their consent.
Example of when owners' consent may be impracticable—
Since the development approval was given, the premises have been subdivided and now has many owners.

[28] What may then be observed is that whilst it may be readily accepted that there is no identifiable material affect, direct or indirect, upon the separately owned and already developed sub-divisions, a different conclusion might well be reached in respect of any broader consideration as to the effect of what is proposed in respect of the premises more generally and particularly what remains to be developed under the approval. It is only necessary to note the issue which arises in respect of the lot sizes proposed for lots 16 and 17 to understand the import of that observation and that the issue as to material affect is not necessarily determined by any finding that the proposed change is a minor one or that the change is able to be assessed as acceptable.

[29] As the issues in this matter developed, the applicant ultimately sought to depart from the concession already noted, that the "premises the subject of the application"

referred to in s 79(1A), encompassed the entirety of the land to which the development approval, which is sought to be changed, attaches. In the end, the applicant's submissions were effectively directed at three questions:

(a) Whether the balance lot may be regarded as the "premises the subject of the application" for the purposes of applying s 79(1A) of the *PA*;

(b) Alternatively, whether the effect is to only require consent from any other owner whose land is materially affected by the proposed change and if not, whether material effect is to be considered in an holistic sense rather than in respect of any part of the land to which the development approval attaches; and

(c) in the further alternative, if the "excluded premises" exception is rendered unavailable in this instance, "whether the court should exercise a discretion to exclude non-compliance with s 79(1A) of the *PA*, pursuant to s 37 of the *PECA"*.

Discussion

[30] As has already been noted, the original concession of the applicant that "the premises the subject of the application" is the entirety of the premises to which the development approval attaches, should be regarded as correctly made. It is of course necessary to read this term in context and the immediate context is that s 79(1A) is directed at the requirement that "a change application must be accompanied by the written consent of the owner of the premises the subject of the application". Meaning is provided to the reference to "change application" in s 79(1A), by reference to s 78(1), in that it is "an application to change a development approval". Further and like the position earlier noted as prevailing under the preceding legislation, in the *SPA,*[31] s 280 of the *PA* provides that "unless the contrary intention appears", for a development approval, a reference to "the premises" is a reference to "the premises that are the subject of the approval". Also there is the following provided in s 73 of the *PA*.

> **"73 Attachment to the premises**
> While a development approval is in effect, the approval—
> (a) attaches to the premises, even if—

[31] See paragraph [26], above.

(i) a later development (including reconfiguring a lot) is approved for the premises; or
(ii) the premises are reconfigured; and

(b) binds the owner, the owner's successors in title, and any occupier of the premises."

[31] Also and as was noted for the applicant,[32] it would be apparently inconsistent with the example in illustration of the application of s 79(1A)(c), to take a narrower view of limiting the reference to "the premises the subject of the application", in the sense of only having application to circumstances not contemplated by the example. Neither is the position necessarily advanced by any consideration that the definition of "premises" is capable of referring to any separately owned land, because of the appearance that the later references to "the premises" in s 79(1A) are consistently in reference back to "the premises the subject of the application".

[32] However and for reasons to be expanded upon and as a matter of statutory interpretation, it should be accepted that the effect of s 79(1A)(c) and the engaged definition of "excluded premises" is to require only consent from an owner whose land, or premises, is materially affected by the proposed change. Further and as was common ground on this application and may be accepted, particularly in the context of what has been noted as to the application being for a minor change to the development approval and otherwise able to be assessed as allowable, the appropriate conclusion is that there is no material effect, direct or indirect, in respect of those separately owned premises.

[33] Accordingly, it is not necessary to consider the alternative or further proposition that considered in a holistic sense, the proposed change does not materially affect the premises to which the development approval attaches. That is, in choosing between an approach which focusses upon what was contended to be a comparison of the effect of the proposed change in a relative sense to all of the development encompassed by the approval, including that which may have already been effected, rather than what was in the course of the hearing of this matter accepted as material effect in respect of the development which is to occur and as it is sought to be changed.

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32 Applicant's supplementary written submissions filed 3/12/19 at [19].

[34] Further, it is also unnecessary to consider any exercise of discretion to excuse non-compliance pursuant to s 37 of the *Planning and Environment Court Act* 2016 *("PECA")*. However, it should be observed that notwithstanding the broad and untrammelled power so provided to this Court,[33] and as is correctly noted by the respondent, an essential problem confronting this submission is found in s 79(2) of the *PA* which provides that:

> "(2) The responsible entity—
> (a) must accept an application that the responsible entity is satisfied complies with subsections (1) and (1A); and
> (b) must not accept an application unless the responsible entity is satisfied the application complies with subsection (1A); and
> (c) may accept an application that does not comply with subsection (1)(a) or (b)(ii); and
> (d) may accept an application that does not comply with subsection (1)(b)(i) to the extent the required fee has been waived under section 109(b)."

In this context, s 79(2)(b) appears to be expressed in mandatory terms and effectively as a condition precedent to the consideration of, or at least the exercise of, the available power to approve a change application. This is particularly when that provision is considered in the context of the specific discretions allowed pursuant to sub-paragraphs (c) and (d), and the contrast with what is otherwise allowed in respect of departure from the requirements of s 79(1).

[35] It is, of course, possible to envisage competing contentions as to the relative generality or specificity of the respective provisions in s 79(2) of the *PA* and s 37 of the *PECA*. And it may also be observed that s 79(2) is generally applicable to all change applications and therefore to all responsible entities to which such applications may be directed, whereas the power for excusal of non-compliance pursuant to s 37 of the *PECA,* is reposed only in this Court, which is the only responsible entity for a change application in the circumstances provided in s 78A(2).

[36] The applicant makes reference to the adoption of a power, equivalent to that now found in s 37 of the *PECA*, in s 4.1.5A of the *Integrated Planning Act* 1997 ("*IPA*"),

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[33] *Bielby v Moreton Bay Regional Council* [2018] QPEC 50 at [12].

in *Tom Dooley Developments v Brisbane City Council & Anor*[34], to excuse what was then the mandatory requirement for owner's consent in s 3.5.33(3) of the *Integrated Planning Act,*[35] in circumstances where there was an application for change of a court ordered approval with respect to car parking, after the approved development had been implemented, with the sale of 39 residential lots. There, the non-compliance was excused on the Court's acceptance of the "plainly difficult task for the applicant to obtain consent of those 39."[36] And for the respondent, reference is made to the consideration of the equivalent power pursuant to s 440 of the *SPA* in *ISPT Pty Ltd v Brisbane City Council*.[37] It is pointed out that the Court was there requested to excuse what would be its own non-compliance with a requirement pursuant to s 65 of the *Building Act* 1975*,* that it not approve a building development application, unless the holder of an easement has consented to the building work. The determination was that the Court could not do so. It is pointed out that in the circumstances considered in *ISPT,* there was no requirement that a building development application contain the consent of the holder of the easement and that the Court did accept that there was a discretion to excuse the failure to obtain consent for a development application.[38] However, it does not appear to follow that any answer is to be found in the following observation or submission made for the respondent:

> "Here, the Court is not asked to excuse its non-compliance with s. 79(2) rather, the Court is asked to excuse the applicant's non-compliance with the requirement in s. 79(1A) for the change application to be accompanied by the written consent of the owner of the premises. Having excused that non-compliance, there is no non-compliance by the court with s. 79(2)(b) of the type that concerned the court is *ISPT*."

That is because of the apparently mandated effect of s 79(2)(b), effectively as a condition precedent to an exercise of power by a responsible entity to approve a change application.

Issues of statutory interpretation

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34 [2004] QPEC 95.

35 It is also noted that there was a similarly mandatory requirement for owner's consent in s 3.5.24 of the *IPA*.

36 [2004] QPEC 95 at p 4.

37 [2017] QPELR 1117.

38 Ibid at [193], in reference to *Gascoyne v Whitsunday Regional Council* [2011] QPELR 373 at [49] – [58].

[37] Essentially, issues of statutory interpretation arise as to whether or not the enactment of the differently worded provisions in s 79(1A) of the *PA* and the definition of "excluded premises", is intended to effect a different approach to the issue as to the material effect of the change application. This is particularly because of the repetitive reference to "the premises" without elaboration, except in the example where it is contextually expressed as the premises which "have been subdivided and now has many owners". And in the words giving application to s 79(1A), where it is effectively expressed as "the premises the subject of the [change] application".

[38] It is of course the preferred approach that these provisions be interpreted so as to best achieve the purposes of the Act.[39] The meaning is to be achieved "by reference to the language of the instrument as a whole" and so that meaning is given to all of the provisions and so that all of the words of a provision are made useful and pertinent.[40]

[39] Reference is also made to the observations of the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council*[41] where it was observed that:

> "The correct approach to statutory interpretation must begin and end with the text itself. At the same time it must be borne in mind that the
>
> > "modern approach to statutory interpretation … (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense ..."

That observation was made in the context of reference to earlier observations made in *Project Blue Sky Inc v Australian Broadcasting Authority*[42], including:

> "However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. …"

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39 S 14 *Acts Interpretation Act* 1954.
40 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 – 382.
41 2014 QPELR 686 at [55].
42 (1998) 194 CLR 355 at [78].

And also in the context of the approval of the following view expressed by Chesterman JA in *AAD Design Pty Ltd v Brisbane City Council*[43]:

> "The starting point in the task of construing statutes and like instruments remains, I think, that explained by Gibbs CJ in Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297 at 304-5:
>
> > "It is an elementary and fundamental principle that the object of the court, in interpreting a statute, "is to see what is the intention expressed by the words used": River Wear Commissioners v Adamson. It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what the say: cf. Cody v JH Nelson Pty Ltd. Of course, no part of a statute can be considered in isolation from its context – the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking "nothing remains but to give effect to the unqualified, words": Metropolitan Gas Co v Federated Gas Employees' Industrial Union. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in Connaught Fur Trimmings Ltd v Cramas Properties Ltd … However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature."

[40] Here and to the extent it may be permissible to consider extrinsic material, as "context", including so as to extend to consideration of the "mischief" or "state of affairs which to date the law has not addressed", or purpose of the provision and in the first instance,[44] there is nothing by way of any assistance to be found in the explanatory notes accompanying the introduction of the *Planning Bill* 2015. Accordingly, it may be noted that there is nothing to suggest that any different approach to that which prevailed under the *SPA* (the legislation to be replaced) was in contemplation. However, any benefit which might be gained from that

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43 [2013] 1 Qd R 1 at [37].

44 See also: *R v A2* (2019) ALJR 1106 at [31] – [37], [124], [148] and [163] and cf: s 14B of the *Acts Interpretation Act* 1954.

observation must be tempered by an understanding that this Bill proposed, as was enacted in the *Planning Act*, that s 79 would apply to all applications for change to a development approval, which were extended to allow for any such applications and not just those which were to be regarded as minor changes. By way of contrast and under the *SPA*, the only allowance for change application, in similar circumstances after the appeal period,[45] was for a "permissible change". And it is the definition of "permissible change" in the *SPA*,[46] which is now substantially reproduced as the definition of "minor change… for a development approval" in the *PA*.[47]

[41] The submissions for the applicant attempt to draw comfort from references to some observations in earlier cases as to rationale for the necessity of other owner's consent to accompany development applications and also from reference to the legislative history of similar requirements in respect of change applications.

[42] Little assistance may be gained in the first instance.[48] There can be no difficulty in understanding the requirement for the consent of an owner of land to which a development application relates, if the applicant is not the owner, as it is to be expected that the development sought to be approved may directly and in any physical sense, affect that land. It may be accepted therefore, as the applicant submits, that "the general purpose of requiring owner's consent is to enable an owner of land [to] exercise control over matters that affect their land".[49] However, it is not to be assumed that such effect will in all instances be of a direct rather than indirect kind, particularly where, as is clearly contemplated, there is ownership in a separate or discreet sense of parts of related land. Further and as was noted in *Evans v Gold Coast City Council & Anor,*[50] in the context of the requirement of owner's consent for a development application, the position of an owner is, in contrast to that of any submitter, one of right to refuse that consent. Nor is the position here one where the issue may be as to excusal of formal requirement for such consent to accompany an application, for instance where there is available evidence of the necessary consent.

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45 See *SPA*, Chapter 6, Part 8, division 2.
46 S 367.
47 See Schedule 2 of the PA.
48 See: *Evans v Gold Coast City Council & Anor* [2004] QPEC 19 and *Bigini Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 1 at [49].
49 Applicant's Second Supplementary Written Submissions, filed 18/12/2020, at [6].
50 [2009] QPEC 19 at [19].

[43] Neither is there any particular assistance for the interpretation of s 79(1A) of the *PA*, to be gained from reference to the history of prior similar provisions.

[44] As has been noted, in the *IPA* there was no express provision for excusal of the requirement.[51] Such was, however, provided in s 371 of the *SPA* by introduction of exceptions to the requirement for a request for a permissible change to a development approval by an applicant who "is not that owner of the land to which the development approval attaches", that "the request must be accompanied by the owner's consent."[52]

[45] For present purposes, it suffices to concentrate on the exceptions set out in sub-paragraphs (d) and (e), including the example provided for the application of sub-paragraph (e)(i). The difficulty in then going to cases where s 371(e) has been applied, including in respect of an earlier change application in relation to this development approval,[53] is that such simply represent instances of the application of the differently expressed provisions of s 371 of the *SPA*. In particular and in the context of the example given for paragraph (e)(i), the references to "owners of the land" extends to a situation where the ownership of "the land to which the development approval attaches" is in multiple persons, in an individual rather than conjoint or co-ownership sense. And, the reference in each of paras (d) and (e) to satisfaction that "the requested change does not materially affect the owners land", clearly required attention to any such effect, in that individual and narrow sense.

[46] The difficulty which remains is in the interpretation of the provisions which effectively replaced s 371 of the *SPA*, in the *PA*. First, it is to be noted that the exclusions which were paras (a) to (e) in s 371, were effectively encompassed in the definition of "excluded premises" in Schedule 2 of the *PA*. Notably and relevantly, in sub-paragraphs (b)(ii) and (iii) of that definition, there is no reference to "the land" nor "the owners' land". Rather, there is simply reference to a requirement that "the assessment manager considers the application does not materially affect the premises".

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51 See paragraph [36], above.
52 See para [14], above.
53 *Highgate Developments Pty Ltd v Sunshine Coast Regional Council* [2017] QPEC 37.

[47] However, and as pointed out for the respondent,[54] the change in language in reference to "premises" in the *PA*, rather than "land" as in the *SPA*, is not confined to the definition of "excluded premises".[55] Of particular note is that in the *PA*, the consent of the owner of premises is required for a development application (s 51(2)), a change application (s 79(1A)), cancelling a development approval (s 84(3)(b)) and an extension application (s 86(2A)), rather than as in the *SPA*, which required the consent of the owner of the land (see, respectively: s 263, s 371, s 379(1) and s 383(3)(d)). And the definition of "premises" included in Schedule 2 of the *PA* may in context simply mean "land".

[48] Moreover this is an instance where it is appropriate to apply the exhortation of McHugh J in *Kelly v R*[56] as to necessity to construe the effect of s 79(1A) and the adoption of the definition of "excluded premises" by having regard to the definition as it would be inserted into the fabric of the substantive provision. Accordingly, what then becomes clear is that s 79(1A) is engaged only "to the extent" that the matters which are the subject of sub-paragraphs (a), (b) and (c) relevantly arise. And because of the use of the conjunction "and" it is to the extent that each of those matters relevantly arise.

[49] In that way and having regard to sub-paragraph (a), there is engagement to the extent that an applicant is not the owner of the premises which is the subject of the application, which in the instance of separate ownership of any part of those premises, serves to engage each such separate or individual aspect of the ownership of the premises and only to that extent. As is the case here, sub-paragraph (b) is established to the extent that, or because, this application is for reconfiguring a lot. And of critical importance for present purposes, is the need to understand that the requirement of s 79(1A)(c) for the consent of the other owners only arises "to the extent that premises are not excluded premises". In the application of this negative proposition and by then reading in the relevant part of the definition of "excluded premises" in sub-paragraphs (b)(ii) or (iii), each of which are only engaged in respect of a situation of multiple ownership, it may be seen that the better view is that the reference to a consideration or conclusion that "the application does not

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54 Respondent's supplementary written submissions at [27].
55 Eg: s 73 *PA* and s 245 *SPA*, s 35(1) *PA* and s 200 *SPA*, s 31(1) *PA* and s 704(1) *SPA*.
56 [2004] 218 CLR 216 at [103].

materially affect the premises" requires attention to the premises only to the extent that they are so separately owned.

[50] Not only does this allow for consistency of application of the words "to the extent" as they appear in s 79(1A) and as both linking and limiting the requirement of the consent of the owners of the premises to the considerations arising in these sub-paragraphs, it appears to be particularly driven by regard to sub-paragraph (b)(ii) and the dual reference to "the premises" in the phrase "the application does not materially affect the premises and that, given the nature of the change, the owner of the premises has unreasonably withheld consent". This is because of an obviously complementary sense of potential application of sub-paragraphs (ii) and (iii) and the more immediate amenability of sub-paragraph (ii) to be viewed in contemplation of the singular sense of the position taken by each owner and therefore only in respect of any material affect upon the premises owned by that person.

[51] In that way, each of the references to "the premises" in sub-paragraph (ii) have a consistent meaning, albeit on the basis of the appearance of a contrary intention to the meaning otherwise provided by s 280 of the *PA*. Further and whilst the same cannot be then said in respect of the reference to "the premises" in the example to sub-paragraph (iii), which is expressed to be an "[e]xample of when owner's consent may be impracticable" and therefore in illustrating how separate ownership of "the premises the subject of the [change] application" may be in an individual sense and in respect of what may also be separately regarded as "premises". In that way, the terms of the example are also engaged to be illustrative of what is meant by the reference to "the premises' in the body of sub-paragraph (iii), notwithstanding that the reference to "the premises" in the example is clearly to the entirety which is subject to the separate ownership.

[52] Moreover, this conclusion also best achieves what may be discerned as an underlying purpose of the requirement for owner's consent, in recognising and allowing for some protection of the interests inherent in ownership in land or "premises", from the material effect of related development, to the extent it is of

certain kinds and to occur under the same approval, whether direct or indirect.[57] And otherwise consistent with the general purpose of the *PA*, as set out in s 3.

Conclusion

[53] Accordingly and because of what has already been noted as to the absence of any material affect in respect of any of the separately owned sub-divided lots and the impracticability of obtaining the consents of all of the owners of those lots, it is appropriate to conclude that each of those premises are excluded premises and that the consents of those separate owners are not required.

[54] Further and for the reasons which have been earlier noted, it is appropriate to conclude that this is both an application for minor change of the development approval and one which is appropriate to allow.

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57 Notwithstanding that the effective end result might be a separate development application in respect of which such interest may only be in the guise of a submitter, rather than owner of any land to which such an application might be directed.