In the Planning and Environment Court No. BD 313 of 2010
Held at: Brisbane

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**

First Co-respondent

And: **McCONAGHY GROUP PTY LTD ACN 108 353 199**

Second Co-respondent

APPELLANTS' OUTLINE OF SUBMISSIONS FOR THE SECOND PRELIMINARY ISSUES HEARING

MATERIAL TO BE READ

1. Affidavit of Michael John Connor, sworn 30 September 2010 (Court Doc Nos 14-16).

ISSUES FOR THE COURT TO DETERMINE

2. The Second Co-Respondent applies to the Court to determine as preliminary issues whether:

   (a) the Appellants have a right of appeal with respect to that part of the Decision Notice that represents the response of the First Co-respondent, as a concurrence agency; and

   (b) the third ground of the Appellants' *"Amended Grounds of Appeal and Further and Better Particulars"* should be struck out.

FACTS

3. The facts of this appeal have been summarised in the two earlier decisions of the Court in the appeal[1] and need not be repeated in detail here. The only facts

[1] *Barnes v Southern Downs Regional Council* [2010] QPEC 111 (Rackemann DCJ); and *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 (Rackemann DCJ).

Cook & Associates
PO Box 263
Northgate QLD 4013
Phone no. 07 3861 9870
Fax no. 07 3266 8595
Email j.cookassocs@gmail.com

necessary to understand are that the development application to demolish 82 and 84 Fitzroy Street, Warwick:

(a) was impact assessable in relation to the demolition of 84 Fitzroy Street but self-assessable in relation to 82 Fitzroy Street under the local government planning scheme by the Respondent (the Council);[2]

(b) was assessable development in relation to the demolition of 82 and 84 Fitzroy Street under Schedule 8 of the IPA[3] by DERM as a concurrence agency.

4. The Council and DERM enjoyed an overlapping jurisdiction in relation to the assessment of the proposed demolition of 84 Fitzroy Street. This overlap is evident in the decision notice and attached conditions, in which DERM required the demolition of the rear of 84 Fitzroy Street, if approved by Council, to be carried out subject to restoring the front of the building and in accordance with an approved plan.[4]

STATUTORY CONTEXT

5. The relevant statutory context is set out in the Second Co-Respondent's written outline of argument and need not be repeated here. The Appellants agree that the Second Co-Respondent has identified the relevant parts of the statutory context, particularly ss 3.5.11, 3.5.14 and 4.1.28 of IPA, but disagree with the interpretation given to those provisions.

6. The only point to add in relation to the relevant statutory provisions that is not set out in the Second Co-Respondent's written outline is that the words "relating to" in s 4.1.28 of the IPA are not defined in the statute. The plain meaning of "relate" and "relation" given in the *Macquarie Dictionary*[5] is:

> **relate** / *verb* (**related**, **relating**) – *verb (t)* **1.** to tell. **2.** to bring into or establish association, connection, or relation. – *verb (i)* **3.** to have reference (*to*). **4.** to have some relation (*to*).
>
> **relation** / *noun* **1.** an existing connection; a particular way of being related: *the relation between cause and effect*. **2.** (*plural*) the various connections between peoples, countries, etc.: *commercial or foreign relations*. **3.** (*plural*) the various connections in which persons are brought together, as by common interests. **4.** the mode or kind of connection between one person and another, between man and God. ...

7. What s 4.1.28 requires for submitters to appeal a part of an approval, is that the part of the approval has *an association or connection* to the assessment manager's decision under s 3.5.14. To give the limitation in s 4.1.28 a sensible meaning, that association or connection must necessarily be more than merely being part of the same development application[6] but the wording is wider than, for example, being limited only to a part of an approval *made under* s 3.5.14. The plain meaning of the section gives some breadth to the required linkage or relationship to the decision

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[2] Section 5.3.2 (Table of Development – Carrying Out Building Work) of the *Warwick Shire Planning Scheme 1999* (the planning scheme).
[3] Sch 8, Part 1 (Assessable Development), Table 5, Item 2. This component of the assessment is not stated to be either impact or code assessable under the Act or the regulations.
[4] See the decision notice at pp 250-259 of the affidavit of Michael John Connor (30 September 2010).
[5] Third revised edition (2001), p 1596.
[6] If this interpretation were adopted, the whole of a development application would always be appellable whenever there was any impact assessable part. That would clearly be too wide.

under s 3.5.14, as reflected in previous decisions of the Court that have addressed questions on submitter appeals against code assessable parts of decisions and stated tests for the required link to impact assessable parts of the decisions.[7]

RELATIONSHIP BETWEEN COUNCIL AND DERM DECISIONS

8. The Appellants submit that the Second Co-Respondent's application and written outline of argument[8] fail to appreciate the relationship between ss 3.5.11, 3.5.14 and 4.1.28 of IPA that create a right of appeal against DERM's decision on the facts of this case. In particular, the application and written outline fail to appreciate how the conditions imposed by DERM affect the Council's decision in relation to 84 Fitzroy Street, which was made under s 3.5.14.

9. As s 3.5.11(1) of IPA required the Council to impose conditions in the exact form given by DERM as a concurrence agency, Council's decision under s 3.5.14 in relation to the impact assessable component of the application to demolish the rear of 84 Fitzroy Street was constrained by DERM's decision. Council could have refused the application outright but, beyond that, it could not effectively vary DERM's decision. For instance, if Council had decided that the Second Co-Respondent could only demolish half of the rear section of 84 Fitzroy Street that DERM had approved the demolition of, such an approval would have been inconsistent with the conditions imposed by DERM, which required the demolition to be carried out "in accordance with" the approved plan.

10. The Second Co-Respondent recognises that the Council "was bound" to include DERM's conditions under s 3.5.11 at paragraph [8] of its written submissions but, inconsistently, goes on to say at paragraph [11] that "the imposition of such conditions has nothing to do with s 3.5.14 ....". One might ask how, on one hand, can the Council be bound to impose DERM's conditions in making its decision about 84 Fitzroy Street under s 3.5.14 but, on the other hand, those conditions "have nothing to do" with its decision about 84 Fitzroy Street under s 3.5.14?

11. As the Council was constrained in making its decision about 84 Fitzroy Street under s 3.5.14 of the IPA by DERM's decision, DERM's decision "related to" Council's decision under s 3.5.14 for the purposes of establishing an appeal right under s 4.1.28.

12. The Second Co-Respondent fails to grasp this relationship. It states at paragraph [11] of its written outline that:

> *It is difficult to see how the conditions imposed by DERM can be construed as "being part of the approval relating to [Council's] decision under s 3.5.14" when in fact Council has no choice but to adhere to the compulsory direction of DERM.*

13. In this submission the Second Co-Respondent both identifies a binding relationship and denies the existence of any relationship between the two decisions.

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[7] *Halfback Pty Ltd v Logan CC & Anor* [2003] QPEC 009; [2003] QPELR 552 at [17] (Brabazon DCJ); *Cairns Aquarius Body Corporate Committee v Cairns CC* [2009] QPEC 86; [2010] QPELR 134 at [15], [20], [24], [25] and [30] (Wilson DCJ); *Garners Beach Habitat Action Group Inc v Cassowary Coast Regional Council & Ors* [2010] QPEC 90 (Everson DCJ), and cases cited therein; *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [28]-[30] (Rackemann DCJ).

[8] Filed 29 April 2011.

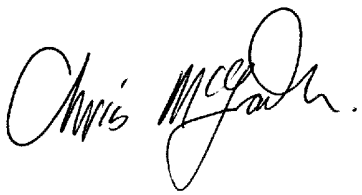
14. The Second Co-Respondent submits at [11] of its written outline that an alternative interpretation "ignores the presence of the word 'approval' and would have to mean the word 'approval' is superfluous". The Court's previous decision in *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 (Rackemann DCJ), which separated the parts of the approval relating to 82 Fitzroy Street and 84 Fitzroy Street shows this submission is erroneous and the wording is not superfluous.

15. The Second Co-Respondent places great emphasis at paragraphs [12]-[16] of its written outline on the history of s 4.1.28 but fails to notice that DERM's assessment of an application to demolish a Queensland heritage place is not assessed against "a concurrence agency code" and, consequently, even the old form of s 4.1.28 would have no application in this case. DERM's assessment of an application to demolish a Queensland heritage place is made against s 68 of the *Queensland Heritage Act* 1992 (Qld). That section is not a "code" and there is no "code" against which such an application is assessed.

16. The Second Co-Respondent also submits at paragraphs [16] and [18] of its written outline that the Court "has made it clear that code assessable development cannot be challenged in a submitter appeal". That is not what the Court has in fact held.

17. The Court has held that it is possible for submitters to challenge code assessable parts of a development application in certain circumstances.[9] 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].

18. The facts of the present case are different from the previous occasions when the Court has been asked to rule on submitter appeals involving aspects of a decision that involve code assessment. In this case the binding requirements of s 3.5.11 constraining the manner in which the Council's decision under s 3.5.14 is made creates a clear relationship between DERM's decision and Council's decision under s 3.5.14. Consequently, DERM's decision and the conditions it required to be imposed were "a part of the approval relating to the assessment manager's decision under s 3.5.14". As such, the Appellants may appeal that part of the decision in accordance with s 4.1.28 of the IPA.



Dr Chris McGrath
Counsel for the Appellants
Dated: 9 May 2011

[9] *Halfback Pty Ltd v Logan CC & Anor* [2003] QPEC 009; [2003] QPELR 552 at [17] (Brabazon DCJ); *Cairns Aquarius Body Corporate Committee v Cairns CCC* [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; *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131 at [28]-[30] (Rackemann DCJ).