

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Eljasie Pty Ltd v Cairns Regional Council & Anor* [2021] QPEC 79

PARTIES: **ELJASIE PTY LTD (ACN 107 169 504)**
(appellant)
v
CAIRNS REGIONAL COUNCIL
(respondent)
and
ROBERT CALLIN
(co-respondent)

FILE NO: 132 of 2018

DIVISION: Planning and Environment

PROCEEDING: Application

ORIGINATING COURT: Cairns

DELIVERED ON: 14 December 2021

DELIVERED AT: Cairns

HEARING DATE: 3 December 2021

JUDGE: Morzone QC DCJ

ORDER: **1. Application adjourned pending further evidence and submissions from the parties.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION FOR MINOR CHANGE – whether substantially different development – whether appeal ought proceed on the basis of the Further Amended Plan PR132687-13 H prepared by RPS and dated 21 October 2021 – whether appeal allowed in part and the development approved in part in relation to Stage 1 in subject to conditions – whether pursuant to section 72(2)(b) of Planning Act 2016 the Appellant may start Stage 1 of the development prior to the resolution of the appeal in relation to Stage 2 – whether the Respondent ought provide further information, including the results of the further traffic generation counts and related comparative analysis, intends to rely upon in relation to Stage 2 of the development.

LEGISLATION: *Planning Act* 2016 (Qld)

CASES: *Cleanaway Solid Waste Pty Ltd v Ipswich City Council* [2020] QPEC 47

Coles Group Property Developments Ltd v Sunshine Coast Regional Council [2010] QPELR 494
Emaas v Brisbane City Council [2014] QPELR 579
G8C Pty Ltd ATF Crick Family Trust v Sunshine Coast Regional Council [2017] QPEC 77
Novadeck Pty Ltd v Brisbane City Council [2016] QPEC 68
Orchard (Oxenford) Developments Pty Ltd v Gold Coast City Council [2015] QPELR 462

COUNSEL: N Loos for the Appellant
 SOLICITORS: Holding Redlich for the Appellant
 P&E Law for the Respondent
 Miller Bou-Samra Lawyers for the Co-Respondent

Summary

- [1] The appellant developer applies to make another minor change to its development application based on reconfigured layout plans for stage 1 and seeks to proceed on this changed application in respect of the appeal for stage 2. The appellant also seeks the courts imprimatur to stay the course of partly allowing the appeal and starting stage 1 before the appeal ends for the contested stage 2.
- [2] Whilst the respondent council accepts that the proposed changes are minor changes for stage 1 *per se*, it argues that the change may result in a substantially different development overall. The co-respondent submitter adopts a neutral position.
- [3] The critical issue is whether the proposed change of removing the connecting internal road and access from stage 1 to stage 2 will significantly impact traffic flow and introduce new impacts on Mount Sampson Street and Danbullan Street, thereby resulting in a substantially different development.
- [4] It seems to me that the proposed change will necessarily alter the way that traffic passes in, out, through and interacts with the overall development, by funnelling all traffic from stage 2 onto Mount Sampson Street and then onto Danbullan Street. But in the absence of further evidence, I am unable to discern whether the traffic access, flow and impacts will not substantially change the development and constitute a minor change to the development approval for stage 1 and/or a minor change to the development application overall.
- [5] I will invite further submissions on these matters, and also on the application of ss 78A(2) & (4), 79, 80, 81, and 81A to the application to change the development approval for stage 1.
- [6] The implementation of the approval for stage 1, pending the continuation of the appeal for stage 2, will depend upon the determination of the minor change application and consequential orders.
- [7] For these reasons, I will adjourn the application to allow for further evidence and submissions from the parties in accordance with these reasons.

Does the proposed change result in substantially different development?

[8] The critical issue is whether the proposed change results in ‘substantially different development’ within the meaning of “minor change” as defined in Schedule 2 of the *Planning Act* 2016 (Qld), for the development approval and the development application.

[9] The term ‘**substantially different development**’ is not defined in the Act. ‘Substantial’ is defined relevantly in the Macquarie Dictionary as:

" ... 2. an ample or considerable amount, quantity, size etc, ...7. relating to the substance, matter, or material of the thing. 8. of or relating to the essence of the thing; essential, material, or important".¹

[10] Guidance is provided in Schedule 1 of the Development Assessment Rules (promulgated by the Minister under s 68 of the PA) with a list of matters in paragraph 4 of the schedule, including relevantly here:

“(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; ...”

[11] In determining whether the proposed change would result in substantially different development, consideration must involve the individual circumstances of the development, in the context of the change proposed. Whether a proposed change results² in a substantially different development requires a comparative evaluation, both quantitative and qualitative, of the development before (including earlier changes)³ and after the proposed change.⁴ It calls for a common sense practical approach⁵ taking into account matters of fact and degree,⁶ to be considered broadly and fairly, having regard to the overall development application.⁷

¹ In approving an earlier decision of *Northbrook Corp Pty Ltd v Noosa Shire Council* [2015] QPELR 664, the Court noted that the word “substantial” is defined in the Macquarie Concise Dictionary as, inter alia, “essential, material or important.”

² *Cleanaway Solid Waste Pty Ltd v Ipswich City Council* [2020] QPEC 47 at [43] ; see also *Dempsey v Brisbane City Council* [2012] QPELR 396.

³ *Orchard (Oxenford) Developments Pty Ltd v Gold Coast City Council* [2015] QPELR 462 at [44] and [54] and *Novadeck Pty Ltd v Brisbane City Council* [2017] QPELR 152 at [10]-[17].

⁴ *Emaas v Brisbane City Council* [2014] QPELR 579 at [15].

⁵ *Coles Group Property Developments Ltd v Sunshine Coast Regional Council* [2010] QPELR 494 at 495; *Collard v Brisbane City Council* [2010] QPELR 635 at 637

⁶ *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].

⁷ *Novadeck Pty Ltd v Brisbane City Council* [2016] QPEC 68 at [9]; *Heritage Properties Pty Ltd v Redland City Council* [2010] QPELR 510 at 512; *Emaas Pty Ltd v Brisbane City Council & Ors* [2014] QPELR 579 at [18]; *GBW Investments Pty Ltd v Brisbane City Council* [2018] QPEC 33 at [49].

- [12] The appellant originally made a combined development application on 30 June 2017 over land then described as Lot 2 on SP121910, Lot 27 on RP908381 and Lot 47 on RP911569 comprising the overall development of stages 1 and 2 as follows:
- (a) preliminary approval for material change of use under s 242 of the Repealed SPA to extend the Sub-Precinct 1B boundary under the Smithfield Local Plan, to include the subject land and creation of use rights applicable to Mixed Use Zone Precinct 2 Trades and Services, and
 - (b) reconfiguration of a lot (1 into 22 lots) and balance area of the land subject of stage 1 only.
- [13] The original accompanying plans depict the proposed subdivision layout for stage 1. The plans also indicatively show an internal spine road off Mount Millman Drive, accessing stage 1 and extending throughout the development connecting stage 1 with stage 2, which was shown with 30 lot layout. A second access was shown off Mount Sampson Street via Danbulan Street for only 4 lots in stage 2.
- [14] The combined application required referral to the State Assessment and Referral Agency, who provided its concurrence agency response with conditions on 5 April 2018. Part of the development application required impact assessment, so it was publicly notified between 5 March 2018 and 19 April 2018. The respondent council ultimately assessed the application and issued its decision notice on 4 July 2018, followed by an amended decision notice on 23 July 2018. The application for the preliminary approval and reconfiguration of stage 1 was approved subject to conditions 1, but it was wholly refused in relation to stage 2.
- [15] In the meantime, the proposal development was significantly disrupted on or about 25 May 2018, when the Department of Transport and Main Roads compulsorily acquired 34.05 hectares (later amended to 34.213 hectares) of the land subject of the development application to make way for the Smithfield bypass project.
- [16] The appellant made a minor change application to deal with the consequences of the resumption. The change related to stage 1, only, whereby the reconfiguration for stage 1 was reduced from the original 21 lots to 9 lots serviced by an internal road in the balance area. The total land area was about 39.12 hectares. That changed application was allowed on the basis of amended plans, which indicatively show a realigned internal road connecting stages 1 and 2 with access off Mount Millman Drive.
- [17] On 6 December 2019, this Court allowed the minor change, allowed that part of the appeal in relation to stage 1, approved the development of stage 1 subject to conditions, and ordered the continuation of the appeal for stage 2.
- [18] By this current change application the appellant seeks a further minor change of the application (and that part of the development approval for stage 1), comprising:
- (a) A small increase in the overall area of stage 1 from 1.693 hectares to 1.694 hectares;
 - (b) A decrease in the number of lots from nine lots to four lots in stage 1;
 - (c) An increase in average lot size from 1330 square metres to 4235 square metres for stage 1;

- (d) Removal of the internal road through stage 1, and over a drainage easement to access stage 2;
 - (e) An increase in the number of lots from 3 to 4 that gain direct access to and from Mount Milman Drive, with lots 1 and 2 having exclusive driveways whereas proposed lots 3 and 4 will share one forked driveway.
- [19] It is not controversial that these changes do not result in substantially different development for stage 1. That is, the proposed change, in so far as it relates to stage 1, still results in a large lot commercial/service/light industrial subdivision albeit of less intensity. The amended conditions of approval for stage 1 adequately deal with consequential changes to access, roadworks and services for the new 4 lot layout and divorces stage 1 from stage 2. There will be no change to the proposed built form. Neighbours are unlikely to perceive any difference in the nature of the development as appreciated from outside of the subject land.
- [20] However, the proposed change removes the internal spine road, which has been an integral feature of the development application and part approval, and its removal necessarily changes the way that the overall proposal will operate in terms of access, traffic flow and impacts, as formerly intended as follows:
- (a) The original application relied upon the internal spine road through the development to connect stage 1 to the indicative 30 lot stage 2. The proposal was intended to operate with almost all stage 2 traffic travelling through stage 1 and onto Mount Millman Drive, with a small portion gaining access off Mount Sampson Street via Danbullan Street.
 - (b) The first changed application, consequent upon the compulsory road resumption, retained the internal road connecting stages 1 and 2. Stage 2 was shown with a reduced 9 lot layout. In that manifestation, the overall proposal was intended to operate so that the stage 2 traffic would travel through stage 1 and onto Mount Millman Drive (with some potential for 2 lots of stage 2 having access off Mount Sampson Drive).
 - (c) The current proposed change completely removes the internal spine road. The accompanying plans show stage 2 split into a four lot “Stage 2a” and a single lot “Stage 2b” served by a new internal road with access off Mount Sampson Street (via Danbullan Street). All connection, access and interaction between stage 1 and stage 2 is abandoned.
- [21] In this regard, the respondent council argues that the removal of the internal road and access from stage 1 to stage 2 will significantly impact on traffic flow and introduce new impacts on Mount Sampson Street and Danbullan Street, and thereby result in substantially different development overall. The respondent points to the following factors to support the argument:
- (a) The stage 2 land is currently in the Rural zone and in Sub-Precinct 1 - Employment of the Smithfield local plan. The Rural zone provides for rural uses and activities recognising the primacy of rural production and farming practices.

- (b) The combined development application seeks to include the land in the Smithfield local plan Sub-Precinct 1b and apply use rights consistent with the Mixed use zone - Precinct 2 Trades and Services. The supporting planning report identifies uses that will become self-assessable and uses that will become code-assessable consequent upon preliminary approvals.
- (c) The engineering report supporting the original development application addressed traffic and access, and the construction a 23 m narrow access corridor via Mount Sampson Street to service lots 40-43. Other external upgrades proposed included a new roundabout and upgrade of Cattana Road in accordance with the Transport (Roads) Trunk Infrastructure Plan, and modification of Mount Millman Drive to accommodate left in, left out movements.
- (d) The affidavit of Mr Sclipa identifies the need for consideration of Danbullan Street both as a consequence of this proposed development and otherwise. This supports the further order sought by the appellant requiring the respondent to undertake works related to the provision of traffic counts on Danbullan Street

[22] On the contrary, the appellant reminds the court that the contested part of the development application subject of the ongoing appeal for stage 2 is merely for preliminary approval for material change of use varying the effect of the Planning Scheme for use rights consistent with a Mixed Use Zone Precinct 2 – Trades and Services, subject to conditions. The appellant points to the Table of Assessment to argue that:

- (a) The granting of a preliminary approval for use rights consistent with the Mixed Use Zone Precinct 2 – Trades and Services does not authorise automatic use rights for a wide range of uses for the land subject of stage 2 of the development.
- (b) The majority of uses indicated as code assessable, and any further reconfiguration of stage 2, would also require a future code assessable development application.
- (c) Any such assessment (including any associated traffic assessment) is a merits assessment for another day and should have no impact on the minor change application that is currently before the Court.

[23] The relevant planning scheme is CairnsPlan 2016 v1.0. The '*Table 5.5.n.2 – Mixed Use Zone Precinct 2 – Trades and Services*' identifies the level of assessment and assessment criteria for different development application types including a development application for a material change of use or reconfiguring a lot.

[24] The following uses are identified as accepted development in the Mixed Use Zone Precinct 2 – Trades and Services:

- (a) Community Care Centre (if contained within an existing building);
- (b) Community Use (if contained within an existing building);
- (c) Environment Facility;

- (d) Food and Drink Outlet (if contained within an existing building used for a lawfully established Centre activity);
- (e) Home Based Business;
- (f) Low Impact Industry;
- (g) Sales Office;
- (h) Service Industry;
- (i) Shop (if contained within an existing building used for a lawfully established Centre activity and the GFA of the shop is less than 500m²);
- (j) Shopping Centre (if contained within an existing building used for a lawfully established Centre activity and the GFA of the shopping centre is less than 500m²); and
- (k) Veterinary Services (if contained within an existing building used for a lawfully established Centre activity).

[25] The following uses are identified as code assessable development in the Mixed Use Zone Precinct 2 – Trades and Services and would require a code assessable development application for a material change of use:

- (a) Adult Store;
- (b) Caretakers Accommodation;
- (c) Club (small scale);
- (d) Club (other than small scale);
- (e) Community Care Centre (other than as identified in item 9(a) above);
- (f) Community Use (other than as identified in item 9(b) above);
- (g) Dwelling Unit;
- (h) Educational Establishment;
- (i) Emergency Services;
- (j) Food and Drink Outlet (other than as identified in item 9(d) above);
- (k) Function Facility;
- (l) Funeral Parlour;
- (m) Garden Centre;
- (n) Hardware and Trade Supplies;
- (o) Health Care Services;

- (p) Hotel;
 - (q) Indoor Sport and Recreation;
 - (r) Office;
 - (s) Outdoor Sales;
 - (t) Place of Worship;
 - (u) Service Industry (if for a laundromat or dry cleaners and the GFA is greater than 150m²);
 - (v) Showroom;
 - (w) Veterinary Services (other than identified in item 9(k) above); and
 - (x) Warehouse.
- [26] The following uses are identified as an impact assessable development in the Mixed Use Zone Precinct 2 – Trades and Services and would require an application for a material change of use:
- (a) Educational Establishment (if involving accommodation);
 - (b) Shop (if for a Department Store or Supermarket);
 - (c) Shopping Centre (if the GFA of the Shopping Centre is greater than 500m²);
 - (d) All other uses not otherwise identified; and
 - (e) Undefined uses.
- [27] A development application for reconfiguration of a lot in the Mixed Use Zone Precinct 2 – Trades and Services requires a Code Assessable Development Application to be submitted and assessed.
- [28] It is true, as the appellant submits, that the delineation of lot size and configuration, internal roads and access shown on the plans are merely indicative in the context of the application for preliminary approval for material change of use and to vary the effect of the planning scheme. And care must be taken not to interpret indicative detail as elevating the application to one of a material change of use or reconfiguration of a lot. Of course, the greater certainty afforded such an application facilitates greater certainty in the assessment process, and the appellant accepts that a success in this change application might imperil development opportunities for the stage 2 in the future.
- [29] However, in my respectful opinion, a preliminary approval of the changed application will enliven use rights identified as accepted development (not otherwise requiring further code or impact assessment) in the Mixed Use Zone Precinct 2 – Trades and Services. The change will alter the way that traffic passes in, out, through and interacts with the overall development. The result is that all traffic from stage 2 will be funnelled onto Mount Sampson Street and then onto Danbullan Street.

In my view such matters of access, traffic flow and impacts are relevant to assessment of the development application for preliminary approval related to stage 2.

[30] There is no evidence of assessment of any impact of the traffic flow on Danbullan Street or of the introduction of new impacts onto Danbullan Street as a result of stage 2 gaining access from it. Yet, these matters are topical. Mr Scippa at paragraph 3 of his affidavit remarks about “...*an internal discussion about whether there are operational or safety risks in relation to the development gaining access from Danbullan Street, whether Danbullan Street should be made a one-way street and whether works are required to Danbullan Street independently of the application the subject of the appeal*”, and at paragraph 4 he deposes that “*In order to assist in determining those matters the Council intends to undertake traffic counts in Danbullan Street and it anticipates that to occur by 25/11/2021.*” The appellant also seeks orders compelling the respondent council to provide with any further information (including the results of the further traffic generation counts and related comparative analysis) it intends to rely upon in relation to stage 2 of the development.

[31] When considered in the context of the overall development application, it seems to me that the proposed change:

- (a) will remove a component that is integral to the operation of the development; and
- (b) will change the ability of the proposed development to operate as intended; and
- (c) may significantly impact on traffic flow such as increasing demand on access and increasing traffic onto Mount Sampson Street and Danbullan Street from stage 2; and
- (d) may introduce new impacts or increase the severity of known impacts on Mount Sampson Street and Danbullan Street.

[32] Therefore, I am unable to conclude that the proposed change will not substantially change the development. Given the attitude of the respondent council, rather than dismiss the application, I propose to allow the appellant an opportunity to adduce further evidence and submissions on these matters.

Is the proposed change a 'minor change' to the development approval for stage 1, and/or a 'minor change' to the development application?

[33] This is also an unusual situation where the proposed changes are sought to be made to the court’s development approval for stage 1 and, more broadly, to the combined development application in the pending appeal in relation to stage 2.

[34] An application for a minor change to a development approval is governed by Subdivision 2 of Division 2 of Chapter 3 of the *Planning Act 2016* (Qld) constrained by operation of s 46(4) of the *Planning and Environment Court Act 2016*, whereas a minor change to an application subject of a pending appeal is constrained by operation of s 46(3) of the *Planning and Environment Court Act 2016*.

- [35] Having regard to the proposed change in the context of these unusual circumstances, I also invite the parties to make further submissions about the relevant considerations for a minor change to a development approval and how such matters interact with any change to the balance of the undetermined development application subject of the continuing appeal. In particular, I invite submissions about the application to this application for minor change of ss 78A(2) and (4), the requirements of s 79, any notification pursuant to s 80, and assessment under s 81, and deciding factors in s 81A.

What declaratory and other orders should be made in relation to the approval and start of stage 1, and consideration of the changed application in the appeal?

- [36] The appellant also seeks the Court's imprimatur to stay the course of partly allowing the appeal and starting stage 1 before the appeal ends for the contested stage 2.
- [37] On 6 December 2019, this Court allowed the first minor change, allowed that part of the appeal and approved the development in relation to stage 1 subject to conditions, and ordered the continuation of the appeal for stage 2. The orders were:

- “1 The Application for the minor change be allowed.
- 2 The appeal proceeds on the basis of the Amended Plan RP132687-133 prepared by RPS and dated 27 February 2019.
- 3 The Appeal be allowed in part and the development approved in part in relation to Stage 1 in accordance with the conditions set out in Attachment A to this Order.
- 4 Pursuant to s72(2)(b) of the Planning Act 2016 the Appellant may start Stage 1 of the development prior to the resolution of the appeal in relation to Stage 2.
- 5 The appeal in relation to Stage 2 of the development is adjourned until such time as the Department of Transport and Main Roads provides the Appellant with further information in relation to the detailed design of the Smithfield bypass.”

- [38] These are final orders disposing of that part of the appeal for stage 1. It seems to me that the court is *functus officio* in relation to that part of the appeal allowed, consequential approval in relation to stage 1 subject to conditions, and permission to start stage 1, except for any further change or other power to revisit the orders.
- [39] The implementation of the approval for stage 1 will depend upon the determination of the minor change application and consequential orders. I will defer this issue until then.

Conclusion

- [40] For these reasons, I will adjourn the application pending further submissions from the parties.

Judge DP Morzone QC