

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Johnston v Banana Shire Council & Anor* [2019] QPEC 8

PARTIES: **ROBERT JOHNSTON**  
(Appellant)

v

**BANANA SHIRE COUNCIL**  
(Respondent)

**and**

**PANCHEK PTY LTD**  
(Co-Respondent)

FILE NO: 45/18

DIVISION: Planning and Environment Court

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 19 March 2019

DELIVERED AT: Brisbane

HEARING DATES: 11, 13 and 14 March 2019

JUDGE: Everson DCJ

ORDER: **The appeal be allowed only to the extent that the co-respondent's proposed condition be substituted for condition 7 in stage 1 and condition 8 in stage 2 of the decision notice.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against approval of a development application for an integrated Caravan Park and Accommodation Village

ASSESSMENT – whether proposed conditions are an unreasonable imposition on the development – whether the proposed conditions are reasonably required

LEGISLATION *Jakel Pty Ltd v Brisbane City Council* [2018] QPEC 21

*Isgro v Gold Coast City Council & Anor* [2003] QPELR 414

CASES *Planning Act 2016*

*Planning and Environment Court Act 2016*

COUNSEL: A N Skoien for the appellant  
 J T Dillon for the respondent  
 C L Hughes QC and H Stephanos for the co-respondent

SOLICITORS: HWL Ebsworth Lawyers for the appellant  
 King & Company Solicitors for the respondent  
 Holding Redlich for the co-respondent

### **Introduction**

- [1] This is an appeal against the decision of the respondent to approve an application for a material change of use for an Integrated Caravan Park and Accommodation Village on land situated at 95 Dawson Highway, Moura (“the land”).
- [2] A caravan park has been operating on the land since the 1960s.<sup>1</sup> In recent times the use of the land expanded to providing accommodation for non-resident workers resulting in the respondent issuing a Show Cause Notice to the co-respondent on 18 May 2017 and an Enforcement Notice on 16 August 2017.<sup>2</sup> The development application approved by the respondent was made to both regularise the current use of the land and provide for further expansion of the Accommodation Village component in the future. It provides for development in two stages. Stage 1 relates to the existing use of the land and incorporates 32 caravan sites and 96 cabins together with ancillary facilities. Stage 2 which represents the proposed extension of the development of the land involves 80 new accommodation units and incidental facilities.<sup>3</sup> The appellant is a commercial competitor which operates a facility called the Banana Accommodation Village not far from the town of Banana which is further along the Dawson Highway to the north-east.
- [3] The issues narrowed considerably prior to the commencement of the hearing of the appeal. On 22 February 2019 Kefford DCJ ordered that the issues in dispute in the appeal remaining for determination were limited to the issue of whether the following condition (“the appellant’s proposed condition”) should be imposed:

“The development is to operate as an integrated facility such that no one type of resident is ever accommodated to the exclusion of all others, and that no more than 60 percent of all occupancy locations on site (including units, caravan and camping sites – as those are identified on the approved plans SP-002 and SP-003) are at any time to be occupied by non-resident workers. The applicant shall keep

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<sup>1</sup> Exhibit 4, para 2.1.

<sup>2</sup> Ibid paras 2.8-2.9.

<sup>3</sup> Ibid para 3.4.

and maintain a register of persons and vehicles accommodated on the site, and the purpose and duration of their use, so as to demonstrate compliance with this condition, and shall make the register immediately available for inspection by the Council upon request.”<sup>4</sup>

- [4] Conversely the co-respondent contends that a different condition should be imposed (“the co-respondent’s proposed condition”) in the following terms:

- “7. The operation of the development is to ensure that at no time is one type of resident accommodated to the exclusion of all others to ensure that the development operates as an integrated facility as has been approved.
- 7A. The development must be operated to ensure that at no time no more than 77% of all occupancy locations on site (including units, caravan and camping sites – as those are identified on the approved plans SP-002 and SP-003) are occupied by non-resident workers.
- 7B. The development must be operated to ensure that no more than four (4) caravan and camping sites are occupied by non-resident workers.
- 7C. The log of the occupants of all occupancy locations must be kept, maintained and be made available within 14 days to the Council upon reasonable request which records:
- (a) the occupancy location occupied;
  - (b) the length of the stay; and
  - (c) whether the purpose of the stay was for:
    - i. personal travel;
    - ii. business travel;
    - iii. work associated with a major development or project.”<sup>5</sup>

- [5] The question for determination by the court is the condition which ought to be substituted for condition 7 in respect of the conditions of approval for Stage 1 of the proposed development and the identical condition 8 of the conditions of approval for Stage 2 of the proposed development. Each of these exiting conditions is in identical terms, namely:

“The operation of the development is to ensure that at no time is one type of resident accommodated to the exclusion of all others to ensure that the development operates as an integrated facility as has been approved.”<sup>6</sup>

- [6] Essentially the appellant submits that the appellant’s proposed condition should be substituted for both condition 7 and condition 8 quoted above and the co-respondent

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<sup>4</sup> Exhibit 1.

<sup>5</sup> Exhibit 15A.

<sup>6</sup> Exhibit 2, p 211 and p 217.

submits that the co-respondent's proposed condition should be substituted for conditions 7 and 8 quoted above.

### **The legislative framework**

[7] As the development application required impact assessment, the relevant assessment benchmarks are found within the Banana Planning Scheme 2006 ("the planning scheme").<sup>7</sup> Pursuant to s 45 of the *Planning Act* 2016 ("PA"), the court in determining the appeal, relevantly:

- (a) Must assess the development application against the planning scheme in place at the time the development application was properly made; and
- (b) May assess the development application having regard to any other relevant matter, other than a person's personal circumstances, financial or otherwise.<sup>8</sup>

[8] As the resolution of this appeal requires the imposition of lawful development conditions, it is necessary to have regard to s 65 of the PA which provides:

- "(1) A development condition imposed on a development approval must—
- (a) be relevant to, but not be an unreasonable imposition on, the development or the use of premises as a consequence of the development; or
  - (b) be reasonably required in relation to the development or the use of premises as a consequence of the development."

[9] Pursuant to the *Planning and Environment Court Act* 2016, the appeal is by way of hearing anew<sup>9</sup> and the co-respondent must establish that the appeal should be dismissed.<sup>10</sup>

### **The assessment**

[10] Moura is a small town located approximately 171kms south-west of Rockhampton which primarily services surrounding mining and rural activities.<sup>11</sup> In terms of tourism the town of Moura is not known as a destination in its own right, rather it is a place to stay en-route to other destinations.<sup>12</sup> The land is in the Tourism Precinct pursuant to the planning scheme. It is situated at the northern entrance to Moura

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<sup>7</sup> Exhibit 3.

<sup>8</sup> *Jakel Pty Ltd v Brisbane City Council* [2018] QPEC 21 at [94].

<sup>9</sup> Section 43.

<sup>10</sup> Section 45.

<sup>11</sup> Exhibit 4, para 2.11.

<sup>12</sup> *Ibid* para 2.17.

and is one of only two sites in Moura in the Tourism Precinct, the other being the Moura Motel which is located nearby but not adjacent to the land.<sup>13</sup> Only one provision of the planning scheme assumed any significance in the course of the hearing of the appeal. It is one of the overall outcomes for the Tourism Precinct which states:

“Land within the Precinct is predominately used for purposes associated with tourism and uses such as caravan parks, indoor entertainment, motels, food premises and hotels which serve the needs of the travelling public.”

[11] I agree with the observation of Mr Ovenden, the town planner who gave evidence on behalf of the co-respondent that in circumstances where there are only two sites in the Tourism Precinct, namely the land which has been used as a caravan park since the 1960s and the Moura Motel, the designation of these sites appears to largely reflect existing land use rather than any policy intent of establishing any major tourist attraction or facility in Moura.<sup>14</sup> On the facts before me, the Moura Motel will continue to operate and the land will continue to be used as a caravan park to a significant degree, regardless of whether the appellant’s proposed condition or the co-respondent’s proposed condition is imposed. Accordingly I find that the “land within” the Tourism Precinct will continue to be predominantly used for purposes associated with tourism and the relevant overall outcome is complied with, regardless of which of the above conditions is imposed.

[12] There is also a relevant matter which I regard as important in assessing the proposed development and that is need. Three suitably qualified experts gave evidence in this regard. Mr Duane was called by the co-respondent, Mr Brown was called by the respondent and Mr Leyshon was called by the appellant. Both Mr Duane and Mr Brown concluded that there was an appropriate level of need to justify the proposed development. Mr Leyshon concluded that there was not. The conclusions of Mr Duane and Mr Brown were confirmed by the evidence of Mr Oldfield<sup>15</sup>, the director of the co-respondent and also of a drilling company called Silver City Drilling (NSW) Pty Ltd which has been engaged by a resources company, Westside Corporation Pty Ltd, to undertake drilling in the Greater Meridian Gas Fields near Moura. The drilling and completions manager at Westside Corporation Pty Ltd, Mr

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<sup>13</sup> Ibid para 4.20 and Appendix D.

<sup>14</sup> Exhibit 6, paras 5.1.1 and 5.1.2.

<sup>15</sup> Exhibit 9.

Van Heuvel, confirmed the significant demand for the accommodation of non-resident workers in carrying out activities developing this gas field.<sup>16</sup> They both stated that the appellant's facility was unsuitable for accommodating their non-resident workers both because of where it is located and also because it is licenced to sell liquor.

[13] In the course of his evidence Mr Duane analysed the major projects in the Moura region which would not be providing accommodation for workers at their own facility and the number of workers likely to be required. He concluded that the total number of workers who would be seeking accommodation of the type contemplated by the proposed development for non-resident workers was in the order of 1,662.<sup>17</sup> I prefer the evidence of Mr Duane to that of the other need experts. I found the evidence of Mr Leyshon partisan and unconvincing. I therefore conclude that there is a significant demand for the non-resident worker accommodation component of the proposed development. I am satisfied that this is not met by existing facilities in the region, including that of the appellant. There is therefore a need for the Accommodation Village component of the proposed development which is not being currently met.<sup>18</sup>

[14] Each of the three town planners who gave evidence, Mr Ovenden on behalf of the co-respondent, Mr Perkins on behalf of the respondent and Mr Forsyth on behalf of the appellant agreed that it was appropriate to impose a condition to cap the extent of the use of the land for the accommodation of non-resident workers in order to ensure that the caravan park use was not subsumed. This was considered important as the caravan park provides an important service in Moura and contributes to economic activity in the town. Mr Ovenden expressed the view that the appellant's proposed condition would lead to excessive "mothballing" of the proposed development in circumstances where this would not contribute to the economic advancement of Moura and would serve no legitimate outcome for the community.<sup>19</sup> Mr Forsyth stated that the percentage of the proposed development that should be occupied by non-residential workers should be determined by the need experts<sup>20</sup> and Mr Perkins was of the same view.<sup>21</sup>

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<sup>16</sup> Exhibit 10.

<sup>17</sup> Exhibit 16.

<sup>18</sup> *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414 at 418 [21].

<sup>19</sup> T1-62 – 1-63 ll 40-45 and 1-5.

<sup>20</sup> T1-77 ll 5-10.

[15] The need experts had the benefit of an occupancy analysis for both the cabins and the caravan sites on the land between October 2016 and August 2018 which was included in confidential Appendix 4 of their joint economic need report.<sup>22</sup> This analysis was extrapolated by Mr Duane in the course of his evidence to include up to January 2019.<sup>23</sup> The analysis showed that the maximum demand for cabins by travellers as opposed to workers was 2.1 per night in October 2018 and that the average demand per month throughout the period was 0.8 cabins. Furthermore, the analysis showed an average demand for caravan and tent sites of 44 per cent per month. It was Mr Brown who originally proposed a cap on non-resident workers which is reflected in the appellant’s proposed condition, however, when confronted with the hard evidence of the usage of the land, he conceded that the co-respondent’s proposed condition was reasonable.<sup>24</sup> Unsurprisingly Mr Duane was of the view that the co-respondent’s proposed condition will ensure that there will always be sufficient tourist and traveller accommodation available and that the proposed development will not be underutilised from an economic perspective.<sup>25</sup> Conversely Mr Leyshon sought to cast doubt upon the statistics although this was the only data provided to the court about the use of the land which was of an empirical nature and it was the data utilised by all the need experts in undertaking their analysis. Again, I did not find Mr Leyshon a compelling witness to say the least.

[16] As was observed in *Sincere International Group Pty Ltd v Council of the City of Gold Coast* the power to impose lawful conditions on an approval “is a broad residual discretion to be exercised for a proper planning purpose”.<sup>26</sup> The limitation on accommodating non-resident workers in the appellant’s proposed condition is unjustifiable when one has regard to the demand for facilities on the land by the travelling public over the extensive period the subject of the above analysis.<sup>27</sup> Pursuant to s 65 of the PA it represents an unreasonable imposition on the proposed development which, moreover, is not reasonably required for the land to continue to be viably used as a caravan park. Not only does the appellant’s proposed condition

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<sup>21</sup> T2-24 ll 9-10.

<sup>22</sup> Exhibit 5 pp 56-57.

<sup>23</sup> Exhibit 5A.

<sup>24</sup> T2-18 ll 1-11.

<sup>25</sup> Exhibit 7 para 3.1.

<sup>26</sup> [2018] QPEC 53 at [24].

<sup>27</sup> Exhibit 5A.

offend s 65 of the PA but it represents bad planning, for as Mr Ovenden correctly observed, an excessive quarantining of the proposed development in terms of non-resident worker accommodation does nothing to contribute to the economic advancement of Moura and achieves no legitimate outcome for the community. Conversely the co-respondent's proposed condition allows the co-respondent to flexibly respond to the demand for different types of accommodation within the proposed development. While it allows for a few non-residential workers to stay in their caravans if they preferred, the quarantining of the caravan park sites to the extent proposed further ensures that the caravan park will continue to function as a viable destination for the traveling public.

- [17] If contrary to the view expressed above, that the appellant's proposed condition is lawful pursuant to s 65(1) of the PA, it is not a condition which should, in exercise of the broad residual discretion of the court, be imposed in any event.

### **Conclusion**

- [18] The appellant's proposed condition is unlawful as it is an unreasonable imposition on the proposed development. Furthermore, it is not reasonably required in the circumstances. There is no proper planning purpose which justifies the imposition of such a condition and in the exercise of the broad residual discretion the court it should not be imposed in any event.
- [19] Conversely the co-respondent's proposed condition more than adequately ensures that the development operates at an integrated facility such that the use of the land as a caravan park will continue. Accordingly, the appeal is allowed to the extent that the co-respondent's proposed condition is to be substituted for condition 7 in Stage 1 of the development approval and condition 8 in Stage 2 of the development approval.