PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*East Coast Gravel Pty Ltd v Brisbane City Council* [2019] QPEC 15
PARTIES:	**EAST COAST GRAVEL PTY LTD ACN 009 931 239** (appellant) v **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	961 of 2017
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	5 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 January and 1 February 2019 and further written submissions received 15 February 2019
JUDGE:	Kefford DCJ
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – where the appellant filed an appeal against Council's decision to refuse a request to change a development approval – where the appellant sought to change an infrastructure charges condition to allow an offset against the transport infrastructure charge in respect of provision of a bike path – whether the proposed change is a permissible change – whether the proposed change lies outside the scope of part 8 division 2 subdivision 1 of chapter 6 of the *Sustainable Planning Act 2009* – whether the change would require the Council to enter an infrastructure agreement – whether in exercise of the discretion the proposed change ought be refused
LEGISLATION:	*Integrated Planning Act 1997* (Qld), s 3.5.14 *Planning Act 2016* (Qld), s 311 *Planning and Environment Court Act 2016* (Qld), s 76 *Sustainable Planning Act 2009* (Qld), s 245, s 345, s 346, s 347, s 361, s 367, s 374, s 375, s 461

CASES:	*48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67; [2017] QPELR 133, cited *Bayview Gardens Pty Ltd v Mulgrave Shire Council* [1989] 1 Qd R 1, cited *Cooper Brookes (Woolongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, cited *Harderan Pty Ltd v Logan City Council* [1981] 1 Qd R 524, cited *Hollis v Atherton Shire Council* [2003] QSC 147; (2003) 128 LGERA 348, cited *Hymix Industries Pty Ltd v Alberton Investments Pty Ltd* [2001] QCA 334, cited *Lake Maroona v Gladstone Regional Council* [2017] QPEC 25; (2017) 224 LGERA 166, cited *Lloyd v Robinson* [1962] HCA 36; (1962) 107 CLR 142, cited *Minister for Immigration & Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, cited *Peet Flagstone City Pty Ltd v Logan City Council* [2014] QCA 210, cited *Pike v Tighe* [2018] HCA 9, cited *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, cited *The Avenues Highfields Pty Ltd v Toowoomba Regional Council* [2017] QPEC 48; [2017] QPELR 1033, approved *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147; (2014) 201 LGERA 82; [2014] QPELR 686, applied
COUNSEL:	A N Skoien and D Whitehouse for the appellant D R Gore QC and M Batty for the respondent
SOLICITORS:	Thomson Geer for the appellant Brisbane City Legal Practice for the respondent

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Introduction

[1] East Coast Gravel Pty Ltd is the beneficiary of a development approval given by Brisbane City Council for land at 59 Wypama Road, Bald Hills. The approval was given on 26 March 2010. It permitted East Coast Gravel to develop its rurally zoned land for 76 residential lots, subject to conditions. Condition 9 required payment of infrastructure charges. Condition 35 required construction of a bike path.

[2] East Coast Gravel acted on the development approval. It constructed the bike path and paid the infrastructure charges. The 76 lots were created. They now contain houses.

[3] After completing the development, East Coast Gravel requested the Council change condition 9. It wants the transport infrastructure charge reduced because of the money it spent building the bike path. The Council refused the request.

[4] The issues for me to decide are:

(a) whether the change requested by East Coast Gravel lies outside the intended scope of the legislative provisions;

(b) whether the requested change is a "*permissible change*" under s 367 of the *Sustainable Planning Act 2009* (Qld);

(c) whether the court has the power to change the condition to compel the Council to refund money collected for infrastructure; and

(d) if there is no legal impediment to approving the requested change, whether it should be approved.

Is the proposed change outside the scope of the legislation?

[5] On 12 December 2016, East Coast Gravel wrote to the Council requesting a change to its development approval.[1] It acknowledged that "*each of the approved 76 lots has now been created, 'plan sealing' is currently underway and the approved lots will be formally titled shortly*". It requested the Council amend condition 9. It was "*seeking an offset to the Transport Infrastructure Charge as fair compensation for the significant cost of the public bike path.*"

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[1] The correspondence was sent by its consultant.

[6] Section 369 of the *Sustainable Planning Act 2009* permits a person to request a "*permissible change*" to a development approval.

[7] A proposed change to a development approval is a "*permissible change*" if the change would not:

(a) result in a substantially different development; or

(b) if the application for the approval were remade including the change—

(i) require referral to additional concurrence agencies; or

(ii) for an approval for assessable development that previously did not require impact assessment—require impact assessment; or

(c) for an approval for assessable development that previously required impact assessment—be likely, in the responsible entity's opinion, to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed; or

(d) cause development to which the approval relates to include any prohibited development.[2]

[8] The Council submits that East Coast Gravel's request to change condition 9 of its development approval is outside the scope of s 369 of the *Sustainable Planning Act 2009*. It says it is absurd to suggest that the legislature intended to allow a developer to request to change a condition about infrastructure charges, for the purpose of obtaining a refund of money spent complying with another condition, where the development approval has been fully acted upon. The Council submits the legislature would not intend to waste public funds by imposing an obligation on the local government to consider such a request, or by conferring a subsequent right of appeal.

[9] The relevant starting point is the plain language of the legislation.

[10] There is no statutory timeframe or deadline for the making of a permissible change request under s 369 of the *Sustainable Planning Act 2009*.[3] There is also no statutory provision that precludes the making of a permissible change request where the approved development is complete or where there has already been compliance with the conditions of the development approval.

[11] The Council does not contest these matters. It contends that a construction that modifies the meaning of the provision is necessary to avoid a request that is intended to ground a right of compensation against the Council. It says that a construction that permits that type of request would be an irrational result.[4] It submits that conditions of a development approval are not a means by which obligations can be imposed on a local government, or a means by which the applicant may obtain a right to recover

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2 *Sustainable Planning Act 2009*, s 367.

3 Leaving aside that the legislation has now been repealed.

4 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 321-1 per Mason J; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 [78]; *Minister for Immigration & Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 651-2 [9].

compensation from a local government. If East Coast Gravel has any such right, it is to be exercised in the civil courts.[5]

[12] The Council submits that the basic object of conditions is to impose obligations on the beneficiary of the development approval. The statutory regimes that have prevailed in Queensland for decades reflect this. For example, under the *Sustainable Planning Act 2009*, the basic proposition that conditions impose obligations on the applicant is reflected in the constraints on conditions,[6] the right to make a written representation to the assessment manager about a condition,[7] and the right to appeal against a condition.[8] The notion that conditions "*run with the land*", as reflected in s 245 of the *Sustainable Planning Act 2009*, also proceeds on that basic premise.[9]

[13] I accept that conditions of a development approval are not an appropriate mechanism to impose obligations on local government. Courts of high authority have recognised that a condition of a development approval is the community price that a developer must pay for that development approval.[10] These matters may well weigh heavily in determining whether to approve a request to change a condition. However, they do not justify a construction of s 367 of the *Sustainable Planning Act 2009* that strains against the natural and ordinary meaning of the provision. I do not accept that the proposed change is outside the scope of the legislation.

Is the proposed change a "*permissible change*"?

[14] The Council submits that the change is not a "*permissible change*" under s 367 of the *Sustainable Planning Act 2009*. It says it is a change that would be likely to cause the Council, in its capacity as an infrastructure provider, to make a properly made submission objecting to the proposed change, if circumstances allowed.[11]

<u>From whose perspective is likelihood of a submission to be judged?</u>

[15] East Coast Gravel submits the likelihood of a submission is to be considered from the perspective of a properly informed[12] "*hypothetical potential objector who must be taken to be an average representative of the community ... taking a rational view of*

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5 The Council submits this is demonstrated by the existence of cases such as *Bayview Gardens Pty Ltd v Mulgrave Shire Council* [1989] 1 Qd R 1 and *Hollis v Atherton Shire Council* [2003] QSC 147; (2003) 128 LGERA 348.

6 *Sustainable Planning Act 2009*, s 345, s 346, s 347.

7 *Sustainable Planning Act 2009*, s 361.

8 *Sustainable Planning Act 2009*, s 461(1)(b).

9 See, for example, *Pike v Tighe* [2018] HCA 9 at [35] where their Honours said that s 245(1) of the *Sustainable Planning Act 2009*:

> "… expressly gives the conditions of a development approval the character of personal obligations capable of enduring in their effect beyond the completion of the development which the development approval authorised. …"

10 *Lloyd v Robinson* [1962] HCA 36; (1962) 107 CLR 142, 154; *Harderan Pty Ltd v Logan City Council* [1981] 1 Qd R 524, 528; *Hymix Industries Pty Ltd v Alberton Investments Pty Ltd* [2001] QCA 334, [23]; *Peet Flagstone City Pty Ltd v Logan City Council* [2014] QCA 210, [28].

11 The parties agree that the changes proposed to the development approval would not result in substantially different development, require referral to any additional concurrence agencies, or result in prohibited development.

12 *48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67; [2017] QPELR 133, 140 [8] citing *Holcim (Australia) Pty Ltd v Bundaberg Regional Council (No 2)* [2014] QPEC 29; [2014] QPELR 561, 568-9 [27]-[29].

the matter"[13]. It submits that the Council, in its role as infrastructure provider, is not a "*hypothetical potential objector*", nor an "*average representative of the community*". It submits this is illustrated by the obvious difficulty that if the Council were to make a submission in their capacity as infrastructure provider, it would be providing the submission to itself, albeit as assessment manager.

[16] When considering the likelihood of an objection, it is appropriate to have regard to the perspective of a "*hypothetical potential objector who must be taken to be an average representative of the community*", rather than that of an expert town planner.[14] However, there may be other legitimate perspectives, such as identifiable individuals or to corporate entities or statutory bodies who might make an objection. The question is whether anyone in the community rationally and reasonably would object.

Was a submission likely, given the submitter and the assessment manager are the same entity?

[17] East Coast Gravel submits the Court should not find that a submission by the Council to itself was likely. It says such an outcome is not desirable practically or as a matter of public policy because it would be near impossible to establish that the Council, as assessment manager, has objectively considered the submission received.

[18] Further, East Coast Gravel says that a submission was not likely, even if it was technically possible. It submits one must ask, "*why would Council make such a submission about an offset for the cost of the Bikepath?*" It says the Council (as infrastructure provider) would know that the Council (as assessment manager) would be aware that infrastructure charges are collected to cover the cost of bike paths. As such, East Coast Gravel says any submission would be pointless. East Coast Gravel also points to the Council's failure to adduce evidence of an intention to make a submission or of similar submissions in other cases as demonstrating the speculative nature of the Council's position in this case.

[19] The test is an objective one. The absence of evidence from the Council on the issue is not determinative.

[20] In this case, the relevant question is whether, viewed objectively, the proposed change would be likely to cause an infrastructure provider to make a properly made submission objecting to the proposed change, if circumstances allowed. The reprint of the *Integrated Planning Act 1997* in force when the development application was properly made[15] recognised the dual capacity of the Council. It was both an assessment manager and an infrastructure provider.[16]

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13 *48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67; [2017] QPELR 133, 140 [8] citing *Ausbuild Pty Ltd v Redland Shire Council* [2001] QPELR 409, 410 [11].

14 *48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67; [2017] QPELR 133, 140 [8] citing *Ausbuild Pty Ltd v Redland Shire Council* [2001] QPELR 409, 410 [11]. In *Ausbuild Pty Ltd v Redland Shire Council* [2001] QPELR 409, when referring to the hypothetical objector at 410 [10]-[11], his Honour Judge Quirk was drawing a distinction between a potential submitter and the views of an expert town planner. He was not excluding the potential for an identifiable individual or corporate entity.

15 Reprint 9A.

16 See s 3.5.4(2)(d) and 3.5.15(2)(k)(iv) and Schedule 10 of the *Integrated Planning Act 1997*.

[21] It has been well recognised by the courts that a local government may be involved in development applications in two capacities. For example, a local government, as an owner of land, can make a development application to itself and it can objectively decide that application as the assessment manager.[17] Similarly, a local government may take an adverse view about a development application in its capacity as assessment manager without being taken to have withdrawn consent to the application given in the local government's capacity as landowner.[18]

[22] There is no practical impediment to the Council, as infrastructure provider, making a submission to itself as assessment manager, nor is there a public policy reason why it should not.

[23] If the infrastructure provider, in this case the Council, wished to make its position known to the assessment manager, it would need to do so by way of submission. There is nothing pointless about such an exercise given the different capacities of the Council. As is apparent from the examples referred to in paragraph [21] above, local governments are accustomed to operating in different capacities, and to following the usual procedures to ensure each action is appropriately referrable to the capacity in which the action is taken.

Was a submission likely having regard to the nature of the change?

[24] East Coast Gravel submits that, objectively considered, a submission was not likely because the Council, as part of the information request, requested the bike path as planned infrastructure and on the basis that it constituted trunk infrastructure. East Coast Gravel notes the proposed change does not remove the requirement to provide the bike path, but changes the requirement that East Coast Gravel meet the cost of the provision of that trunk infrastructure. It submits this is important because the Council has, and will, collect funds for the infrastructure under its infrastructure planning documents.

[25] The Council refutes the basis on which East Coast Gravel submits it imposed condition 35. The Council says the provision of the bike path at no cost to the Council was a ground that justified the approval of the development, despite its conflict with the planning scheme. It says the conditions reflect that position.[19]

The context in which the information request was made and the conditions imposed

[26] On 19 June 2008, East Coast Gravel lodged a development application with the Council. It sought two approvals: a preliminary approval overriding the planning scheme for material change of use to facilitate 51 additional houses in a rural area, and a development permit for reconfiguration of the land.

[27] The report that accompanied the development application noted that there had been a previous application in August 2007. It sought reconfiguration of one lot into 100. It was apparently withdrawn because the Council did not support it. The Council was

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17 *Heavey Lex No.64 Pty Ltd v Mulgrave Shire Council* [1990] QPLR 108, 112.

18 *Read & Anor v Duncanson & Brittain (Quarries) Pty Ltd & Anor* (1987) 64 LGERA 1, 5.

19 At the time the development application was made, the *Integrated Planning Act 1997* applied. As such, the Council's decision could not conflict with the planning scheme unless there were sufficient grounds to justify the decision. See *Integrated Planning Act 1997*, s 3.5.14. Grounds were defined as matters of public interest.

concerned about inconsistency with the area classification and infrastructure provision.

[28] The 2008 report sought to address the Council's earlier concerns. It promised "*The site will be provided with the appropriate infra-structure (sic) for the intended purpose of the site*", and that "*Infra-structure (sic) costs will be borne by the developer*".[20] It said the land provides convenient access to the bikeway network.[21] The report did not propose a bike path as part of the development.

[29] On 31 July 2008, the Council issued an information request, which stated:

> "Council documents contain preliminary plans for a bikeway through site linking the recently constructed Tinchi Tamba bikeway to Westfield Strathpine. As such provide for a 3.0m wide off-road bikeway between the waterway corridor and the allotment proposed in the south eastern corridor".

[30] The information request recorded that, under the provisions of the *Integrated Planning Act 1997*, East Coast Gravel could respond by providing:

(a) all of the information requested; or

(b) part of the information requested together with a notice asking the Council to proceed with the assessment of the development application; or

(c) a notice stating it did not intend to supply any of the information requested and asking that the Council proceed with the assessment of the application.

[31] On 17 April 2009, East Coast Gravel elected to respond to the request.[22]

[32] The response to the Council's bikeway request was as follows:

> "A bicycle path is proposed within the road reserve of Wyampa Road. This path will traverse proposed road 1 between Wyampa Road and proposed road 4, whilst running the entire length of proposed road 4. A link between proposed road 4 and Wyampa Road will be provided proximate to the eastern property boundary of lot 8.
>
> Pedestrian and cycle paths are to be provided through proposed park areas, as can be seen within the attached master plan prepared by EDAW. Paths can be extended under the Gateway Motorway and through Tinchi Tamba wetlands following the Department of Main Roads upgrade of the Gateway Motorway."

[33] The Landscape Masterplan by EDAW AECOM listed the landscape and urban design objectives for the proposed development. They included "*[t]o ensure pedestrian and bicycle connectivity through and across the park, whilst linking to existing tracks*".

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[20] See the response to in response to the identification in the North Bald Hills Precinct of the draft Neighbourhood Plan that the land is lacking infrastructure and the response to performance criteria P1.5 of the Subdivision Code.

[21] See, for example, the responses to s 3.2.2.1 of City Plan 2000, the desired environmental outcome about access and mobility and s 3.5.2.2, the criterion about pedestrian and cyclist accessibility that applied to development classified as "*impact assessable generally inappropriate*", and performance criteria P2 in s 5.1.3 of the Subdivision code.

[22] In his affidavit, Mr Panaretos deposes that Urban Strategies Pty Ltd, of which he is a director, was retained by East Coast Gravel to act on its behalf In respect of the development the subject of this appeal.

A plan within that report showed the "*bike / pedestrian pathway*". It provided indicative images for the path.

[34] The response also included other changes to the proposed development. It increased the number of proposed lots to 77. The proposed residential subdivision plan provided as part of the response showed a "*bikeway provided in new development*". The path corresponded with the pathway shown on the landscape masterplan. It roughly coincides with the eastern half of the bike path ultimately constructed under condition 35.

[35] On 1 September 2009, East Coast Gravel provided further information "*to assist Council in its deliberations*". It proposed to redirect and extend the path. East Coast Gravel's consultant explained:

> "The path now meets the existing path opposite the site at Wyampa Road, traverses proposed roads 4, 1 and 3 and links to the pedestrian crossing under the Gympie Arterial north of proposed lot 62."

[36] The concept masterplan provided with that letter showed a bike path in the same location as that the subject of condition 35.

[37] On 24 November 2009, East Coast Gravel provided further reports "*in support of the proposed 1 into 76 lot subdivision*". The Revised Landscape Master Plan prepared by EDAW again stated an objective of the proposed development was to "*ensure pedestrian and bicycle connectivity through and across the park, whilst linking to existing tracks*". The plan showed the extended bikeway that corresponds to the bike path required under condition 35.

[38] A council officer's assessment report was presented to the Council on 23 March 2010. It recommended approval. It noted, "*A bike path is proposed to connect Kluver Street and Wyampa Road in the drainage reserve*."

[39] The officer's report said additional grounds supporting the proposed development, despite conflict with the planning scheme, included "*provision of a bikepath along the wetland for public use*".

[40] On 26 March 2010, the Council gave the decision notice approving the application. The decision notice recorded that the proposed development had demonstrated sufficient grounds for approval notwithstanding the variances from the planning scheme. It listed grounds in support of the proposal as including "*provision of a bikepath along the wetland <u>for public use</u>*".[23]

[41] The development approval was subject to conditions. Condition 9 required payment of a monetary contribution towards the cost of providing infrastructure. Condition 35 required the construction of the bike path.

<u>The basis for imposition of condition 35</u>

[42] I do not accept East Coast Gravel's submission that the ground referred to in the decision notice was that the development of the otherwise rural land would facilitate the provision of the planned infrastructure in a timely manner and adjacent residential development, rather than through a rural property.

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[23] Emphasis added.

[43] The development application contained several assertions about convenient access to the cycle network and an intention to provide necessary infrastructure. In that context, the information request asked that the proposed development provide a three-metre wide off-road bike path.

[44] East Coast Gravel did not direct my attention to any evidence to substantiate its assertion that the Council requested the bike path as planned infrastructure and on the basis that it constituted trunk infrastructure. The information request did not refer to "*trunk infrastructure*" or "*planned infrastructure*". It only referred to unidentified Council documents that contained "*preliminary plans*".[24]

[45] In any event, I am not persuaded that the ground referred to in the decision notice should be construed in the manner suggested by East Coast Gravel. The ground that justified approval of the proposed development was the provision of the bike path, proposed by East Coast Gravel during the application process, at no cost to the Council. That interpretation of the decision notice is consistent with the imposition of condition 35 and the absence of reference to an offset in condition 9.

[46] Although the proposed change will not remove the requirement to provide the bike path, it will remove the public benefit associated with it, namely the provision of the bike path at no cost to the community. It removes one of the grounds relied on to justify a decision to approve the proposed development despite conflict with the planning scheme.

<u>Was a submission likely having regard to the provisions of the Infill Transport Infrastructure Contributions Planning Scheme Policy?</u>

[47] East Coast Gravel submits that any submission against the proposed change to condition 9 would have been contrary to the Infill Transport Infrastructure Contributions Planning Scheme Policy dated July 2009.

[48] Section 6.1.31 of the *Integrated Planning Act 1997* permitted the Council to impose a condition on the development approval requiring a contribution towards the cost of supplying infrastructure under a planning scheme policy. The relevant planning scheme policy was the Infill Transport Infrastructure Contributions Planning Scheme Policy dated July 2009.

[49] It is East Coast Gravel's position that the proper and complete application of that policy, particularly clause 1.8.3, requires the provision of an offset. It submits that, at all material times, the bike path was identified in Council's planning documents as trunk infrastructure. East Coast Gravel submits that, consequently, it was entitled to an offset[25] for the cost of the bike path and condition 9 has always been defective.

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[24] In the Respondent's Response to the Appellant's Statement of Facts, Matters and Contentions, the Council accepts that the bike path the subject of condition 35 was shown on the Brisbane Bicycle Plan and constituted trunk infrastructure at the time of the issue of the development approval. However, it did not admit that the path the subject of the information request was shown on the Brisbane Bicycle Plan or constituted trunk infrastructure at the time of the issue of the development approval.

[25] Throughout East Coast Gravel's Outline of Submissions, it refers to an entitlement to a credit. During oral submissions, it clarified that it was intending to refer to an offset, not a credit.

[50] Section 1.8 of the policy provides an overview of the process for calculating infrastructure contributions. Section 1.8.3 deals with infrastructure offsets. It states:

> "**1.8.3 Infrastructure Offsets**
>
> An offset may be allowed where a developer will undertake trunk infrastructure works that are part of the PSP. The amount of this offset is determined by Council, deducted from the calculated infrastructure contributions and expressed as ICUs.
>
> A development may be conditioned or agreement reached (via an Infrastructure Agreement) to supply certain items of trunk infrastructure as part of a development. In such instances, the value of that infrastructure identified in the relevant PSP will be offset against the contribution for the relevant network. For example, where Council has approved the construction of works or dedication of land in fee simple, the value of these works or land will be offset against the assessed infrastructure contribution where an agreement is reached with the Council to do this."

[51] Chapter 2 provides the detail about how transport infrastructure contributions, credits and offsets are to be calculated. It relevantly provides:

> "**2.5.2 Infrastructure Offsets**
>
> An offset may be allowed where a developer will undertake trunk infrastructure works that are part of the PSP. The amount of this offset is to be determined by Council, deducted from the calculated infrastructure contributions and expressed as ICUs."

[52] East Coast Gravel submits that the references to "*may*" in these provisions should be construed as "*must*".[26] It says the first sentence of the first paragraph of s 1.8.3 sets a condition precedent that triggers the obligation to give an offset. It says the word "*may*" in the first sentence of the second paragraph of s 1.8.3 connotes the choice available to Council: it can provide for the offset either by way of condition or by entering an infrastructure agreement. East Coast Gravel says this is apparent from the third sentence of the second paragraph of s 1.8.3, which provides an example of how the Council might offset the value of the works.

[53] The starting point is the language of the relevant provisions. Both s 1.8.3 and s 2.5.2 of the Infill Transport Infrastructure Contributions Planning Scheme Policy are expressed in facultative or permissive language. A literal interpretation of those provisions would permit the Council to exercise a discretion.

[54] The words "*where a developer will undertake trunk infrastructure works that are part of the PSP*" in the first sentence of s 1.8.3 are a precondition to the exercise of the Council's discretion. There is nothing about the precondition that, as a matter of context, suggests that the word "*may*" should be construed as "*must*".

[55] The first sentence of the second paragraph in s 1.8.3 is directed at the mechanisms that the Council may use to facilitate the provision of the trunk infrastructure, not the offset. East Coast Gravel's submissions regarding the example provided by the third

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[26] Relevant principles with respect to statutory construction and whether "*may*" should be construed as "*must*" are set out in *The Avenues Highfields Pty Ltd v Toowoomba Regional Council* [2017] QPEC 48; [2017] QPELR 1033, 1045-6 [47] – [52]. They assist with construction of the Infill Transport Infrastructure Contributions Planning Scheme Policy: *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147; (2014) 201 LGERA 82; [2014] QPELR 686, [52].

sentence do not accord with its ordinary meaning. That sentence indicates that an offset will be provided where the Council agrees to give an offset. It supports a construction that the provision of an offset is at the Council's discretion.

[56] Under the policy, the amount of any offset is a matter for determination by the Council in its capacity as infrastructure provider. The policy does not prescribe a means for calculating any offset. This also lends support to a construction that any offset was at the discretion of the Council.

[57] For those reasons, I do not accept that the Infill Transport Infrastructure Contributions Planning Scheme Policy conferred an entitlement to an offset. The provision of an offset was a matter for the Council in exercise of its discretion.

[58] In those circumstances, a submission objecting to the change would not have been contrary to the Infill Transport Infrastructure Contributions Planning Scheme Policy dated July 2009.

Conclusion regarding likelihood of a submission

[59] East Coast Gravel has not persuaded me that the proposed change would not be likely to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed.

[60] In this case, it is likely that a properly informed person, including the infrastructure provider, would object to the proposed change for three reasons.

[61] First, during the development application process, East Coast Gravel said it would provide necessary infrastructure and, after receiving the information request, it offered to provide the bike path.

[62] Second, the Council, as assessment manager, granted the development approval on the basis that the bike path would not give rise to an offset, but was a ground for approval despite conflict.

[63] Third, East Coast Gravel's request at this late stage has the potential to prejudice the infrastructure provider and its provision of infrastructure throughout the city. The collection of infrastructure charges forms an important part of the budget of an infrastructure provider. An infrastructure provider is entitled to rely upon certainty and finality in the collection of infrastructure charges.

[64] The development approval was granted to East Coast Gravel on 26 March 2010, nearly 9 years ago. East Coast Gravel did not exercise any appeal right in respect of the conditions included in the development approval. To the contrary, on 8 April 2010, it notified the Council that it accepted the decision notice "*without dispute*" and would not exercise any right of appeal in respect of the decision. It paid the relevant infrastructure charges on 24 November 2016. On 3 January 2017, the survey plan giving effect to the development approval was registered.

[65] Prior to paying the infrastructure contributions, in August 2016, East Coast Gravel requested a change to the development approval. It sought to change condition 9 to obtain an offset against the transport infrastructure charge for the cost of the provision of the bike path required by condition 35. On 26 September 2016, East Coast Gravel requested that the outstanding infrastructure charges be paid by way of instalment, to

allow buyers to start building work, sealing of the survey plan (to allow settlement of allotments), and to assist with its cash flow.

[66] On 2 November 2016, East Coast Gravel withdrew the requested change to condition 9 and instead asked to alter the existing approval to include a number of small changes to the survey plan to accommodate on-site conditions identified during the construction phase. The Council approved that amended request on 10 November 2016.

[67] On 17 November 2016, East Coast Gravel, through its consultant, wrote to the Council about payment of the infrastructure charges. The letter asserted:

> "In order to stave off crippling costs and interest charges and to satisfy contractual pressures from buyers, *[East Coast Gravel]* has been forced to pay the full amount of the Infrastructure Charges, without any offset, so that the plan sealing can be finalised and land titles issued for the new lots.
>
> We wish to reiterate that *[East Coast Gravel]* does not accept the lawfulness of the transport component of the Infrastructure Charges applied to this development and advise that a further Permissible Change will shortly be lodged with Council, to seek an appropriate financial offset for the provision of a trunk bike path through the approved estate."

[68] These actions by East Coast Gravel prior to the payment of the infrastructure contribution do not persuade me that the change would not be likely to cause a person to make a properly made submission. There was no entitlement to an offset.

[69] For the reasons given, I am not satisfied the proposed change is a permissible change. East Coast Gravel has not discharged the onus.

Is the change sought within the power of the court?

[70] The Council contends that, even if the court thought there was some merit in East Coast Gravel's contention that it is entitled to an offset, the court would be powerless to grant the relief. It submits that the court has no power to require the Council to enter into an infrastructure agreement or to require it to carry out a valuation for the purpose of determining an offset. The Council referred to this as "*the Harderan issue*".[27] These submissions were made at a time when East Coast Gravel had not identified the precise nature of the change to the condition that it sought.

[71] In its Outline of Submissions dated 1 February 2019, East Coast Gravel said the permissible change does not seek a change to require anything at all. It said the request simply asks that condition 9 be modified to recognise East Coast Gravel's entitlement to a credit for the cost of the trunk infrastructure that it provided. At that time, East Coast Gravel's assertions about the effect of the condition were unsubstantiated, as East Coast Gravel had not identified the wording of the condition sought.

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27 *Harderan Pty Ltd v Logan City Council* [1989] 1 Qd R 524, approving *Knox v Brisbane City Council* (1975) 31 LGRA 108; *Wendon Nominees Pty Ltd v Brisbane City Council* [1984] QPLR 99; *Wroxall Investments Pty Ltd v Cairns Regional Council* [2010] QPEC 92; [2011] QPELR 82, 91-4.

[72] After the completion of the hearing, East Coast Gravel told the Council it proposed the following wording be added to condition 9:[28]

> "The establishment costs of the infrastructure required under Condition 35 shall be offset under the Infill Transport Infrastructure Contributions Planning Scheme Policy – CityPlan 2000 (**PSP**) against the infrastructure contributions imposed pursuant to the PSP for the Transport Trunk Infrastructure Network, calculated at the rate payable when the infrastructure contributions under Condition 9 are paid."

[73] The Council now submits that the wording of the proposed change would appear to be based on efforts to avoid the application of the *Harderan* principle.[29] Regardless of whether it successfully does so, the Council says the wording is plagued with so many defects that it gives rise to further reasons why, in the exercise of the Court's discretion, the request for the proposed change should be refused.

[74] In East Coast Gravel's Further Written Submissions dated 14 February 2019, East Coast Gravel submits that there is no scope for the application of the *Harderan* principle as the proposed change to condition 9 does not impose a requirement on the Council. It says the change recognises that East Coast Gravel is entitled to a reduction in the infrastructure contribution because it provided infrastructure that was planned to be provided by the Council at Council's cost.

[75] For reasons already provided, I do not accept that there is an entitlement to an offset.

[76] In light of my finding that the request is not for a "*permissible change*", and due to the change in the complexion of this part of the appeal following the late notification of proposed wording for condition 9, it is unnecessary for me to address this issue further.[30]

Should the proposed change be approved?

[77] In making a determination about whether a proposed change is a permissible change, the court retains a discretion to refuse the request.[31] Two things make that clear. First, s 374 of the *Sustainable Planning Act 2009* does not limit those matters the court may consider in reaching a decision. Second, s 375 of the *Sustainable Planning Act 2009* requires the court to make a decision in respect of the permissible change request. It does not prescribe the outcome. It only requires that the decision be made "*after assessing the request under section 374*". The court is to exercise the discretion in the circumstances of each case having regard to the specified considerations.[32] East Coast Gravel accepts this.

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28 The late provision of the proposed change to the condition resulted in the provision of further written submissions by both parties. In the submissions that accompanied the proposed condition 9, East Coast Gravel notes that the Council first raised the issue about the form of the amendment to condition 9 in final submissions. Regardless of whether that was so, East Coast Gravel has the onus and, as I have noted, its submissions were reliant on assertions that it could not substantiate without identifying, with precision, the proposed wording.

29 *Harderan Pty Ltd v Logan City Council* [1989] 1 Qd R 524.

30 As is identified by the Respondent's Reply dated 15 February 2019, having finally drafted a proposed condition, East Coast Gravel departed from some of the positions taken by it at the hearing.

31 East Coast Gravel accepted this during its opening.

32 See *Lake Maroona v Gladstone Regional Council* [2017] QPEC 25; (2017) 224 LGERA 166, 173 [29] with respect to s 387 and s 388 of the *Sustainable Planning Act 2009*, which are in similar terms. See also *48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67; [2017] QPELR 133, 146-50 [36]-[51].

[78] It is unnecessary for me to consider whether East Coast Gravel's request should be approved, as East Coast Gravel has not satisfied me that the proposed change is a permissible change. However, were it necessary to consider the merits of East Coast Gravel's request, I would not approve the proposed change for four reasons.

[79] First, there has been substantial delay in making the request and there is no reasonable explanation for the delay. East Coast Gravel lodged its development application in June 2008. It received its approval on 26 March 2010. It paid the relevant infrastructure charges in November 2016. It waited almost six years from the original grant of the development approval, and until after the development was complete and money paid, to pursue this request to change condition 9 to provide for an offset.

[80] Second, East Coast Gravel elected not to challenge the conditions by way of appeal, even though it is of the view that, at all material times:

(a) the bike path was identified in Council's planning documents as trunk infrastructure;

(b) it was entitled to an offset[33] for the cost of the bike path; and

(c) condition 9 was defective.

[81] Instead of exercising its appeal rights, East Coast Gravel elected to act in reliance on the development approval it had obtained, with all its attendant rights and obligations.

[82] In 2016, East Coast Gravel requested a change similar to the present request, but withdrew the request prior to its determination. Rather than pursuing that request, East Coast Gravel again elected to continue to act in reliance on the development approval. It chose to pay the outstanding infrastructure charges, register the plan, and sell the lots before further pursuing the possibility of an offset.

[83] Third, the provision of a bike path along the wetland for public use was a ground relied on by the Council to support approval of the proposed development, which conflicted with City Plan 2000. The cost of its construction, as required by condition 35, was part of the community price paid by East Coast Gravel to secure the right to develop rurally zoned land for 76 lots.[34] Having regard to this matter alone, I would have refused the request.

[84] Fourth, I do not accept East Coast Gravel's submission that there is no prejudice to the Council in the provision of an offset now rather than at the time of the grant of the development approval. East Coast Gravel's election not to appeal condition 9, and to make the request after the development was complete, denies the Council the ability to argue that should the condition be changed, the development application should be refused.

Conclusion

[85] East Coast Gravel has not discharged the onus. The appeal is dismissed.

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33 Throughout East Coast Gravel's Outline of Submissions, it refers to an entitlement to a credit. During oral submissions, it clarified that it was intending to refer to an offset, not a credit.

34 *Lloyd v Robinson* [1962] HCA 36; (1962) 107 CLR 142, 154; *Hymix Industries Pty Ltd v Alberton Investments Pty Ltd* [2001] QCA 334, [23]; *Peet Flagstone City Pty Ltd v Logan City Council* [2014] QCA 210, [28].