

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

**APPELLANTS' OUTLINE OF SUBMISSIONS FOR
THE PRELIMINARY ISSUES**

INTRODUCTION

1. This is a case where the second co-respondent invited the respondent and the co-respondent ("DERM"), and will at trial invite the Court to consider, its development application for demolition of one building and partial demolition of another building *for the purpose* of a material change of use for a shopping centre without actually applying for the material change of use.
2. The second co-respondent's plan, dated November 2008, submitted in response to an information request from DERM and actually attached to DERM's concurrence agency response and the decision notice shows the intention in demolishing the buildings is to allow a truck turning circle for a loading bay for the proposed shopping centre extension and construction of part of the shopping centre.¹ The plan shows that the proposed demolition of the two buildings is tied together because of the need to create the proposed truck turning circle and extension of the shopping centre. Approval of demolition of one building without the other will be useless.

¹ For convenience, this plan is attached as Appendix 1 to these submissions. It is exhibited at p 215 to the affidavit of Michael John Connor sworn 30 September 2010 (hereafter "MJC").

3. If the material change of use of the land had been included in the development application, it would have been impact assessable under the relevant planning scheme. The planning scheme itself ties together consideration of a material change of use and any demolition of buildings on the local heritage register.² Because the development application only applied for demolition of the buildings, part of the application was impact assessable and part was code assessable. Even so, because the demolition of two buildings is inextricably linked, the appellants, as submitters, may raise issues concerning the code assessable components of the development application in accordance with the principles stated by this Court.³

QUESTIONS FOR THE COURT TO RESOLVE

4. There are, in essence, three inter-related questions the Court must answer to resolve the preliminary issues raised by the parties:⁴
 - (a) Whether 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?
 - (b) Whether the appellants' second, third and fourth grounds of appeal ought to be struck out pursuant to Rule 171(1)(a) of the *Uniform Civil Procedure Rules 1999* because, materially, these grounds raise matters involving code assessable development?
 - (c) Whether the respondent, in its role as assessment manager, was required to decide parts of the development application that were not assessable development under the planning scheme and, if the respondent was required to decide these parts of the development application but failed to do so, what is the consequence of that failure for the development application and hearing of the appeal by the Court?

FACTUAL CONTEXT OF THE PRELIMINARY ISSUES

5. The Co-respondent, McConaghy Group Pty Ltd, made a development application ("the development application") on or about 14 September 2007 to the then Warwick Shire Council for preliminary approval for building work (demolition of heritage listed buildings) for the demolition of the building situated at 82 Fitzroy Street, Warwick and demolition of part of the building situated at 84 Fitzroy Street, Warwick, being land described as Lots 1, 2 and 3 on RP 5801 and Lot 1 on RP 94676, respectively ("the land").⁵

² See Table of Development – Material Change of Use for the City Centre at page 4-3, para 4.2.3 and Table of Development – Carrying Out Building Work at page 5-10, para 5.3.2 of the planning scheme.

³ *Halfback Pty Ltd v Logan City Council & Anor* [2003] QPEC 009; [2003] QPELR 552 at [17] (Brabazon DCJ); *Cairns Aquarius Body Corporate Committee v Cairns City Council* [2009] QPEC 86; [2010] QPELR 134 at [15], [20], [24], [25] and [30] (Wilson DCJ); and *Garners Beach Habitat Action Group Inc v Cassowary Coast Regional Council & Ors* [2010] QPEC 90 (Everson DCJ); and cases cited therein.

⁴ The three issues are, respectively, raised in the 1st ground of appeal of the Appellants' Notice of Appeal; the Second Co-respondent's Application in Pending Proceeding filed on 20 September 2010; and the issues raised by notice in writing by the respondent's solicitor on 23 September 2010.

⁵ See MJC pp 1-47.

6. It is common ground that the buildings at 82 and 84 Fitzroy Street that are proposed by the development application to be demolished in whole and in part, respectively, are included as a single listing, known as “Plumb’s Chambers”, on the Queensland Heritage Register under the *Queensland Heritage Act 1992* due to their heritage significance as buildings dating from the 1860s and 1870s.⁶
7. As a registered place on the Queensland Heritage Register, Plumb’s Chambers at 82 and 84 Fitzroy Street constituted, at the date of lodgement of the development application:⁷
 - (a) a State Heritage place for the purposes of section 68 of the *Queensland Heritage Act 1992*; and
 - (b) a Queensland Heritage Place for the purposes of the *Integrated Planning Act 1997* (“IPA”).
8. The co-respondent, the Department of Environment and Resource Management (“DERM”), formerly known as the Environmental Protection Agency, was a concurrence agency for the development application in respect to development on a Queensland Heritage Place. At the time the development application was lodged, the Queensland Heritage Council (“QHC”) was the relevant concurrence agency but nothing material to this case hinges on this change of responsibilities.
9. The planning scheme in force at all material times was the *Warwick Shire Planning Scheme 1999* (“the planning scheme”) and the land is located in the City Centre Land Use Area under the planning scheme.
10. While both buildings are recognised and protected for their State level heritage significance, only the building at 84 Fitzroy Street is included on the register of cultural heritage places maintained by the respondent under its *Planning Scheme Policy No. 1 – Cultural Heritage*. Inclusion on this register now makes the building at 84 Fitzroy Street a local heritage place under the *Queensland Heritage Act*; however, this recognition was provided by amendments to the Act commencing after the development application was lodged and the appellants do not seek the Court to give weight to it.⁸ Nothing material turns on the further recognition under the *Cultural Heritage Act* of 84 Fitzroy Street as a local heritage place.

⁶ A certified copy of the listing of Plumb’s Chambers on the Queensland Heritage List is provided at MJC pp 260-268.

⁷ Note: to avoid confusion the parties have agreed to use IPA Reprint No. No 8F, which provides the law as in force at 21 September 2007; Reprint No 6C of the *Integrated Planning Regulations 1998*, which provides the regulations as in force at 29 June 2007; and Reprint No 3 of the *Queensland Heritage Act* which provides the law as in force at 18 November 2005.

⁸ Pursuant to s 4.1.52(2)(a) of the IPA.

11. The principal purpose⁹ of the proposed development is to facilitate a material change of use and re-development of the land to extend the existing Rose City Shoppingworld situated on adjoining land, which is a shopping centre exceeding 4,000m². As noted above, the second co-respondent's plan, dated November 2008, submitted in response to an information request from DERM and actually attached to DERM's concurrence agency response and the decision notice shows the intention in demolishing the buildings is to allow a truck turning circle for a loading bay for the proposed shopping centre extension and construction of part of the shopping centre (see Appendix 1).
12. On or about 25 November 2009, pursuant to advice from DERM, the respondent resolved to approve that part of the development application relating to the partial demolition of 84 Fitzroy Street, Warwick, being the land described as Lot 1 on RP 94676.
13. The respondent appears not to have decided that part of the development application relating to the demolition of 82 Fitzroy Street.
14. The respondent issued a Decision Notice on 24 December 2009.

⁹ Note: The cover letter dated 14 September 2007 for development application states the demolition was required due the buildings posing a significant public risk given their dilapidated state (see MJC p 1). Part A (Common details) of the IDAS development application states that the intended use of the land is "vacant" (MJC p 26). No mention is made of the desire to construct a truck turning circle for a loading bay for the Rose City Shoppingworld but this intention is evident from:

- (a) pages 3-4 of the Heritage Report by Thomson Adsett Architects, dated September 2007, which accompanied the development application (MJC pp 5-6);
- (b) page 2 of the information request issued by the Queensland Heritage Council ("QHC") on 8 November 2007 which stated the proposal was "to facilitate the extension of the adjacent Rose City shopping centre" (MJC p 56);
- (c) pages 3, 6, 8 & 12-14 of the Statement of Heritage Impact by Watson Architects, dated July 2008, provided in response to the QHC information request (MJC pp 62, 65, 67 & 72-73);
- (d) pages 1-2 of the "Rose City Shoppingworld Expansion – Architectural Statement by Thomson Adsett Architects, dated 1 August 2008, Appendix 2 to the Statement of Heritage Impact by Watson Architects, dated July 2008, provided in response to the QHC information request (MJC pp 82-83).
- (e) pages 3, 37, 38 & 44 of the Conservation Assessment Report by Watson Architects, dated July 2008, provided in response to the QHC information request (MJC pp 102, 136, 137 & 143);
- (f) the fact that the demolition is not proposed by the owners of the buildings but the proponent of the shopping centre expansion, the second co-respondent, as noted in the Conservation Assessment report by Watson Architects at page 44 (MJC p 143), suggests that the true purpose of the demolition is the material change of use to the shopping centre, not a desire from the building owners to protect public safety [Note: the appellants understand that the land is now owned by the shopping centre owner, Rose City Centre Pty Ltd but this is not in evidence];
- (g) the imposition of a condition that the demolition be carried out in accordance with a drawing showing the proposed truck turning circle for a loading bay for the Rose City Shoppingworld as a condition of DERM's amended concurrence agency response, dated 17 September 2009, subsequently attached to the decision notice by the respondent (MJC pp 214-215, 228-229 & 255-256).
- (h) pages 2-3 of the planning report prepared by the respondent's planning officers, dated 21 October 2009 (MJC pp 220-221); and
- (i) the recognition of the proposed extension of the Rose City Shoppingworld in the respondent's resolution on 25 November 2009 and decision notice on 26 November 2009 to approve the proposed development (see Certificate Pursuant to s251 of the *Local Government Act* by Andrew Ireland, made on 1 October 2010 and MJC p 250).

REQUIRED LEVELS OF ASSESSMENT

15. As a consequence of the recognition of the cultural heritage significance of the buildings in the planning scheme and on the Queensland Heritage Register, the development application was, variously:
- (a) assessable development and impact assessable under the planning scheme in relation to the demolition of 84 Fitzroy Street;¹⁰
 - (b) not assessable development under the planning scheme in relation to the demolition of 82 Fitzroy Street;¹¹
 - (c) assessable development under Schedule 8 of the IPA in relation to all aspects of development on a Queensland heritage place¹² and, thereby, code assessable under the *Integrated Planning Regulations 1998* (“IP Regulations”) in relation to the demolition of both 82 and 84 Fitzroy Street.¹³
16. Where different levels of assessment apply to different parts of the proposed development under the planning scheme, Schedule 8 of IPA and the IP Regulations, as set out in the preceding paragraph, the highest level of assessment is applied. Therefore, the proposal to demolish 82 Fitzroy Street is code assessable and the proposal to demolish part of 84 Fitzroy Street is impact assessable.
17. The proposed extension of the Rose City Shoppingworld involves a material change of use for a shopping centre exceeding 4,000m² and is impact assessable under the planning scheme in its entirety, including the components of the development on both 82 and 84 Fitzroy Street.¹⁴

WHETHER THE DEVELOPMENT APPLICATION WAS PROPERLY MADE

18. The majority in *Fox v Brisbane City Council* [2003] QCA 330; (2003) 127 LGERA 390; [2004] QPELR 44 held a development application for operational works involving cutting and filling of rural land was invalid for not including an application for preliminary approval of a material change of use of the land for industrial use.¹⁵ The facts of the case were central to the decision of the majority. In particular, the fact that the cutting and filling was extensive and, on the facts of the case, was properly regarded as a necessary and incidental use of the land for the proposed industrial use. White J, agreeing with a similar approach by Jerrard JA, approved the approach taken in this Court of looking “at the purpose of the work, its scale and

¹⁰ See Table of Development – Material Change of Use for the City Centre at page 4-3, para 4.2.3 and Table of Development – Carrying Out Building Work at page 5-10, para 5.3.2 of the planning scheme.

¹¹ See Table of Development – Material Change of Use for the City Centre at page 4-3, para 4.2.3 and Table of Development – Carrying Out Building Work at page 5-10, para 5.3.2 of the planning scheme.

¹² See Schedule 8, Part 1, Table 5, item 2 of the IPA as in force when the development application was lodged.

¹³ See Schedule 1, Part 3, Table 5, item 3 of the *Integrated Planning Regulation 1998* as in force when the development application was lodged.

¹⁴ Table of Development – Material Change of Use for the City Centre at page 4-3, para 4.2.3 of the planning scheme

¹⁵ Jerrard JA and White J; de Jersey CJ dissenting.

other questions of fact and degree to see if, objectively, it amounted to material change of use.”¹⁶

19. While the reasoning in *Fox v Brisbane City Council* has been criticised by academic and professional commentators,¹⁷ the decision is consistent with the ordinary principles for determining what is a “use” of land. What constitutes a “use” of land is typically a matter of commonsense as expressed in the words used by ordinary members of the community to describe the activity occurring on the land.¹⁸ Once it is appreciated that land can be used for a purpose even though no physical activity occurs on the land, as in the case of open space provided as a buffer and for clean air around a hospital,¹⁹ it is no great step to conclude that preparatory works or activities undertaken for a particular purpose can constitute the start of a new use.
20. This case is on all fours with the reasoning of the majority in *Fox v Brisbane City Council*. Looking at the purpose of the proposed demolition, its scale and other questions of fact and degree, objectively, it will amount to material change of use of the land as preparatory work for the proposed extension of the Rose City Shoppingworld. Consequently, the failure to include an application for at least preliminary approval for the material change of use for the proposed shopping centre meant the application was not properly made.

WHETHER THE SUBMITTERS MAY APPEAL THE CODE ASSESSABLE ASPECTS OF THE PROPOSED DEVELOPMENT

21. While the demolition of 82 Fitzroy Street is code assessable under the planning scheme and IP Regulations, it is inextricably linked to the impact assessable demolition of 84 Fitzroy Street and, therefore, is properly raised by the submitters/appellants in the appeal in accordance with the principles stated by this Court.²⁰
22. Wilson DCJ (as he then was) variously stated the test as “inextricable link”, “materially overlapping”, “dependent upon”, “inextricably linked and integrated” and “[not] separated, functionally and physically” in *Cairns Aquarius Body Corporate Committee v Cairns City Council* [2009] QPEC 86; [2010] QPELR 134 at [15], [20], [24], [25] and [30].
23. In this case the planned demolition of the buildings at 82 and 84 Fitzroy Street only make sense in the context of constructing a truck turning circle for a loading bay for the proposed material change of use for the extension to the Rose City Shoppingworld. The proposed development of the two buildings can properly be described as “inextricably linked”, “materially overlapping”, “dependent upon”,

¹⁶ *Fox v Brisbane City Council* [2003] QCA 330; (2003) 127 LGERA 390; [2004] QPELR 44 at [84].

¹⁷ Quoted in *Cairns Aquarius Body Corporate Committee v Cairns City Council* [2009] QPEC 86; [2010] QPELR 134 at [26]-[28].

¹⁸ *Shire of Perth v O’Keefe* (1964) 110 CLR 529; 10 LGRA 147; [1965] ALR 70; 38 ALJR 83 at CLR 535 per Kitto J.

¹⁹ *Newcastle CC v Royal Newcastle Hospital* (1956) 96 CLR 493; (1959) 100 CLR 1.

²⁰ *Halfback Pty Ltd v Logan City Council & Anor* [2003] QPEC 009; [2003] QPELR 552 at [17] (Brabazon DCJ); *Cairns Aquarius Body Corporate Committee v Cairns City Council* [2009] QPEC 86; [2010] QPELR 134 at [15], [20], [24], [25] and [30] (Wilson DCJ); and *Garners Beach Habitat Action Group Inc v Cassowary Coast Regional Council & Ors* [2010] QPEC 90 (Everson DCJ); and cases cited therein.

“inextricably linked and integrated” and “not separated, functionally and physically”. The code assessable part of the development can, therefore, properly be raised by the submitters/appellants in this appeal.

24. If, contrary to these submissions, the Court decides to uphold the second co-respondent’s strike-out application, the orders made should be limited to striking out the grounds to the extent they relate to code assessable development. To the extent those grounds deal with impact assessable development there is no question they are valid grounds of appeal for submitter/appellants to raise. Alternatively, if the Court wishes to strike-out the whole of the grounds, the appellants should be given an opportunity to re-plead the grounds of appeal limited to the impact assessable development.

WHETHER THE ASSESSMENT MANAGER SHOULD HAVE DECIDED ALL PARTS OF THE DEVELOPMENT APPLICATION

25. The final questions for the Court to determine are:

- (a) whether the respondent, in its role as assessment manager, was required to decide parts of the development application that were not assessable development under the planning scheme; and
- (b) if the respondent was required to decide these parts of the development application but failed to do so, what is the consequence of that failure for the development application and hearing of the appeal by the Court?

26. The respondent appears to believe it was only required to determine those parts of the application that required assessment under the planning scheme.²¹ That approach is contrary to the role of an assessment manager, which is to decide the whole of the application, including any parts the subject of referral to a concurrence agency.²²

27. The decision notice, on its face, only approves that part of the development application relating to demolition of 84 Fitzroy Street. There is, on the face of the decision notice, no decision in relation to 82 Fitzroy Street. A basic and well-known principle applied to planning approvals is that the approval should primarily be interpreted as a stand-alone document and not by reference to other (extrinsic) documents unless they are expressly or by necessary implication incorporated into the approval.²³

28. With one proviso, the partial approval of the development application by the respondent is a moot issue because the Court considers the application anew²⁴ and is not limited by what the respondent decided or did not decide.

²¹ See the affidavit of Annette Mary Doherty sworn on 1 October 2010 and the Certificate Pursuant to Section 251 of the *Local Government Act 2009* by Andrew Ireland on 1 October 2010.

²² See s 3.5.11 of the IPA read in context of the effect of a concurrence agency’s response stated in section 3.3.18.

²³ See *Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth of Australia* (1994) 51 FCR 213 at 219-222 per Wilcox J; and *Blackington Pty Ltd v Tweed Shire Council* (2006) 145 LGERA 160 at [66] per Jagot J.

²⁴ Section 4.1.52 IPA.

29. The proviso to this is, if the second co-respondent is successful in striking out the grounds of appeal to the extent they relate to code assessable development, the Court may be deprived of jurisdiction to consider the parts of the development application relating to 82 Fitzroy Street.

COSTS

30. The second co-respondent applies for indemnity costs against the appellants in its Application in a Proceeding. The ground of such an order is not identified by the second co-respondent. There is no basis for such an application and none of the grounds for awarding costs, even on an ordinary scale, in s 4.1.23 of IPA are made out. Even if the appellants are wholly unsuccessful on the preliminary issues, there can be no question that the issues are honestly raised by public interest litigants²⁵ and involve difficult questions of law that it is appropriate to seek a ruling from the Court upon.²⁶ Whatever the outcome of this preliminary hearing, the appropriate order is that each party bear its own costs.

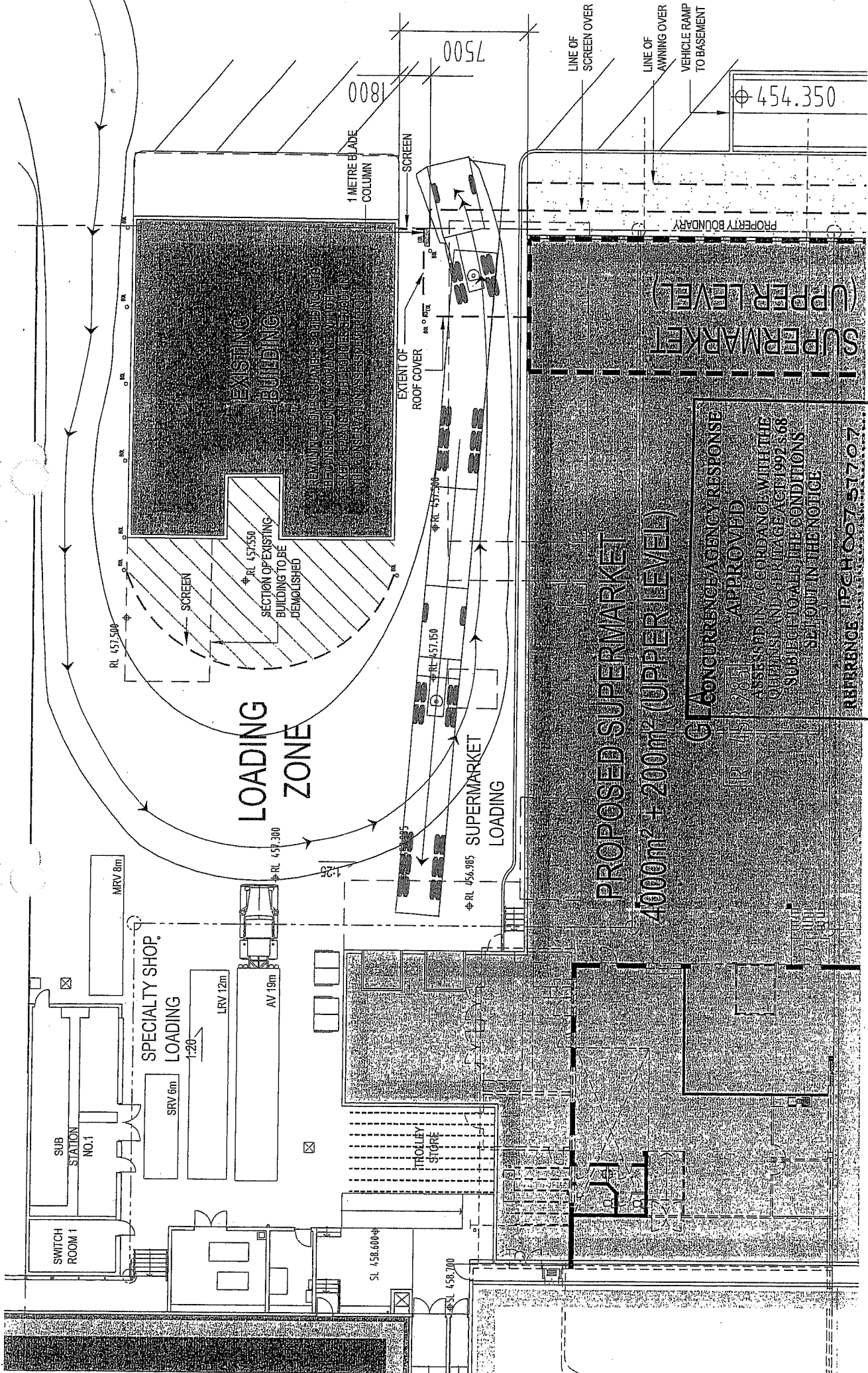
Dated: 1 October 2010

A handwritten signature in black ink, appearing to read "Chris McGrath". The signature is fluid and cursive, with a large initial "C" and "M".

Dr Chris McGrath
Counsel for the Appellants

²⁵ Should the Court consider it necessary to consider, the appellants are not commercial competitors of the proposed shopping centre extension. They are ordinary members of the public with no financial interest in the outcome of the proceedings who are merely concerned to protect cultural heritage in the public interest. These facts are not in evidence before the Court. Should it be considered necessary, the appellants' solicitor can swear to these facts.

²⁶ See *Cairns Aquarius Body Corporate Committee v Cairns City Council* [2009] QPEC 86; [2010] QPELR 134 at [45]-[48] (Wilson DCJ) and cases cited therein.



FITZROY STREET

APPENDIX 1

NOVEMBER 2008
SCALE 1:200 @ A3



CONCURRENCE AGENCY RESPONSE
APPROVED

ASSESSMENT IN ACCORDANCE WITH THE
QUESTIONS AND HERITAGE ACT 1993 S66
SUBJECT TO ALL THE CONDITIONS
SET OUT IN THE NOTICE

REFERENCE: PCH 007 51707

DATED 17 SEP 2009

SIGNED *Simon Abbott*
DELEGATE
ENVIRONMENTAL PROTECTION AGENCY

ROSE CITY SHOPPINGWORLD
PALMERIN STREET, WARWICK
FITZROY STREET LOADING DOCK

