

In the Planning and Environment
Court
Held at: Brisbane

No. BD313 of 2010

Between:	JOHN EDWARD MYTTON BARNES AND GEOFFREY FREDERICK COOK	Appellants
And:	SOUTHERN DOWNS REGIONAL COUNCIL	Respondent
And:	THE CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT	Co-Respondent
And:	MCCONAGHY GROUP PTY LTD ACN 108 353 199	Second Co- Respondent

OUTLINE OF SUBMISSIONS

A. Introduction

1. By order of this Honourable Court made on 22 September 2010, three *"preliminary issues"* in the appeal have been identified for determination, namely:
 - (a) was the development application properly made given that it failed to include an application for preliminary approval for a material change of use to extend the Rose City Shoppingworld (*"the Material Change of Use Point"*);
 - (b) were the building works proposed by the Second Co-Respondent, in the development application relating to 82 Fitzroy Street, Warwick, development assessable against the Warwick Shire Planning Scheme

and if not, could and has that component of the development application been decided by the Council as the assessment manager;

- (c) should the second, third and fourth grounds of appeal be struck out pursuant to Rule 171(1)(a) of the *Uniform Civil Procedure Rules* 1999 ("*the Appeal Point*").

B. Background

2. Nos. 82 and 84 Fitzroy Street, Warwick are adjoining parcels of land which are both improved by buildings constructed in the nineteenth century. The buildings on both parcels are included in the Heritage Register under the *Queensland Heritage Act* 1992¹.
3. Under the Warwick Shire Planning Scheme² ("*the Planning Scheme*") at all material times:
- (a) 82 Fitzroy Street, Warwick was:
- (i) in the City Centre Land Use Area pursuant to the Planning Scheme; and
- (ii) not included in the Register of Cultural Heritage Places pursuant to Planning Scheme Policy No 1.

¹ Certificate pursuant to Section 251 of the *Local Government Act* 2009

² Certificate pursuant to Section 251 of the *Local Government Act* 2009

(b) 84 Fitzroy Street, Warwick was:

(i) in the City Centre Land Use Area pursuant to the Planning Scheme; and

(ii) included in the Register of Cultural Heritage Places pursuant to Planning Scheme Policy No 1.

4. Both Nos. 82 and 84 Fitzroy Street adjoin, at the rear, the Rose City Shoppingworld, a major shopping facility located in the centre of Warwick and owned by the Second Co-Respondent.

5. On or about 18 September 2007, the Council received a development application³ on behalf of the McConaghy Group ("*McConaghy*"), the Second Co-Respondent, for preliminary approval (building work) for demolition of a building on 82 Fitzroy Street and part of a building on 84 Fitzroy Street.

6. The letter accompanying the development application from McConaghy's town planners, Urbis, described the circumstances as follows⁴:

"As Council is aware, McConaghy Group has been monitoring the structural integrity of the two buildings at 82-84 Fitzroy Street, Warwick.

Both these buildings adjoin the Rose City Shoppingworld and since 2005,

³ Affidavit of Michael John Connor ("*Connor*"), Exhibit "*MJC-1*" pp 1-47

⁴ Affidavit of Connor, Exhibit "*MJC-1*" p 1

our client has been concerned that the current state of the structural integrity of the buildings (sic). A recent visit by Farr engineers to monitor the buildings current structural state identified that the buildings structural integrity is continuing to deteriorate and our client now believes that they pose a significant public risk..."

And later in the same letter:

"In accordance with Section 3.2.1 of the Integrated Planning Act 1997 and on behalf of McConaghy Group, we make a 'properly made' development application for Preliminary Approval Building Works (Impact Assessment) for a Demolition of 82 Fitzroy Street, Warwick and part of 84 Fitzroy Street, Warwick."

7. The development application also comprised Form 1, Part A - Common Details⁵, Part C - Development in a Heritage Registered Place⁶ and Part E - Operational and/or Building Work assessable against a Local Government's Planning Scheme⁷.
8. In Part E, the description of the development for which approval was sought was as follows:

"Building work assessable against a planning scheme."

⁵ Affidavit of Connor, Exhibit "MJC-1" pp 26-27

⁶ Affidavit of Connor, Exhibit "MJC-1" pp 28-29

⁷ Affidavit of Connor, Exhibit "MJC-1" pp 30-31

9. On or about 8 October 2007, the Council issued an acknowledgement notice⁸ relating to both 82 and 84 Fitzroy Street which:
- (a) described the application as *"preliminary approval for building works and demolition of heritage listed buildings"*
 - (b) identified the level of assessment as *"impact assessment"*.
10. It is now clear that the development application made by McConaghy and the acknowledgement notice issued by the Respondent operated, to an extent, on a false premise. The false premise was that 82 Fitzroy Street was included in the Register of Cultural Heritage Places pursuant to the Planning Scheme Policy No 1, was assessable under the Respondent's planning scheme and therefore every aspect of the development application was impact assessable.
11. When the Council decided the application on 25 November 2009⁹ and thereafter issued the Decision Notice on 26 November 2009¹⁰, the development approved was limited to 84 Fitzroy Street, Warwick for *"Preliminary Approval for Building Work (Partial Demolition of Buildings on the Register of Cultural Heritage Places)"*.

C. The Material Change of Use Point

⁸ Affidavit of Connor, Exhibit "MJC-1" pp 50-51

⁹ *"Attachment 1"* to the Certificate pursuant to section 251 *Local Government Act 2009*

¹⁰ Affidavit of Connor, Exhibit "MJC-2" pp 250-259

12. The Appellant's suggestion that the development application was not properly made because it failed to include an application for a material change of use "*to extend the Rose City Shoppingworld*", seems to rely upon the contention that in some circumstances, a material change of use can include the processes which lead to the actual use¹¹.

13. In the development application which was made to the Council, a number of propositions seem to emerge:
 - (a) both buildings adjoin Rose City Shoppingworld and access is provided to the shopping centre adjacent to 84 Fitzroy Street via Haig Avenue¹²;

 - (b) the building at 82 Fitzroy Street has little structural integrity and the overall rate of deterioration is so great that demolition is the only realistic future of the building¹³;

 - (c) a similar situation exists in respect of 84 Fitzroy Street, but in particular, the western wall is unsafe and requires urgent attention¹⁴;

¹¹ *Fox v Brisbane City Council* (2003) 127 LGERA 390

¹² Affidavit of Connor, Exhibit "MJC-1" p 1

¹³ Affidavit of Connor, Exhibit "MJC-1" p 9: Preliminary Heritage Report prepared by Thomson Adsett Architects

¹⁴ Affidavit of Connor, Exhibit "MJC-1" pp 11: Preliminary Heritage Report prepared by Thomson Adsett Architects

- (d) there are intentions to enlarge the existing Rose City Shoppingworld and the demolition of the buildings will allow for that enlargement¹⁵.

14. Questions of this kind have arisen before, in the context of operational works that may lead to a material change of use, and the Courts have dealt with the question in the following ways:

- (a) the factual question of whether or not someone has commenced or started a material change of use is answered by an examination of what has actually been done on the land in light of surrounding objective circumstances and not merely by the intent of the developer¹⁶;
- (b) in some circumstances, operational works may be incidental to and necessarily associated with a material change of use of premises and in those circumstances, they will be for a material change of use¹⁷.

15. In the present circumstances, it is respectfully submitted that:

- (a) no aspect of the proposal amounts, in the sense required by law, to starting a material change of use for an extension to the Rose City

¹⁵ *Affidavit of Connor, Exhibit "MJC-1" p 5*

¹⁶ *Theiss Services Pty Ltd & Anor v Mareeba Shire Council & Ors* [2009] QPELR 1 at 17

¹⁷ *Fox v Brisbane City Council* [2003] 127 LGERA 390

Shoppingworld. When considered objectively, the evidence about those matters is equivocal; and

- (b) the proposed demolition is not incidental to and necessarily associated with a material change of use for an extension to the Rose City Shoppingworld. There is no unavoidable connection between the proposed demolition and future plans to expand the shopping centre in the way required by law¹⁸.

D. The Assessment Manager Point

16. It is clear from the evidence¹⁹ that relevant Council officers assumed that the Council was no longer the assessment manager for the development application relating to 82 Fitzroy Street when they discovered that the premises were not included in the Council's Register of Cultural Heritage Places in Planning Scheme Policy No 1. It also seems clear that the Council did not decide that aspect of the development application²⁰.
17. As a consequence, two questions seem to emerge. First, upon a proper construction of the *Integrated Planning Act 1997* ("IPA"), was the view formed by the Council officer about the identity of the assessment manager correct and if not, what is the consequence given the Council's decision.

¹⁸ *Boral Resources (Qld) Pty Ltd v Cairns City Council* [1997] 2 QD R 31

¹⁹ Affidavit of Annette Mary Doherty

²⁰ Certificate pursuant to section 251 *Local Government Act 2009*: Attachment "A"

18. Schedule 8A, Item 1 of IPA provides that if an application is for development completely within a single local government area and *"any aspect of the development is assessable against the planning scheme"*, then the assessment manager is the local government.
19. Here, it is submitted that the question about who was the assessment manager for 82 Fitzroy Street turns upon what *"the development"* is in the context of Schedule 8A IPA and the development application more widely.
20. If *"the development"* is the demolition of both 82 and 84 Fitzroy Street then the Council would be the assessment manager for all aspects of the development application. In those circumstances, whilst the Council did not have the power to assess the part of the development application not assessable against the planning scheme, it was required to decide the application and attach the concurrence agency response to its decision notice²¹.
21. If, however, the proposal for demolition of 82 and part 84 Fitzroy Street represented two separate components of development, conveniently combined in the one application, then:
 - (a) the Council was the assessment manager for the 84 Fitzroy Street application, which is assessed and decided; and

²¹ Section 3.5.3A of IPA

- (b) the former EPA should have been the assessment manager²² for the demolition proposed for 82 Fitzroy Street. In those circumstances, that part of the current application seeking approval for demolition of 82 Fitzroy Street was a nullity.
22. It is respectfully submitted that whilst there may be factors which point in different directions, the proper construction of the current factual circumstances leads to a conclusion that the development application contained, in truth, two components of separate development for building works combined in a single application.
23. Clearly, simply combining two separate and distinct aspects of building work in a single development application will not be enough to make the Council the assessment manager merely because one aspect is assessable against the planning scheme and another is not. Something more is required. For example, the fact that the buildings were attached or structurally support one another might be such a factor. Here, there is little or no evidence which suggests the two buildings were connected or related in a way that makes them collectively "*the development*" for the purposes of Schedule 8A of the IPA.

²² Schedule 8A IPA, Table 3, Item 7

E. The Appeal Point

24. The Respondent does not wish to be heard on the Appeal point.

MJ Connor
Solicitor for the Respondent