COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

CA NUMBER: CA 709/11.

NUMBER: BD 313 of 2010

APPLICANTS/APPELLANTS: **JOHN EDWARD MYTTON BARNES** and **GEOFFREY FREDERICK COOK**

FIRST RESPONDENT: **SOUTHERN DOWNS REGIONAL COUNCIL**

SECOND RESPONDENT: **THE CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENTAL AND RESOURCE MANAGEMENT**

THIRD RESPONDENT: **McCONAGHY GROUP PTY LTD ACN 108 353 199**

APPLICATION TO COURT OF APPEAL

TAKE NOTICE that the Applicants/Appellants are applying to the Court of Appeal under section 4.1.57 of the *Integrated Planning Act 1997*, continued in force pursuant to section 802 of the *Sustainable Planning Act 2009*, for the following orders that:

1. The Applicants/Appellants are granted leave to appeal against the whole of the order made by the Planning and Environment Court in *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131.

THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE -

Date of judgment: 14 December 2010

Description of Proceedings: BD 313 of 2010

Description of parties involved in the proceedings:

John Edward Mytton Barnes and Geoffrey Frederick Cook as Appellants

and

Southern Downs Regional Council as Respondent

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The Chief Executive, Department of Environment & Resource Management as first co-respondent

McConaghy Group Pty Ltd as second co-respondent

Name of Primary Court Judge: His Honour Judge Rackemann DCJ

Primary Court: Planning and Environment Court

Location of Primary Court: Brisbane

THE REASONS JUSTIFYING THE GRANTING OF LEAVE ARE –

1. His Honour made an error or mistake in law in construing what constitutes a "material change of use" in section 1.3.5 (Definition of the terms used in *development*) of the *Integrated Planning Act 1997* (IPA). His Honour found as a question of fact that, "if the buildings are allowed to be demolished/partly demolished, the co-respondent [owner of the premises and the adjacent shopping centre] intends to seek to use the land freed up by the demolition to extend its shopping centre."[1] Having made this finding, which was not disputed at the preliminary hearing, his Honour should have found as a question of law that in addition to being building work, the demolition constituted "the start of a new use of the premises" and, consequently, a "material change of use" for the purposes of section 1.3.5 of the IPA. His Honour erred in speculating about potential uses of the land other than a shopping centre[2] or that the proposed demolition could be justified by the "dilapidated state of the buildings" alone[3] when this was not what the development application had in fact done. A new use of premises starts as soon as the purpose of the activities on the land is directed towards that use. This includes the construction phase of buildings to support the new use and any associated demolition and operational works. Demolition and other forms of development may be done in a way that does not constitute a new use but that is not what was proposed in this case. The question should not have been what might be done[4] but what in fact was actually proposed by the development application.

[1] *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [3].
[2] *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [23].
[3] *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [24]-[25].
[4] *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [23].

2. His Honour made an error or mistake in law in construing the right of appeal under section 4.1.28 (Appeals by submitters) of the *Integrated Planning Act 1997* that a submitter may appeal "only against the part of the approval relating to the assessment manager's decision under section 3.5.14 [involving impact assessable development]". It was not in dispute before his Honour that the assessment manager had considered the proposed demolition of the rear section and restoration of the front section of 84 Fitzroy Street, being the impact assessable component of the development application, as not isolated from but subject to the concurrent approval of the demolition of 82 Fitzroy Street, the code assessable component of the development application, for the purpose of extending the adjoining Rose City Shopping Centre, including to allow a truck turning circle across both premises. It was not in dispute before his Honour that the assessment manager had issued the development approval subject to conditions requiring the demolition to be carried out in accordance with an approved plan that showed the truck turning circle across both 82 and 84 Fitzroy Street for the proposed shopping centre extension and subject to complying with a conservation assessment report that considered the proposed demolition of 82 and 84 Fitzroy Street on this basis. His Honour attempted to *ex post facto* change the basis upon which the assessment manager had considered the part of the approval relating to the assessment manager's decision under section 3.5.14 by excluding consideration of the proposed shopping centre to justify the demolition of 82 and 84 Fitzroy Street.[5] The right of appeal arose due to the way in which the development application was considered by the assessment manager and could not be limited *ex post facto* in this manner. In the form considered by the assessment manager, the demolition of both 82 and 84 Fitzroy Street was "related to" the assessment manager's decision under section 3.5.14 of the IPA. His Honour therefore erred in holding that "the appeal [must be] limited to the partial demolition of 84 Fitzroy Street" and not allowing the demolition of 82 Fitzroy Street to be raised in the appeal.[6]

3. For the reasons set out in grounds 1 and 2, the decision of the Planning and Environment Court from which leave to appeal is sought is attended with sufficient doubt to warrant its being reconsidered and also, supposing the decision below to be wrong, substantial injustice would result if leave were refused.

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[5] *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [27].
[6] *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [31].

This application will be heard by the Court of Appeal at Brisbane

on: date to be advised ~~2010~~

at: 10.15am

Filing date: 2 February 2011

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Registrar

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do no appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the Applicants/Appellants intend to rely on the following affidavit:

(a) Affidavit of Janet Lesley Cook (affirmed 2 February 2011).

PARTICULARS OF THE APPLICANTS / APPELLANTS

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Name: Geoffrey Frederick Cook
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PARTICULARS OF THE FIRST RESPONDENT

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Signed: Cook & Associates
Cook & Associates

Description: Solicitor for the Applicants/Appellants

Dated: 2 February 2011

This application is to be served on:

Southern Downs Regional Council
c/- Michael Connor, Connor O'Meara
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Chief Executive, Department of Environment and Resource Management
Attention: Steve Barclay, DERM Litigation Unit
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