PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Hobson Constructions (Qld) Pty Ltd v Chief Executive Administering the Planning Act & Anor* [2018] QPEC 56
PARTIES:	**HOBSON CONSTRUCTIONS (QLD) PTY LTD** (applicant) **v** **CHIEF EXECUTIVE ADMINISTERING THE PLANNING ACT** (first respondent) **and** **TOWNSVILLE CITY COUNCIL** (second respondent)
FILE NO/S:	D168/2017
DIVISION:	Planning and Environment
PROCEEDING:	Application
ORIGINATING COURT:	Maroochydore
DELIVERED ON:	6 April 2018
DELIVERED AT:	Maroochydore
HEARING DATE:	16 February 2018
JUDGE:	Long SC, DCJ
ORDER:	**It is declared that pursuant to s 78(3)(b) of the *Planning Act* 2016 (Qld), this Court is the responsible entity for determination of the application for minor change to the development approval given on 15 December 2011.**
CATCHWORDS:	ENVIRONMENT AND PLANNING - COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND - STATUTES - INTERPRETATION - FUNCTION OF COURT Where a development approval has been given by the Court – where conditions which were the subject of a response of a referral agency were part of that approval - where application is subsequently made for minor change to development approval – whether the referral agency or the Court is the responsible entity under section 78 of the Planning Act

LEGISLATION:	*Acts Interpretation Act* 1954 (Qld) s 14A *Planning Act* 2016 (Qld) ss 56, 52, 78, 79, 80, 81, 82, 83, *Planning and Environment Court Rules* 2010 (Qld) r 8 sch 2 *Sustainable Planning Act* 2009 (Qld) ss 367, 369
CASES:	*Becker v Brisbane City Council* [2017] QPEC 71 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355
COUNSEL:	A Williams (sol) for the applicant M Batty for the first respondent C Stockall (sol) for the second respondent
SOLICITORS:	p&e law for the applicant Ashurst for the first respondent Townsville City Council Legal Services for the second respondent

Introduction

[1] On 24 November 2017, the applicant filed an originating application seeking orders pursuant to s 81(4)(a) of the *Planning Act* 2016 ("PA"), to approve the proposed changes to conditions attached to a development permit for material change of use of premises situated at Granitevale Road, Alice River, previously described as lot 2 on RP738646 and part of lot 2 on RP728339. That approval was granted by this Court on 15 December 2011, upon an appeal brought from the refusal of the development application by the second respondent.

[2] It is noted in the originating application that it is for approval of purported minor changes and only to conditions which, whilst part of this Court's approval, are those that were the subject of the response of a referral agency in the process leading to the refusal of the development application by the second respondent. Further, it is noted that the proposed changes arise as a consequence of a revised traffic impact assessment conducted on 15 March 2017 and pursuant to a requirement of those conditions. The following circumstances are then specifically noted:

(a) On 11 October 2017, the applicant made a minor change application to the first respondent (through the State Assessment and Referral

Agency - "SARA")[1] as the responsible entity, pursuant to s 78(3)(a) of the PA;[2]

(b) On 17 October 2017, the first respondent, through SARA, refused to accept the application, on the basis of the assertion that this Court was the responsible entity for the application; and

(c) On 21 November 2017, the first respondent also declined to provide a "pre-request response notice", on the basis that it was not an "affected entity" pursuant to s 89(2)(a) of the PA but indicated an interest that remained in the application, on the basis of being directly affected by the relief sought.

[3] Consequently, the applicant, whilst otherwise pursuing the relief sought in this Court, has also sought a preliminary order as to the jurisdiction of the Court to do so.

[4] As far as the second respondent's position is concerned, on 1 November 2017 it advised that it had no objection to the proposed changes and on the jurisdictional issue, sought only to support the position of the first respondent, that it was this Court which was to be regarded as the responsible entity.

[5] In support of its contention that the first respondent should be found to be the proper responsible entity, pursuant to s 78(3) of the PA, the applicant pointed to the following uncontentious circumstances:

(a) The application for the subject development was "properly made" on or about October 2006, by the then owners of the land;

(b) The application was for an impact assessable development, was given the reference number M09/07 and was referred to concurrence agencies, including the Department of Main Roads ("DMR");

(c) The DMR issued a concurrence agency response, dated 25 February 2008, requiring conditions to be imposed in the event of development approval, which were subsequently amended by letter dated 30 November 2011;

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1 See the dictionary in Schedule 2 of the PA.

2 That was on the uncontentious basis that the first respondent would be the relevant referral agency in respect of the changes sought by the application.

(d) There were 159 properly made submissions during the public notification period;

(e) The decision of the second respondent, by notice dated 27 January 2009, was to refuse the application; and

(f) On 2 March 2009, an appeal to this Court was lodged, which on 15 December 2011, resulted in an order approving the development application, subject to conditions and including the amended conditions that were the subject of the amended response of the DMRT.[3] And that those conditions were not put in issue in the appeal.

Applicant's submissions

[6] The ultimate submission of the applicant is that s 78(3) of the PA is ambiguous, in that whilst it purports to identify a single responsible entity for any particular application,[4] there is a drafting error in that, as these circumstances demonstrate, the same factual circumstances enliven different alternatives under the section. It may be noted that s 78 provides:

> **"Making change application**
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> (1) A person may make an application (a ***change application***) to change a development approval.
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> (2) A change application must be made to the responsible entity.
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> (3) The ***responsible entity*** is—
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> (a) for a change application for a minor change to a development condition that a referral agency imposes—the referral agency; or
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> (b) the P&E Court, if—
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> (i) the change application is for a minor change; and
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> (ii) the development approval was given because of an order of the court; and
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> (iii) there were any properly made submissions for the development application; or
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> (ba) for a change application to change a condition imposed by the Minister under section 95 —the Minister; or
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> (bb) for a change application to change a development approval given by the Minister for an application

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3 It is noted that by this point the Departments of Transport and Main Roads had been merged and were referred to as the Department of Main Roads and Transport ("DMRT").

4 Particularly by the use of the conjunction "or".

that was called in under a call in provision—the Minister; or

(c) otherwise—the assessment manager.

(4) If the P&E Court is the responsible entity, the court—

(a) must assess and decide the change application as required under this subdivision; but

(b) is not otherwise bound by the process under this subdivision.

(5) If a change application is made to the Minister and the Minister is satisfied the change does not affect a State interest, the Minister may refer the change application to the assessment manager.

(6) If the Minister refers the change application to the assessment manager, the assessment manager is taken to be the responsible entity for the change application."

[7] Then and in seeking to invoke the principles of statutory interpretation, as particularly recognised in *Project Blue Sky v Australian Broadcasting Authority*,[5] and also the application of s 14A of the *Acts Interpretation Act* 1954, as to a purposive approach, it is contended that contextual aspects of the PA point towards a statutory intention that s 78(3)(a) is the applicable provision, so that the responsible entity is the first respondent. As to the contextual considerations, it is pointed out that an applicant who is permitted to make an application for a change to a development application is required to proceed according to specified steps or formalities, which except in respect of this Court, if it is the responsible entity,[6] also places procedural requirements or obligations on the responsible entity and other interested entities. Essentially, the applicant points out that there may be discerned to be a consistent statutory scheme in this respect and in support of its contention that s 78(3) applies to make the first respondent the responsible entity. This is because:

(a) The applicant would meet the requirements of s 79 by making application to the first respondent;

(b) The applicant would, pursuant to s 80(2)(b), have to notify any "affected entity" (here the second respondent), which affected entity may be requested to give a "pre-request response notice", pursuant to s 80(3), but if that does not occur, must, pursuant to s 80(5), give a "response notice" stating its position as to the proposed change, within 15 business days of receiving a copy of the application; and

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5 (1998) 194 CLR 355, particularly at [70].

6 See s 78(4)(b).

(c) The first respondent as the responsible entity would then be required, by s 81, to decide the application within 25 business days,[7] and then give notice of the decision as prescribed by s 83, which would include, pursuant to s 83(1)(g), notice to this Court.[8]

[8] However and as is pointed out by the applicant and if the position of the first respondent is adopted, the consequence is that:

(a) The first respondent is not within the concept of "affected entity" in s 80(2)(c);

(b) The first respondent is not, unlike any affected entity (such as the second respondent here) amenable to a request for a "pre-request notice" or required to give a "response notice" stating its position in response to the proposed change; and

(c) The application then remains to be assessed and decided by the Court pursuant to s 81 but without the Court being otherwise bound by the process under the subdivision and without any notification requirement under s 83.

It is further pointed out that apart from the application of r 8 of the *Planning and Environment Court Rules* 2010, the first respondent would have no role in the application made to this Court.[9]

Discussion

[9] An initial difficulty with the applicant's submission is that reference to s 80(2) demonstrates that the first respondent is expressly, rather than implicitly, excluded from the definition of "affected entity", by the use of the words "other than the Chief Executive" in sub-paragraphs (a), (b) and (c). Whilst it may be seen as a curious position, it must be concluded to be by statutory intent, as is also confirmed by the relevant definition of "minor change":[10]

> ***"minor change*** means a change that—

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7 But otherwise not until 20 business days after receiving the application except if it has received a pre-request response notice from each affected entity.

8 With the statutory injunction in the instance of any such notice given to the court that "the court must attach the notice to the court's file for the court order": see s 83(5).

9 The original submission made reference to r 26(2) of the *Uniform Civil Procedure Rules*1999 but on the hearing of the matter it was accepted that the correct reference is to r 8 of the *Planning and Environment Court Rules* 2010.

10 See Schedule 2 to the PA.

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(b) for a development approval—
(i) would not result in substantially different development; and
(ii) if a development application for the development, including the change, were made when the change application is made would not cause—
(A) the inclusion of prohibited development in the application; or
(B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application; or
(C) referral to extra referral agencies, other than to the chief executive; or
(D) a referral agency to assess the application against, or have regard to, matters prescribed by regulation under section 55(2), other than matters the referral agency must have assessed the application against, or have had regard to, when the application was made; or
(E) public notification if public notification was not required for the development application.

[10] Moreover and as has occurred in this matter and as a matter of ordinary practice in this Court, once it is accepted that the first respondent is an appropriate respondent to such an application made to the Court, that enlivens amenability to directions as to providing a response and so as to identify or narrow the issues for determination by the Court. In these circumstances, it is difficult to discern how the express absence of ability to obtain a "pre-request notice" from the first respondent is indicative of any view as to the necessity for s 78(3)(a) of the PA to prevail.

[11] Further and as pointed out by the first respondent, s 78(3)(a) is expressed to apply to make a referral agency the responsible entity for a minor change application, only where it is to make a minor change to "a development condition that [the] referral agency imposes". The submission is that when the approval decision is that of the Court, any conditions, even if reflective of the position of a referral agency, are imposed by the Court and not the referral agency.

[12] Whilst it may be correct to say that the reference to a condition that is imposed by a referral agency is not conducive to application to an order made by a Court, the difficulty in ascribing meaning to the words "that a referral agency imposes" is potential exclusion also of any approval given by the assessment manager, which would then deny any applicability to s 78(3)(a). The answer must be found in

understanding the role ascribed to a referral agency in the process of development assessment under the PA. That is dealt with in Division 1 of Part 3 and reference to s 56 discloses that a referral agency is upon assessment of a referred application, empowered to direct the assessment manager to do specified things, including "to give any development approval subject to stated development conditions". And by s 62 of the PA, the assessment manager's decision "must….include the conditions exactly as stated in the response". However and if the assessment manager's decision is the subject of appeal to this Court, not only is there no similar statutory injunction to this Court but such an appeal may be pursued in respect of the conditions required by a referral agency.[11] And as has been noted to have apparently occurred here, a referral agency response may be overtaken by later agreement or consent of the agency, whether by way of an amended response or submission in the hearing of an appeal.

[13] Accordingly, there is some support for a conclusion that s 78(3)(a) is capable of applying, whenever the condition in respect of which minor change is sought is one that the referral agency directed the assessment manager to impose in the assessment process. However, there is then an evident difficulty in giving full effect to the first respondent's submission, in that this provision is not amenable to application to any situation where the assessment manager's decision is overtaken by a development approval given by this Court. That is because, as was noted in *Becker v Brisbane City Council*,[12] s 78(3)(b) does not have effect to make this Court the responsible entity in every instance where that occurs, but rather is limited to only those instances where there is application for minor change and there were also any properly made submissions for the development application.

[14] Therefore and if the first respondent's submission were to be given effect, in those instances where it might otherwise be concluded that the relevant condition was imposed by a referral agency in the assessment process but where there is ultimately an approval given by this Court and where there were no properly made submissions, an application for minor change would be dealt with under s 78(3)(c). Then and unlike any other referral agency, the first respondent may have no input, as an affected agency or otherwise. That is because and in contrast to s 82, s81 of the PA does not engage Part 3, and therefore the referral process therein prescribed,

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11 For example, see s 229(5) of the PA.

12 [2017] QPEC 71 at [15].

and otherwise does not prescribe any basis for such input. Whilst s 81(2)(da) may be seen as requiring consideration of the breadth of available relevant material, there is the prospect of absence of input from the Chief Executive in respect of the proposed change. Although any view which may be proffered may well be within s 81(2)(da) or (e), there is no requirement for notification or express provision for input from the Chief Executive. However and if there is any problem in such circumstances, that lies in the express exclusion of the first respondent in s 80(2).

[15] Accordingly and consistently with the application of the *Project Blue Sky* principles,[13] these considerations point to a need to have regard to the apparent purpose of s 78(3), rather than to the consequence of the singular exclusion of the first respondent in s 80(2). The apparent purpose of s 78(3) is to not only provide for a single responsible entity for any change application but also to provide for such entity having regard to particularly identified considerations. In the first instance, it is understandable that in respect of an application for a minor change to a development condition which is referrable to a requirement of a referral agency, primarily the responsible entity for deciding the application is that referral agency. However it is clear that this is not intended to be the case in every such instance. And it is of some importance to note that the sub-section then proceeds in respect of some other alternative circumstances, in sub-paragraphs (b), (ba) and (bb). Further, all sub-paragraphs are joined by the conjunction "or" and in sub-paragraph (c) there is a residual provision which is obviously designed to pick up all remaining situations, by the use of the word "otherwise". It may then be discerned that the intention is to allow s 78(1)(a) to apply, except where sub-sections (b), (ba) or (bb) are applicable and that where none of the preceding sub-sections apply, then it is s 78(1)(c) that is applicable.

[16] There may well be some curiosities that emerge but there is also evident legislative choice as to the particular criteria that will engage respective responsible entities. It may be noted that it is only in respect of an application for minor change and therefore where the less extensive assessment process, under s81, is engaged, rather than as provided for any other change application in s 82 of the PA, that either a referral agency or the Court will be the responsible entity.

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13 (1998) 194 CLR 355, including at [70].

[17] And notwithstanding the potential extent of the matters that may require consideration under s 81(2)(da), it is a particular curiosity that the express requirement in s 81(2)(b) and as to consideration of properly made submissions, is only directed at an assessment manager as the responsible entity. This is particularly because the determining factor for the engagement of the Court as the responsible entity, is the fact that submissions were previously properly made. It may be, as was contended for the first respondent on the hearing of this application, that such instances will include the more controversial development applications but this need not necessarily be the case as s 78(3)(b) is engaged even if all properly made submissions are supportive of a development application. However and once again, there appears a deliberate shift from the pre-existing situation pursuant to s 367(1)(c) and s 369(1)(d) of the *Sustainable Planning Act* 2009 and not just in respect of the requirement that all applications for "permissible change" in respect of approvals given by the Court be made to the Court but also in departure from a discrete and confined enquiry as to the likelihood of the prompting, by the change sought, of any appropriate or legitimate objection by way of submission.

[18] It is unnecessary, on this application, to further consider these observations or to examine the requirements of s 81 of the PA in any greater detail, or to finally decide the precise meaning of the phrase "that a referral agency imposes" in s 78(3)(a). And only necessary, for the reasons given, to conclude and declare,[14] that pursuant to s 78(3)(b) of the PA, this Court is the responsible entity for determination of the application for minor change to the development approval given on 15 December 2011.

[14] Pursuant to s 11(1)(b) of the *Planning and Environment Court Act* 2016