



No: BD 313 of 2010

Between: **JOHN EDWARD MYTTON BARNES** Appellants  
**and**  
**GEOFFREY FREDRICK COOK**

And **SOUTHERN DOWNS REGIONAL** Respondent  
**COUNCIL**

And **THE CHIEF EXECUTIVE,** First Co-respondent  
**DEPARTMENT OF ENVIRONMENT**  
**AND**  
**RESOURCE MANAGEMENT**

And **THE McCONAGHY GROUP PTY LTD** Second Co-respondent  
**ACN 108 353 199**

**Submission for Second Co-respondent**

**Background**

- The Second Co-respondent invites the Court to strike out grounds two, three and four of the Appellants' notice of appeal in so far as they relate to the approval to demolish the building on 82 Fitzroy Street, Warwick being Lots 1, 2 and 3 on RP5801 on the basis that the approval is for development that is not assessable under the Respondent's planning scheme and the Appellants have no right of appeal in relation to development to the extent it relates to 82 Fitzroy Street, Warwick. The Co-respondent also invites the Court to make an order requiring the Appellants to pay the Co-respondent's costs of application, calculated on an indemnity basis.

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The grounds of appeal set out the notice of appeal are:

- The development application was not a properly made application because it failed to include an application for preliminary approval for a material change of use of the land to extend the Rose City Shoppingworld.
- Contrary to section 3.5.11 of the *Integrated Planning Act 1997*, the Respondent failed to decide that part of the development application concerning demolition of 82 Fitzroy Street, being the land described as Lot 1 on RP 5801 (sic), and there is no valid decision for that part of the development application.
- The development application conflicts with the laws and policies administered by the DERM as a concurrence agency.

APPLICATION IN PENDING PROCEEDING  
Filed on behalf of the Second Co-Respondent  
Form PEC-3

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- (d) The development application conflicts with the planning scheme and there are not sufficient grounds to justify the decision despite the conflict.

### Second Co-Respondent's submissions

#### Warwick Planning Scheme

3. The land is subject to the Warwick Planning Scheme (**Planning Scheme**).
4. Building work for removal, demolition or external building work on buildings listed in Planning Scheme Policy No. 1 Cultural Heritage of the Shire of Warwick (the **Policy**) is impact assessable under section 5.3.2 of the Planning Scheme.
5. The building known as Plumbs Chambers at 84 Fitzroy Street, Warwick being Lot 1 on RP94676 is listed as Recording Number 55 under the Policy.
6. The building on 82 Fitzroy Street, Warwick is not identified as a place of cultural heritage significance under the Policy.
7. Under the Planning Scheme,
  - (a) Building work on 84 Fitzroy Street is assessable development;
  - (b) Building work on 82 Fitzroy Street is **not** assessable development.

#### Integrated Planning Act – Development on a Queensland Heritage Place

8. Development on both properties is assessable development under the *Integrated Planning Act 1997 (IPA)*, schedule 8, table 5, item 2 (Development on a Queensland heritage place).
9. Under the Integrated Planning Regulation 1998, schedule 1, part 3, table 5, item 3, development on a Queensland heritage place made assessable under the IPA, schedule 8, part 1, table 5, item 2 (Queensland heritage place) is subject to code assessment.

#### Level of Assessment

10. Under the IPA, the following levels of assessment apply to the development application:
  - (a) The development on 82 Fitzroy Street, Warwick is **code** assessable;
  - (b) The development on 84 Fitzroy Street, Warwick is impact assessable.

#### Development Application

11. On or about 14 September 2007 a development application was lodged for a development approval for a preliminary approval to carry out building work (demolition of 82 Fitzroy Street and part of 84 Fitzroy Street) on 82 and 84 Fitzroy Street, Warwick.
12. The development application included:
  - (a) IDAS Form 1 Part A Common Details;
  - (b) IDAS Form 1 Part C Development in heritage registered place;
  - (c) IDAS Form 1 Part E Operational &/or building work assessable against a local government planning scheme;

- (d) IDAS Assessment Checklist identifying the application involved development in a heritage registered place as defined under the *Queensland Heritage Act 1992*.
13. On or about 8 October 2007, the Southern Downs Regional Council (**Council**) issued an acknowledgement notice for the development application.
  14. The acknowledgement notice stated that the application was for Preliminary Approval for Building Work (Demolition of Heritage Listed Buildings), required referral to the Environmental Protection Agency (**EPA**) as a Concurrence Agency and was subject to impact assessment.
  15. On or about 16 October 2007, the applicant was advised that the application was referred to the EPA.
  16. On or about 8 November 2007, the EPA issued an information request on the development application.
  17. On or about 4 August 2008, the applicant responded to the information request.
  18. On or about 16 September 2008, the applicant advised that public notification was completed.
  19. On or about 17 September 2009, the Department of Environment and Resource Management (**DERM**) (formerly the EPA) issued an amended concurrence agency response giving preliminary approval with conditions.
  20. On or about 26 November 2009, the Council issued a decision notice giving preliminary approval for building works (partial demolition of building on the register of cultural heritage places) subject to conditions, including concurrence agency conditions (the **Development Approval**).
  21. The Second Co-Respondent (Applicant) did not appeal the Development Approval.
  22. On or about 28 January 2010, the Appellants filed a notice of appeal against the Development Approval.

#### **Development Approval**

23. The Development Approval concerns two separate buildings on land being:
  - (a) 82 Fitzroy Street being Lots 1, 2 and 3 on RP5801; and
  - (b) 84 Fitzroy Street being Lot 1 on RP94676.
24. The Development Approval authorises, subject to conditions:
  - (a) The demolition of the building on 82 Fitzroy Street, Warwick; and
  - (b) Partial demolition and conservation works to the building on 84 Fitzroy Street, Warwick.

### Scope of Appeal

25. The appeal has been made by the Appellants under section 4.1.28 of the IPA.
26. Under section 4.1.28, a submitter for a development application may appeal to the Court only against that part of the approval relating to the assessment manager's decision under section 3.5.14 or section 3.5.14A of the IPA.
27. Section 3.5.14 of IPA applies to any part of a development application requiring impact assessment.
28. Section 3.5.14A of the IPA applies to any part of a development application for a preliminary approval overriding a local planning instrument.
29. In the present case, the only part of the development application requiring impact assessment is the building work for partial demolition on 84 Fitzroy Street, Warwick.
30. The part of the development application in relation to building work for demolition on 82 Fitzroy Street, Warwick is subject to code assessment and is therefore not subject to appeal by the Appellants.
31. In *Halfback Pty Ltd v Logan City Council & Anor* [2003] QPEC 009, Brabazon J stated at [80]:  
  
*"As the application involves both impact assessment and code assessment, appeal rights are only available for that part of the application involving impact assessment"*
32. In this case, the development of 82 Fitzroy Street, Warwick involves only code assessment. Accordingly, there is no right of appeal against the development approval to demolish the building presently located upon 82 Fitzroy Street, Warwick.
33. The appeal is therefore limited to the development approval to carryout building works on 84 Fitzroy Street, Warwick.

### Conclusion

34. The development on 84 Fitzroy Street, Warwick is impact assessable as the Planning Scheme requires impact assessment for the development.
35. The development on 82 Fitzroy Street, Warwick is code assessable as the development is **not** assessable under the Planning Scheme.
38. The Appellants' second and third grounds of appeal as they relate to 82 Fitzroy Street, Warwick are fallacious in that the IPA did not grant appeal rights in respect of them. Consequently, these grounds should be struck out.
39. Given that the application to demolish 82 Fitzroy Street, Warwick is not within the purview of the Planning Scheme the Appellant's fourth ground of appeal is without foundation and should be struck out.

  
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 Gadens Lawyers  
 Solicitors for the Second  
 Co-Respondent