PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2018] QPEC 63
PARTIES:	**TOSH ORDY MURPHY** (appellant) v **MORETON BAY REGIONAL COUNCIL** (respondent) and **BGM PROJECTS PTY LTD (ACN 102 165 328)** (co-respondent) AND **AUSTRALIAN NATIONAL HOMES PTY LTD (ACN 020 903 189)** (appellant) v **MORETON BAY REGIONAL COUNCIL** (respondent) and **BGM PROJECTS PTY LTD (ACN 102 165 328)** (co-respondent)
FILE NO/S:	340 of 2018 and 694 of 2018
DIVISION:	Planning and Environment
PROCEEDING:	Application in Pending Proceeding
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 and 19 September 2018 and 3 December 2018
JUDGE:	Kefford DCJ
ORDER:	**I make the following orders:** **1. The Co-respondent's application in pending proceeding filed 3 September 2018 is dismissed.**

2. The further hearing of Appeal No 694 of 2018 proceed based on the change to the development application identified in the amended application in pending proceeding attached to the Appellant's application in pending proceeding filed 2 October 2018.

3. The Appellant, Australian National Homes Pty Ltd, pay half of the costs incurred by each of the Respondent and the Co-respondent for the objection hearing on 14 June, 21 June and 22 June 2018, with such costs to be assessed on the standard basis unless otherwise agreed.

4. The Appellant, Australian National Homes Pty Ltd, pay each of BGM and the Council's costs of the application dated 31 August 2018, with such costs to be assessed on the standard basis unless otherwise agreed.

5. Both appeals be listed for lengthy review at 9 am on 31 January 2019.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPLICATION – applications in pending proceeding – where the substantive proceeding involves two appeals ordered to be heard together – where those appeals concern competing applications for a shopping centre – where in one appeal the appellants are appealing council's decision to grant the co-respondent's a development permit for a material change of use to facilitate a local centre – where in the other appeal the appellants are appealing council's decision to refuse their own application for a preliminary approval for a material change of use to facilitate a local centre – where the plan included in the appellants' application was not intended for detailed design or assessment and the appellants did not seek approval in accordance with it – where the appeals are part-heard – where the court has been asked to decide four applications in pending proceeding – where the appellants' applications seek to adduce new evidence and further amended plans and re-open traffic evidence – where the appellants also propose a minor change and then an amended minor change and seek to tie the appellants' development application to the further amended plans – where the co-respondents seek to de-couple the appeals – whether the appellants' proposed change is a minor change – whether the appellants should be permitted to change their application – whether the appellants should be ordered to pay costs – whether the appeals should be heard separately

LEGISLATION: *Planning and Environment Court Act 2016* (Qld), s 43, s 46, s 59, s 60

	Planning and Environment Court Rules 2010 (Qld), r 27
CASES:	*Australian National Homes Pty Ltd v Moreton Bay Regional Council* [2018] QPEC 14, considered
	Capricorn Green Pty Ltd v Livingstone Shire Council & Ors [2007] QPEC 14; [2007] QPELR 410 approved
	Carillon Development Ltd v Maroochy Shire Council [2000] QPELR 216, distinguished
	Lagoon Gardens Pty Ltd v Whitsunday Regional Council & Ors; Proserpine Co-operative Sugar Milling Association Ltd v Whitsunday Regional Council & Ors [2009] QPEC 66; [2010] QPELR 74, cited
	Westfield Limited v Gold Coast City Council [2000] QPELR 121, distinguished
COUNSEL:	D R Gore QC and B D Job QC for the appellants R Bain QC and J Ware for the respondent C L Hughes QC, J G Lyons and M Batty for the co-respondent
SOLICITORS:	Connor O'Meara for the appellants Moreton Bay Regional Council for the respondent McCullough Robertson for the co-respondent

TABLE OF CONTENTS

Introduction

[1] There are presently four applications in pending proceeding before the court that require determination. They relate to two appeals that His Honour Judge Morzone QC ordered be heard together. The appeals involve competing proposals for a shopping centre on sites about 600 metres apart.

[2] Appeal No 340 of 2018 is a submitter appeal by Mr Murphy against the Moreton Bay Regional Council's ("*the Council*") decision made 20 December 2017. The Council granted BGM Projects Pty Ltd ("*BGM*") a development permit for a material change of use to facilitate a local centre at Sovereign Drive, Narangba.

[3] Appeal No 694 of 2018 is an appeal by Australian National Homes Pty Ltd ("*ANH*") against the Council's decision to refuse its application for a local centre at 96 Raynbird Road, Narangba on 16 February 2018. ANH's application sought a preliminary approval for a material change of use. It also sought to vary the effect of the Moreton Bay Regional Council Planning Scheme 2015 ("*Planning Scheme*"). ANH's application did not contain a detailed design of the shopping centre it sought. The application report stipulated that the concept plan provided as part of the application showed, in general terms, how the site may be developed as a local centre. The plan was not intended for detailed design or assessment purposes. The application did not seek approval in accordance with the plan.

[4] The appeals were allocated three weeks hearing time between 11 June 2018 and 29 June 2018. The hearings are part heard. They did not finish in the allocated time. The applications were filed after the initial three weeks of hearing had concluded.

Background

[5] Before turning to consider the applications, it is necessary to understand the progress of the appeals to date.

[6] Appeal No 340 of 2018 was filed on 30 January 2018.

[7] On 13 February 2018, BGM filed an application seeking directions for the conduct of the appeal. The application was returnable on 16 February 2018. At that time, BGM sought orders to facilitate a hearing of the appeal in May 2018. His Honour Judge Rackemann made some directions but declined to make orders allocating the appeal for hearing in May 2018. He adjourned the consideration of hearing dates until 5 March 2018 so that it could be considered with any application that the appellant may make in relation to Mr Murphy's foreshadowed appeal in relation to its competing shopping centre.

[8] Appeal No 694 of 2018 was filed on 23 February 2018. On 28 February 2018, ANH filed an application seeking an order that its appeal be heard together with Appeal No 340 of 2018 and that evidence in one appeal be evidence in both appeals. The application noted that Mr Murphy and ANH are related entities. The application was returnable on 5 March 2018. It was resisted by BGM.

[9] On 8 March 2018, His Honour Judge Morzone QC ordered that the appeals be heard together. On 16 March 2018, His Honour Judge Rackemann listed the appeals for hearing for three weeks commencing 11 June 2018 before me.

[10] On 22 March 2018, His Honour Judge Rackemann made orders that were intended to ensure the trials would be ready to proceed at that time. He ordered the town planners complete a joint expert report by 30 May 2018 and the parties exchange written reports of all their consultant experts (except for town planning and visual amenity) and any lay witness statements before 1 June 2018. The exchange of written reports of the town planning and visual amenity experts was required to occur before 8 June 2018.

[11] On 13 April 2018, Mr Viney (the traffic engineer retained by ANH) emailed Mr Douglas (the traffic engineer retained by BGM) a "*revised plan for discussion*" at their joint expert meeting. The plan was drawing no. DA-01 rev 8 dated 13 April 2018 ("*the amended site plan*").

[12] The amended site plan was similar to the site plan prepared by Thomson Adsett and provided to the Council as part of ANH's response to the information request during the development application process. In the response to the information request, ANH stated:

> "… [the site plan] indicates an alternative development scenario for the site. We reiterate that the application does not seek approval in accordance with the plan, rather the plan serves to demonstrate that a future Local Centre can be established on the site, while meeting the requirements of the planning scheme."

[13] On 23 April 2018, ANH's lawyers disclosed the amended site plan as "*the updated site plan for our client's proposed development, that our client has caused to be prepared*".

[14] On 27 April 2018, BGM's lawyers asked ANH's lawyers to clarify the relevance of the amended site plan.

[15] On 30 April 2018, ANH's lawyers wrote to BGM's lawyers stating:

> "The updated Site Plan the subject of your letter, is the latest iteration of a plan that was previously provided by our client to the Council in its response to the information request.
>
> We have recently received instructions from our client that it proposes to change its development application in a way which references the Site Plan and seeks approval for the Site Plan.
>
> Both the town planning and legal teams are considering the most efficient way of affecting such a change.
>
> …
>
> As soon as the changes which are necessary to incorporate the Site Plan into the development application have been settled upon we will be in touch again."

[16] On 2 May 2018, BGM's lawyers wrote to ANH's lawyers expressing concern about the delay in the disclosure of the amended site plan. At the time it was disclosed, a number of experts had entered the joint expert meeting process.

[17] On 4 May 2018, I heard an urgent application by BGM for further directions. At the hearing, I ordered that, if ANH intended to apply to change its development application, it must file and serve any application with respect to any proposed changes by 4 pm that day. I also ordered the application be heard by His Honour

Judge Everson on 10 May 2018. I extended the date by which the joint expert reports (other than town planning and need) be completed to 17 May 2018.

[18] On 8 May 2018, ANH made an application for an order that its appeal be heard and determined on the basis of a proposed change, which it contended was a minor change for the purpose of s 46(3) of the *Planning and Environment Court Act 2016*. The application stated that ANH wished to amend its development application to:

> "vary the assessment benchmarks contained in the Local Centre Precinct Provisions of the Centre Zone Code to the following effect ("*the Proposed Change*"):
>
> (a) that development generally in accordance with the Amended Site Plan is deemed to be compliant with the purpose / overall outcomes 1(a) to 1(q); and
>
> (b) that development generally in accordance with the Amended Site Plan is deemed to be compliant with performance outcomes PO1 to PO4, PO6, PO7, PO10, PO12, PO13, PO15, PO16, PO20 to PO24, PO26, PO38, PO40 to PO45, PO48 to PO51, PO54 to PO56, PO58, PO76 to PO80, PO85, PO87, PO93 to PO95 and PO98 to PO101."

[19] BGM and the Council resisted that application.

[20] On 10 May 2018, His Honour Judge Everson gave judgment dismissing the application. In his ex tempore reasons, His Honour observed:

> "Notable differences between the original plan and the new plan include the deletion of the gym and the inclusion of a pharmacy. There is also an indication of specific uses in the new plan in an area that was simply stated to be future development in the original plan. Included in these additional uses is a future childcare centre."

[21] His Honour found:

> "On the facts before me, the inclusion of a pharmacy involves a new use, and the potential impacts of a pharmacy are different to potential impact that appertain to retail establishments in general. It is a material or important change to the proposed development.
>
> Equally, it could be argued that the removal of the gym in circumstances where it is unclear whether or not a gym is still proposed as part of the future development adjacent to the future child care centre could come within the concept of removing a component that is integral to the operation of the development. However, I have not received any submissions to this effect, and I do not intend to make a finding in this regard, despite this being a further relevant consideration pursuant to the guideline.
>
> For the reasons set out above, I dismiss the application."

[22] On 10 May 2018, BGM's lawyers wrote to the experts retained by BGM, including those experts engaged in joint expert meetings. The letter referred to the outcome of the hearing before His Honour Judge Everson and said:

> "Accordingly, in preparing your respective joint expert reports in the above appeal, you are required to consider the application as it was at the time the application was publicly notified, including the site plan provided in the Appellant's response to the Council's information request (drawing no. DA-01 dated 6 November prepared by Thomson Adsett). The New Site Plan is not part of the application to be considered by the Court."

[23] Regrettably, BGM's lawyers sent the letter in contravention of r 27(1) of the *Planning and Environment Court Rules 2010* (Qld).

[24] At the time, Mr Peabody and Mr Lynch, the architecture experts retained by ANH and BGM respectively, were engaged in their joint expert meeting. They sent an email to the lawyers for both ANH and BGM requesting clarification on the letter.

[25] On 16 May 2018, ANH's lawyers wrote to BGM's lawyers indicating that it was still considering the appropriate response to the architecture experts but that it did not agree with the content of BGM's unilateral communication with the experts.

[26] On 17 May 2018, ANH's lawyers wrote to BGM's lawyers. The letter, in part, stated:

> "The part of your letter in respect of which we are most concerned, is the following paragraph:
>
> *"Accordingly, in preparing your respective joint expert reports in the above appeal, you are required to consider the application as it was at the time the application was publicly notified, including the site plan provided in the Appellant's response to the Council's information request (drawing no. DA-01 dated 6 November prepared by Thomson Adsett). The New Site Plan is not part of the application to be considered by the Court."*
>
> We are concerned that such a statement suggests that the *"New Site Plan"* (i.e. DA-01 rev 8) cannot be considered at all by the experts. We do not agree that this is the case. The decision of His Honour Judge Everson was to dismiss our client's application in pending proceeding (*"the Application"*). The Application sought a change to the development application to further vary the assessment benchmarks applying to future development on the land, to the effect that development generally in accordance with the New Site Plan would be deemed to be compliant with various provisions of the Local Centre Zone that your client has raised as issues in dispute in the appeal.
>
> There is nothing about His Honour's decision that alters the fact that the development application is for a preliminary approval (variation approval) varying the effect of the planning scheme so that, in effect, the Centre Zone (local centre precinct) provisions of the planning scheme apply to the land[1]. His Honour's decision does not mean that, if the development application is approved, the land cannot be development in accordance with the New Site Plan pursuant to the Centre Zone (local centre precinct) provisions then applying to the land.
>
> The New Site Plan has been put forward by our client as a representation of how it intends to develop the land consistent with the Centre Zone (local centre precinct) provisions in the event that its development application is approved and there is no reason why the New Site Plan cannot be considered by the experts on that basis.
>
> Given the above, we consider that the situation that currently exists is wholly unsatisfactory. We consider that at the review of these matters tomorrow morning, orders should be made by the Court that all of the experts be provided with a letter in terms of the enclosed draft letter."

[27] The proposed draft letter was as follows:

> "The letter of McCullough Robertson dated 10 May 2018 is to be disregarded.
>
> The application in pending proceeding brought by Australian National Homes Pty Ltd (*"ANH"*) to change its development application was dismissed by the Court on 10 May 2018.
>
> Notwithstanding the Court's decision in the application in pending proceeding, you are entitled to consider the new site plan (being DA-01 rev 8 dated 13 April 2018) on

---

1 Subject to some minor modification.

> the basis that it represents the way in which ANH intends to develop the land in the event that its development application is approved."

[28] The appeals were reviewed by His Honour Judge Rackemann on 18 May 2018. At the review, ANH sought an order permitting it to send the draft letter to the experts. In explaining the reason for the order, Mr Job QC said:

> "The concept that's put forward is a representation of how my client intends to develop the land, consistent with the centre zone provisions, in the event that the application before the court is approved. It's not seeking approval of that plan in terms of the development permit or not, it's an indication of how the provisions, that have been placed in issue by the co-respondent, can and are addressed. …"

[29] In resisting the order, Mr Macnaughton for BGM stated "*Your Honour, there's nothing that cannot be dealt with by individual reports*".

[30] Mr Ware, for the Council, also resisted the order. In relation to Mr Job QC's explanation of the relevance of the plan, Mr Ware said:

> "Also, your Honour, on this approach, there'd be no limit to the number of plans, concept or otherwise, that could be put forward by a party as attempting to address certain of the issues which may be raised by any of the parties."

[31] No orders were made by His Honour Judge Rackemann at the review.

[32] The substantive hearing for the appeals commenced on 11 June 2018.

[33] From early in the hearing, it was apparent the parties were not ready to proceed with respect to either appeal.

[34] Paragraph 24 of Planning and Environment Court Practice Direction No 1 of 2018 requires:

> "On the first day of a hearing, the party that bears the onus should provide an agreed list of the disputed issues that remain for determination or, in the absence of agreement, a list of the issues that the party with the onus contends remain for determination."

[35] It seems to me that compliance with the practice direction is intended to serve the wholesome purpose of identifying with precision the issues that remain to be determined. Where the list is not agreed, the list produced by the party with the onus nevertheless would be expected to expose any misunderstanding with respect to the scope of the issues. Consistent with the parties' implied undertaking under s 10(2) of the *Planning and Environment Court Act 2016* to proceed in an expeditious way, it is incumbent on the other parties to inform the court, at the commencement of the hearing, of the basis of any dispute with the list prepared by the party with the onus. This allows the court to make any necessary rulings with respect to the ambit of the dispute, so that the hearing may proceed in an expeditious way. The process should avoid wasting time on issues that are no longer in dispute. It should also minimise the prospect of potential applications to recall witnesses that might otherwise arise during the trial due to misunderstandings about the issues.

[36] At the outset of the hearing on 11 June 2018, BGM tendered a list of issues in its appeal. The list was not agreed. BGM tendered it as the list "*for the time being*".[2] It

---

[2] T1-8.

said, "*finalisation of an ultimate list is a work-in-progress*".[3] The parties were apparently attempting to reach agreement on the list of issues and it was said "*hopefully before we start the evidence that will be determined*".[4] Mr Gore QC, who appeared for Mr Murphy, gave no indication as to the nature of the dispute about the issues as framed by BGM.

[37] With respect to its appeal, ANH produced a document that it contended was a list of the issues to be determined. It was not agreed. However, BGM produced a list that it said framed the issues to be determined. As such, to the extent that BGM did not agree with ANH's list, it had provided notice of its position.[5]

[38] During the opening on 11 June 2018, the parties identified that expert evidence would be called in relation to 11 disciplines, namely need, town planning, architecture, visual amenity, ecology, traffic, noise and air quality, lighting, stormwater, civil engineering, and bushfire. With respect to some of those disciplines, contrary to the court orders, the experts completed joint reports only a very short time before the commencement of the hearing. For example, the town planners only completed their joint expert report on Friday 8 June 2018.[6]

[39] At the commencement of the hearing, again contrary to the court orders, the parties had not yet exchanged some of the individual reports of their experts.[7] ANH had also not provided the other parties with the sizeable statement of Mr Zeller, the State Manager of Property for Coles.[8]

[40] Despite the significant number of witnesses to be called in the three weeks, progress during the hearing was slow.

[41] No evidence was called on the first afternoon, even though the openings finished before lunch. The parties invited me to spend the next day reading reports. There was a half-day site inspection on Wednesday 13 June 2018.

[42] On Thursday 14 June 2018, before any witnesses were called, BGM and the Council objected to plans sought to be tendered by ANH. The plans were dated 7 June 2018. Prior to the commencement of the hearing on 11 June 2018, ANH had provided a copy of the plans to the experts it retained, but had not provided a copy to the other parties or the other parties' experts.[9] Argument about whether the plans should be admitted consumed the whole morning. After lunch, ANH withdrew the tender.

[43] The first witness in the case was called on the afternoon of Thursday 14 June 2018. At that time, the parties had still not provided a final list of issues for each appeal.[10]

[44] By the end of the first week, only two of the three expert witnesses on need had given evidence. The court adjourned early on the afternoon of Friday 15 June 2018 to allow the parties to finalise the documents identifying the issues in dispute.

---

3 T1-8.
4 T1-8.
5 The differences were apparent to ANH. As much is evident from what Mr Gore QC said when tendering his list. See T1-34.
6 T1-17.
7 T1-20.
8 T1-28.
9 See T1-25.
10 See T2-37 – T2-38.

[45] On Monday 18 June 2018, the last of the expert witnesses on need gave evidence. The court adjourned early again on the afternoon of Monday 19 June 2018. The documents identifying the issues in dispute were still outstanding at that time. In email correspondence, the parties had requested that the next day the court hear and determine an objection to ANH relying on further plans that it had not provided prior to the commencement of the hearing.

[46] On Tuesday 19 June 2018, Mr Job QC for ANH requested an adjournment as Mr Gore QC, the other Queen's Counsel representing ANH, had sustained an injury overnight and was in hospital. BGM and the Council did not oppose the adjournment that day. However, they indicated that they expected the matter to proceed the following day.

[47] On Wednesday 20 June 2018, ANH applied to adjourn the hearing until a date to be fixed. Mr Dunning QC appeared with Mr Job QC for ANH. BGM and the Council opposed the application. The application was dismissed.

[48] On Thursday 21 June 2018 and Friday 22 June 2018, I heard the objection to ANH's reliance on new plans. I delivered my ruling on that objection on 22 June 2018.

[49] During the hearing on Monday 25 June 2018, a new list of issues in dispute was tendered for each appeal. The lists were still in draft form as they were subject to final instructions from the Council.[11] A final (agreed) list of issues in dispute was tendered for each appeal[12] on Thursday 28 June 2018 – the second last day allocated for the hearing.

[50] In the final week allocated for the hearing, the court heard the evidence of the experts with respect to noise and air quality (although the cross-examination of Mr King was not completed), architecture and traffic engineering.

[51] On Thursday 28 June 2018, the parties estimated that a further seven days would be required to finish the hearing. The appeals were listed for further hearing for five days commencing 17 September 2018 and for review on 21 August 2018 so that further dates could be allocated later in the year to finalise the hearing.

[52] The issue of allocation of the final hearing dates was not resolved at the review on 21 August 2018. The matters were listed for further review on 28 August 2018.

[53] At the review on 28 August 2018, my attention was directed to correspondence between the lawyers for the parties.

[54] On 20 August 2018, ANH's lawyers wrote to the other parties providing disclosure of a development approval over the adjoining land granted by the Council on or about 1 August 2018 ("*the Satterley approval*"). The conditions to the Satterley approval included conditions requiring dedicated constructed road access to the subdivision from Raynbird Road via an access road. The construction of the intersection of that access road and Raynbird Road was required to be in accordance with an approved traffic impact assessment report prepared by Holland Traffic Consulting dated 6 July 2018. The access road is immediately adjacent ANH's site and in the approximate location of the proposed access road for the ANH development. The Raynbird Road access as approved in the Satterley approval is different to that shown on plans

---

11 T9-54.

12 Exhibit 60A and Exhibit 52A.

tendered by ANH to date. The correspondence indicated that ANH intended to prepare an updated site plan reflecting the access road and roundabout approved in the Satterley approval and amend its vehicular access and supermarket servicing arrangements to accord with the Satterley approval.

[55] On 22 August 2018, ANH's lawyers provided a further amended site plan, being Thomson Adsett Site Plan - Drawing No.17.0352 A-DA-02 rev. 12 dated 22 August 2018 and Thomson Adsett Site Plan Annotated - Drawing No. A-DA-03 rev. 10 dated 22 August 2018 ("*the further amended plans*"). The changes were not limited to changes that arose out of the Satterley approval. They included revisions made in response to issues raised in the oral evidence of the traffic experts. ANH's lawyers advised that Mr Viney, the traffic expert retained by ANH, was preparing a report in relation to the changes and indicated ANH would request a further joint expert meeting of the traffic engineers when the matter was reviewed on 28 August 2018.

[56] At the review, the other parties opposed this course. I gave directions about the filing and serving of any applications in pending proceeding and affidavit material and set the time for hearing of those applications as 7 September 2018.

The applications in pending proceeding

[57] On 31 August 2018, Mr Murphy and ANH filed an application in pending proceeding. ANH seeks permission to adduce evidence of the Satterley approval. ANH also seeks to rely on further amended plans and adduce further evidence of the traffic engineers.

[58] On 3 September 2018, BGM filed an application in pending proceeding. In the event that ANH succeeds on its application, BGM seeks an order setting aside the previous order of His Honour Judge Morzone QC that the appeals be heard together. The Council is supportive of BGM's application. BGM's application is opposed by ANH.

[59] I heard both of those applications on 7 September 2018.

[60] The Council did not oppose the orders admitting the Satterley approval or the further amended plans. However, it opposed further evidence of the traffic engineers or any other expert evidence in relation to the Satterley approval or the new site plan. BGM opposed the admission of further amended plans and the application to adduce further evidence. Both the Council and BGM relied on prejudice to the parties and principles of proper case management. The Council also opposed further evidence on the basis that there was no indication that ANH sought to be bound by the further amended plans. As will become evident from the discussion below, the issue of whether ANH should be permitted to rely on the admission of further amended plans and adduce further evidence, including issues about proper case management, were largely overtaken by subsequent applications made by ANH.

[61] At the hearing on 7 September 2018, in response to the Council's submission that ANH did not seek to be bound to the further amended plans, Mr Gore QC submitted that ANH now wishes to rely upon the further amended plans.[13] When I sought to clarify ANH's position in this respect, Mr Gore QC repeatedly confirmed that ANH no longer sought a preliminary approval that allowed a potential multitude of designs; rather, it now wished to pursue a preliminary approval based only on a design generally in accordance with that depicted in the further amended plans. Mr Gore

---

13 T14-17/L45 – T14-18/L2.

QC confirmed that ANH did not seek to adduce evidence of the further amended plans on the basis that it was but one of a myriad of potential designs that could be achieved on ANH's site; rather, ANH confirmed the further amended plans depict the design it wished to pursue.[14]

[62] That revelation by ANH during the hearing on 7 September 2018 had a dramatic effect on the hearing. As was observed, at the time, by Mr Hughes QC:[15]

> "Your Honour, my learned friend is at liberty to do that if he wants to, but he will have to make, in our respectful submission, an application for a minor change, because, as your Honour has alluded to, there has been a great deal of evidence pointed to in the original application for the ANH proposal with respect to complete and repeated disavowal to be linked to a particular plan of development. If our learned friends wish now to be linked to a particular plan of development, notwithstanding that that plan did not exist at the time their application went on public notice, nor did it exist at the time the council dealt with and refused their application, then it is inevitable, in our submission, that they will need to make a minor change application. And at that point, the relevant statutory provisions with respect to minor change will need to be examined."

[63] Mr Bain QC for the Council also aptly observed:

> "Can we take your Honour to the simple thing with which your Honour is now faced, it seems, after the twice affirmed commitment by the ANH interests to the plan? As your Honour would appreciate, there not having been a plan which was embraced, every emanation of the plan having been steadfastly and vigorously eschewed, never was their assessment or public notification of a version of the ANH initiative which featured a plan. What is now being sought is, in effect, and as such, a minor change. I say – I say it's because, it seems, still, notwithstanding, not having embraced the plan, there is this continuing contention or position by the ANH interests that this should be something which the matters your Honour is conditioning, rather than they're making an application to your Honour – making an application to your Honour for a minor change to the variation in quest. And that's not something to which we haven't answered for, your Honour. But that's what your Honour's is now faced with. And that's not an insignificant circumstance."

[64] In reply, Mr Gore QC indicated that, in our earlier exchanges, he had not intended to convey an intention on ANH's part to pursue an application for a preliminary approval based only on a design generally in accordance with that depicted in the further amended plans. ANH's position remained the same as that adopted on 22 June 2018, at the hearing with respect to the admission of further site plans. The position was expressed as follows:

> "ANH have been at pains to make clear that it was not seeking to change its application, and that it will, at the end of the day, say that the Court nevertheless has the power to condition its application to limit an approval to be generally in accordance with a plan."

[65] Mr Gore QC's submission did not accord with my understanding of the effect of his earlier submissions. I briefly adjourned the matter so that Mr Gore QC could obtain instructions and provide clarity about whether his client wished to pursue an application for preliminary approval that allowed a potential multitude of designs or one based only on a design generally in accordance with that depicted in the further

---

14 T14-20/L46 – T14-22/L36.
15 T14-23/L14-24.

amended plans. Following the adjournment, Mr Gore QC confirmed that ANH wished to pursue only a design that is generally in accordance with that depicted in the further amended plans. He accepted that this was a change to the application to the extent that the words in the original planning report and the planning report in response to the information request indicated that the application was not one for any particular design.[16]

[66] Pursuant to s 46(3) of the *Planning and Environment Court Act 2016*, the court cannot consider a change to the development application unless the change is only a minor change.

[67] Neither BGM nor the Council had come to court to face an application that the appeal proceed based on the now proposed change.

[68] In light of the developments with respect to ANH's intentions, I adjourned BGM's application and made orders to facilitate the hearing of ANH's application for a minor change on 19 September 2018.

[69] ANH filed a written application for minor change on 13 September 2018. The application was for an order that ANH's appeal be heard and determined based on a proposed change to that part of its development application that sought to vary the effect of the Planning Scheme. The proposed change includes proposed amendments to the Planning Scheme that would refer to the further amended plans the subject of ANH's first application. ANH contends that the proposed change is a minor change. BGM and the Council contend that the proposed change is not a minor change. This application was heard on 19 September 2018.

[70] Before I had an opportunity to determine these three applications, ANH made yet another application. It was made by ANH on 2 October 2018. ANH seeks to amend the application it made on 13 September 2018. It now seeks an order that its appeal be heard and determined on the basis of a proposed change to that part of its development application that sought to vary the effect of the Planning Scheme and that part of its development application that sought a preliminary approval for a material change of use. The proposed change seeks to tie both aspects of ANH's development application to the further amended plans. ANH contends that the proposed change is a minor change. BGM and the Council disagree.

[71] This further application by ANH was heard on 3 December 2018.

[72] Each of the applications has the potential to impact on how the further hearings of the appeals proceed. They call for consideration of the following issues:

(a) Is ANH's proposed change to its development application a minor change?

(b) Should ANH be permitted to change its development application?

(c) Should the appeals be heard separately?

(d) Should ANH be ordered to pay costs?

---

16 T14-35/L45 – T14-36/L25.

Is ANH's proposed change to its development application a minor change?

[73] ANH's appeal is a Planning Act appeal. Pursuant to s 43 of the *Planning and Environment Court Act 2016* it is to be conducted by way of hearing anew. However, pursuant to s 46(3) of the *Planning and Environment Court Act 2016*, the court cannot consider a change to the development application unless the change is only a minor change.

[74] A "*minor change*", for a development application, means a change that:[17]

> "(i) does not result in substantially different development; and
>
> (ii) if the application, including the change, were made when the change was made— would not cause—
>
> (A) the inclusion of prohibited development in the application; or
>
> (B) referral to a referral agency if there were no referral agencies for the development application; or
>
> (C) referral to extra referral agencies; 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;"

[75] There is no dispute about the satisfaction of sub-paragraph (ii) of the definition of minor change. However, BGM and the Council contend that the proposed change is not a minor change on the basis that it would result in a substantially different development.

[76] The legislation does not define "*substantially different development*". Whether a proposed change would result in substantially different development depends on the individual circumstances of the development.

[77] The starting point is a consideration of the development application.

The nature of the development application

[78] The IDAS forms for the development application indicated that ANH sought a preliminary approval for the making of a material change of use, as well as a variation approval.

[79] The IDAS forms described the material change of use component of the application as "*Land uses consistent with the Centre Zone – Local Centre Precinct*". This description, by itself, is "*apt to create uncertainty as to what the development application may lead to*".[18]

---

17 See s 3 and schedule 1 of the *Planning and Environment Court Act 2016* and s 6 and schedule 2 of the *Planning Act 2016*.

18 *Lagoon Gardens Pty Ltd v Whitsunday Regional Council & Ors; Proserpine Co-operative Sugar Milling Association Ltd v Whitsunday Regional Council & Ors* [2009] QPEC 66; [2010] QPELR 74, 87 [25].

[80] Numerous statements in the town planning report that formed part of the application did not assist the potential uncertainty about that part of the development application that sought a material change of use. For example, the description of the "*Application Type*" in the section dealing with the "*Proposal*" said:

> "This application **is** a variation request. It formally seeks preliminary approval for a material change of use **for a** variation approval under section 50(3) of the *Planning Act 2016*. The variation approval will vary the effect of the local planning instrument, being the Moreton Bay Regional Council Planning Scheme 2016 (Version 3, as effective 3 July 2017) in effect for the site.
>
> The variation request seeks to facilitate the use of the site for a variety of land uses consistent with the Centre Zone – Local Centre Precinct. Those uses are described in the following section (5.3) of this report.
>
> As permitted under section 43(1) and (3)(c) of the *Planning Act 2016*, this variation request:
>
> (a) categorises development as assessable or accepted development;
>
> (b) for assessable development, specifies the category of assessment as code assessment for those uses intended on the site; and
>
> (c) sets out the matters (the assessment benchmarks) that an assessment manager must assess assessable development against.
>
> To achieve the above, the application proposes to adopt the Table of Assessment for the Centre Zone of the planning scheme (Table 5.5.1.1.1), specifically the provisions applicable to the Local Centre Precinct. A copy of the Table is included in Appendix A. The Table of Assessment identifies the proposed land uses, the categories of development and assessment and assessment benchmarks for assessable development and requirements for accepted development."
>
> (emphasis added)

[81] Section 5.3 of the town planning report stated "*it is proposed to adopt the table of assessment … of the planning scheme in full, notwithstanding that all of the uses may not eventuate on the site*".

[82] BGM submits that the development application was a "*bald variation request seeking to impose an alternative planning regime over the land*".[19] It submits the application was analogous to a rezoning, which sought to treat the subject land as part of the Local Centre precinct. The submission has apparent force when one considers the statements referred to in paragraphs [79] to [81] above. The application does not use the word "*re-zoning*", but the statements outlined above create an impression that ANH sought to exclude the land from Next Generation Neighbourhood Precinct in the General Residential Zone and include it in the Local Centre Precinct of the Centre Zone. The parts of the planning report referred to above do not identify the "*use*" sought.

[83] Although the development application could have been drafted with more clarity, reading it as a whole, there are a sufficient number of other references that together make it plain enough that ANH is seeking a preliminary approval to change the use of the site from vacant to use for a local centre.

---

19 That nature of application was found to be invalid in *Lagoon Gardens Pty Ltd v Whitsunday Regional Council & Ors; Proserpine Co-operative Sugar Milling Association Ltd v Whitsunday Regional Council & Ors* [2009] QPEC 66; [2010] QPELR 74.

[84] The Executive Summary described the application in the following terms:

> "The variation request proposes to vary the effect of the local planning instrument, being the Moreton Bay Regional Council Planning Scheme 2016 (Version 3, as effective 3 July 2017). Specifically, it seeks to facilitate the use of the site for a variety of land uses consistent with the Centre Zone – Local Centre Precinct. Those land uses include, but are not limited to: Shopping Centre; Shops; Office; Health Care Services; Indoor Sport and Recreation; Food and Drink Outlet; and Service Station. **The proposal ultimately seeks to achieve a local centre on the site**.
>
> To achieve this, the variation request proposes to:
>
> - categorise the proposed land uses as either accepted or assessable development;
> - where assessable development, specify the category of assessment as code assessment for those uses intended on the site. Those code assessable uses will be subject to future development applications made in accordance with this variation request for material change of use; and
> - prescribe assessment benchmarks applicable to the proposed land uses. All of the assessment benchmarks are the existing provisions of the Moreton Bay Regional Council Planning Scheme 2016 applicable to land uses in the Centre Zone – Local Centre Precinct."
>
> (emphasis added)

[85] The report also indicated an intention to provide "*a range of goods and services*" on the site, which was said to be a "*highly convenient location for a local centre*".

[86] The Executive Summary noted that the planning report was supported by an Economic Needs Assessment, which the Executive Summary described as demonstrating that the "*proposed local centre*" is strategically located and responsive to the needs of the current and planned population.

[87] The Executive Summary referred to a "*Concept Site Plan*" in the following terms:

> "The Concept Site Plan shows, in general terms, how the site may be developed as a local centre. This plan is not intended for detailed design or assessment purposes; the ultimate layout of the centre and the majority of future uses will be subject to subsequent development applications made in accordance with this variation request for material change of use. It is at that time that detailed design will be assessed. The purpose of this application is to set up the framework under which those future applications will be assessed."
>
> (original emphasis)

[88] Section 5.4 of the town planning report was headed "*Concept Design and Centre Description and Role*" and stated:

> "A Concept - Site Plan and Site Location Plan is included in Appendix B. The purpose of the concept plan is to demonstrate a potential layout for a local centre on the site. The plan shows potential access, carparking, on-site manoeuvring areas, land uses and built form (including indicative gross floor area) and future road widening along Oakey Flat Road. The concept plan is not intended to be used for assessment purposes regarding detailed design and layout. That extent of detail will be provided and further refined through subsequent development applications for a material change of use, made in accordance with this variation request".

[89] The Concept Site Plan was not advanced as the ultimate design. However, it is apparent that the intent was to seek approval to use the site for a local centre, with the detailed design of the local centre, including its form and operational aspects, to be addressed in subsequent development applications.

[90] Although the application did not define the characteristics of the proposed local centre by reference to a particular plan, the report described the general characteristics of the local centre. In particular, section 5.4 of the town planning report stated:

> "The scale of the proposed centre will be consistent with that of a Local Centre described in Table 6.2.1.1 of the Centre Zone Code of the Planning Scheme. This includes:
>
> - **Retail** – 5,000sqm - 7,000sqm GFA of retail activities including a full-line supermarket, convenience stores, personal services and specialty stores;
> - **Commercial** – 2,000sqm - 5,000sqm GFA of commercial activities including local professional offices;
> - **Residential** – medium-low density and low rise residential activities;
> - **Community** – activities including but not limited to health services, child care, education and support services; and
> - **Other** – small scale entertainment activities.
>
> It is intended that **the centre will service a local catchment and responds to an undersupply of full line supermarkets** in the area around Narangba. The proposed uses will provide goods and services which are therefore not currently available to residents of the surrounding neighbourhoods. …"
>
> (emphasis added)

[91] Section 8.3 of the town planning report clarified that, in terms of "*Other activities*", the application did not propose any additional activities.

[92] In addition to the specific reference to a scale of centre consistent with that of a Local Centre described in Table 6.2.1.1 of the Centre Zone Code, section 8.2 of the planning report also observed that the variation request contemplated:

> "a local centre with the full range of uses typically found in such centres and with a maximum retail gross floor area of 7000sqm ...".

[93] In section 8.3, the report stated:

> "The development is anticipated to provide for, at a minimum, a full line supermarket, specialty shops, medical centre, fast food premises and service station."

[94] The town planning report described the commercial activities as including offices and a gym.

[95] The application was also accompanied by an economic assessment report. In the Summary, it stated:

> "The centre will be anchored by a 3,900m^2 full-line supermarket and complemented by 2,129m^2 of specialty shops. The applicant has indicated that development will also include a gym, medical practice, fast food outlet, fuel station and associated amenities."

[96] The introduction to the economic assessment report stated:

> "Australian National Homes proposes to develop a neighbourhood retail centre of approximately 8,065m^2 on the corner of Raynbird and Oakey Flat Road in Narangba.
> ….
>
> The centre will be anchored by a 3,900m^2 full-line supermarket and complemented by an additional 2,129m^2 of specialty shops and outparcels for fast food and fuel outlets."

[97] In terms of access, the town planning report noted that the concept plan identified the principal access as an integrated access with the adjoining lot 101 to/from Raynbird Road, with the second access shown to/from Oakey Flat Road. However, as I have already observed, the concept plan was not intended to be used for assessment purposes. The town planning report further stated that detailed access arrangements would be provided in the context of a future development application, and would be subject to detailed traffic engineering assessment and design.

[98] In its response to the information request, ANH confirmed its intent to include a full line supermarket. Appendix C to that response provided a further plan, which ANH said:

> "… indicates an alternative development scenario for the site. We reiterate that the application does not seek approval in accordance with the plan, rather the plan serves to demonstrate that a future Local Centre can be established on the site, while meeting the requirements of the planning scheme."

[99] Appendix A to the response to the information request included a letter from Foresight Partners. In response to a query about whether fuel retailing is an intended use, the report provided an analysis of the forecast market share and need for the "*proposed service station*".

[100] A letter from ANH's traffic engineers was provided as Appendix E to the response to the information request. It indicated that, in terms of Oakey Flat Road access, the proposal sought "*left in left out (LiLo) only access, in some form, to be determined through the ongoing design development process, subject to further detailed design*". The report also stated, "*primary access to the site would be required to be provided from Raynbird Road*".

ANH's proposed change

[101] In its application in pending proceeding filed 2 October 2018, ANH indicated a desire to change its development application by way of:

(a) a change to the variation request, such that Table 1 of the development application be amended in accordance with the table in Attachment A to the application in pending proceeding; and

(b) a change to the material change of use of premises part of the application to:

> "Land uses consistent with the Centre Zone – Local Centre Precinct, where identified in Table 1, and where developed as part of a shopping centre (as defined in the Moreton Bay Regional Council Planning Scheme version 3) generally in accordance with the 2 Drawings referred to in Table 1."

[102] The drawings referred to in Table 1 are the further amended plans provided to the parties on 22 August 2018.

[103] The table in Attachment A was as follows:

TABLE 1: PROPOSED LAND USES AND CATEGORIES OF DEVELOPMENT AND ASSESSMENT	
USE	**CATEGORIES OF DEVELOPMENT AND ASSESSMENT**
~~Animal husbandry~~	~~Accepted development, if complying with Table 1.7.7.1 of the planning scheme~~
~~Animal keeping~~	~~Accepted development, if complying with Table 1.7.7.1 of the planning scheme~~
~~Cemetery~~	~~Accepted development, if complying with Table 1.7.7.1 of the planning scheme~~
~~Caretaker's accommodation~~	~~Accepted development, subject to requirements~~
~~Child care centre~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Club~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Community care centre~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Community residence~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Community use~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Dwelling unit~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Educational establishment~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Emergency services~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
Food and drink outlet	Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme
	Accepted development, subject to requirements
	Otherwise, Code Assessment <u>if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10</u>
~~Function Facility~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Garden Centre~~	~~Accepted development, subject to requirements~~
~~Hardware and trade supplies~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
Health care services	Accepted development, subject to requirements
	Otherwise, Code Assessment <u>if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10</u>
~~Home based business~~	~~Accepted development, if complying with Table 1.7.7.1 of the planning scheme~~
	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~

TABLE 1: PROPOSED LAND USES AND CATEGORIES OF DEVELOPMENT AND ASSESSMENT	
Indoor sport and recreation	Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme
	Accepted development, subject to requirements
	Otherwise, Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
~~Low impact industry~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Major electricity infrastructure~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
~~Market~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Motor sport facility~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~ **[DELETED FROM TABLE IN DEVELOPMENT APPLICATION]**
~~Nightclub entertainment facility~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
Office	Accepted development, subject to requirements
	Otherwise, Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
~~Outdoor sport and recreation~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
~~Park~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
~~Place of worship~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Residential care facility~~	~~Code Assessment~~
~~Sales office~~	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
Service industry	Accepted development, subject to requirements
	Otherwise, Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
Service station	Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
Shop	Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme
	Accepted development, subject to requirements
	Otherwise, Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
Shopping centre	Accepted development, subject to requirements
	Otherwise, Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
~~Showroom~~	~~Accepted development, subject to requirements~~

TABLE 1: PROPOSED LAND USES AND CATEGORIES OF DEVELOPMENT AND ASSESSMENT	
	~~Otherwise, Code Assessment~~ ~~if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10~~
~~Substation~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
	~~Otherwise, Code Assessment~~
~~Telecommunication facility~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
	~~Accepted development, subject to requirements~~
~~Theatre~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
	~~Accepted development, subject to requirements~~
	~~Otherwise, Code Assessment~~
~~Tourist attraction~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
~~Utility installation~~	~~Accepted development, if for a temporary use and complying with Table 1.7.7.1 of the planning scheme~~
	~~Otherwise, Code Assessment~~
Veterinary services	Accepted development, subject to requirements
	Otherwise, Code Assessment if forming part of a development which is generally in accordance with Drawings 17.0352 A-DA-02 Rev. 12 and 17.0352 A-DA-03, Rev. 10
Any other use not listed above OR Any use listed above but not complying with the criteria OR Any other undefined use	Impact Assessment

Note:

Development of the subject land for the uses referred to on this Table has the categories of development and assessment as identified on the Table, with:

(a) the requirements for accepted development are those identified on Table 5.5.1.1.1 of the Planning Scheme (other than being in the Local Centre Precinct); and

(b) the assessment benchmarks for assessable development and requirements for accepted development are those identified on Table 5.5.1.1.1 of the Planning Scheme."

[104] As can be seen from the table above, ANH seeks to delete reference to 32 of the 41 uses previously referred to in the table. The effect is that those 32 uses will require impact assessment, rather than code assessment.

[105] To the extent that the changed application seeks a shopping centre generally in accordance with the further amended plans, the application also involves a change to the access arrangements. Although the scope of the application was not defined by reference to a particular plan, as I noted at paragraph [100] above, the proposed access

arrangements involved primary access to the site from Raynbird Road and left in left out only access from Oakey Flat Road.

Does the proposed change result in a substantially different development?

[106] BGM opposes ANH's application to change its development application on the basis that the change is not a minor change. It submits the conduct of ANH is a complete antithesis of what the legislation requires. No firm proposal was put before the public or the Council when this application was publicly notified and assessed. BGM notes ANH has continually sought to refine its proposal by providing changes, including new plans, which have never been assessed by the public or by the Council in accordance with the structure of the legislation. It submits ANH seeks to use the court proceedings to "*design*" its proposal and now, after three weeks of hearing, ANH seeks to change the proposal by locking in a particular new plan as an approved plan for the code assessability of a number of uses. BGM notes that the public have never seen or been given the opportunity to comment on either the new plan or the nominated uses in the changed Table of Development. It submits the public will lose the opportunity for such comment or submission in the event this change is permitted and will, therefore, never have had the opportunity to lodge a submission against the now likely development of this site if the changed application is approved. BGM submits for that reason alone the changes cannot be regarded as minor.

[107] Although the description of ANH's conduct is a reasonable one, and the consequence of a finding that the change is minor is accurate, these matters do not persuade me that the proposed change will result in a substantially different development.

[108] BGM also submits ANH seeks to change the application from a bald variation request seeking to impose an alternative planning regime over the land to one that ties code assessable development to particular plans and that this results in a "*substantially different*" material change of use. It submits the question as to what plan or plans, if any, the proposed change should be compared highlights the fundamental change to the nature of the development application. It submits that a comparison of the new plans and the previous plans reveal there are significant changes proposed to the development application that result in a "*substantially different development*". BGM also submits the removal of approximately 31 uses from the development application is a significant change. It submits that the uses removed may have included uses that potential submitters regarded as an incentive or offset component that could have balanced a negative impact of the development. It also submits removal of the uses changes the ability of the proposed development to operate as intended.

[109] For the reasons explained at paragraphs [82] to [100] above, I do not accept that ANH's application was a bald variation request. Further, given the scope of the development applied for was not defined by reference to a plan, a comparison of the further amended plans on which ANH now seeks to rely with plans provided during the application is not of itself determinative.

[110] The Council also opposes ANH's application to change its development application on the basis that the change is not a minor change.

[111] The Council characterised the application as one seeking any combination of the 41 uses set out in table 1 of the planning report (qualified by the relevant requirements and, in certain cases, compliance with table 1.7.7.1 of the Planning Scheme), but

which was not tied to any form of development. It further submits that the proposed development comprises:

(a) 5 000 to 7 000 square metres gross floor area of retail activities including a full-line supermarket, convenience stores, personal services and speciality stores;

(b) 2 000 to 5 000 square metres gross floor area of commercial activities including local professional offices;

(c) medium-low density and low-rise residential activities;

(d) community activities including artistic, social or cultural facilities, child care, education, emergency service, health services, religious activities, social interaction or entertainment, and support services; and

(e) in terms of other activities, small scale entertainment activities and local civic park.

[112] The Council submits the proposed change reduces the possible uses that could be facilitated by the proposed development from 41 to six uses. It further submits that the proposed change effectively removes two of the five proposed categories of uses that could be facilitated by the proposed development, each of which is described as being a characteristic of the proposed local centre in both the application and in the Planning Scheme. They are the "*residential activities*" comprising "*medium-low density, low-rise*" and the "*other activities*" category. It also submits that the "*community activities*" category of uses is effectively removed, with only "*health services*" remaining. The Council submits the uses removed under the community activities category include child care centre and religious activities, which were specifically identified in the public advertising as uses included in the proposed development. The Council also submits that the proposed development has gone from one that had an infinite number of possible forms to a specific layout. The further amended plans show the location, type, and size of each component of the proposed development, as well as access arrangements, car parking and internal access, levels, heights of retaining walls and batters, landscaping, external roadworks and servicing, screening and signage.

[113] What is missing from the Council's characterisation of the application is an acknowledgment that it sought a material change of use for a "*local centre with the full range of uses typically found in such centres and with a maximum retail gross floor area of 7000sqm*". That remains the case.

[114] The 41 uses referred to in the application were included in a table that identified the proposed variations to the Planning Scheme. It was clear from the application that the uses listed as code assessable reflected those uses that were code assessable in the Local Centre precinct under the Planning Scheme.

[115] The effect of the deletion of 32 of the 41 uses should also be considered in the context that, pursuant to s 45 of the *Planning Act 2016*, a variation approval may only specify the category of assessment or stipulate assessment benchmarks in relation to:

(a) development that is the subject of the variation approval; or

(b) development that is the natural and ordinary consequence of the development that is the subject of the variation approval.

[116] Upon a fair reading of the application, I do not consider it sought a material change of use for a local centre made up of any combination of the 41 uses listed in the table. Some of those uses, such as "*cemetery*", "*major electricity infrastructure*" and "*substation*", are not uses "*typically*" found in a local centre. Further, having regard to the matter noted in paragraph [91] above, I do not regard the application as one for a centre that might include activities from the "*other activities*" category.

[117] The application specifically contemplated the local centre would at least include a full line supermarket (a term defined by the Planning Scheme), specialty shops, medical centre, fast food premises and service station. That remains the case.

[118] The proposed change does not have the effect of providing for something not otherwise contemplated. It was always the case that if the development application were approved, a code assessable development application for a local centre would be required. Further, it was always the case that the form of development depicted in the further amended plans could have been the subject of that code assessable application.

[119] Properly characterised, the change is not one that alters the built form of development that the development application sought to facilitate. Rather, it provides information about the built form and earthworks associated with the proposed development in circumstances where no definitive details were previously provided, only examples of the possible built form. To the extent that this information was reasonably required to properly assess the development application, ANH's failure to provide it during the application process may have consequences later. However, the change from a limitless number of forms which the proposed development could have taken to just one of those possible forms does not result in a substantially different development.

[120] Similarly, in this case the confinement of the potential combinations of uses to be included in the centre would not result in a change that affects the ability of the proposed development to operate as intended or remove a component that is integral to its operation. The proposed development was intended to operate as a local centre providing day-to-day convenience services. In that respect, as I have already noted at paragraph [117] above, it was intended to be a local centre containing a full line supermarket (a term defined by the Planning Scheme), specialty shops, medical centre, fast food premises and service station. That continues to be the case.[20]

[121] To the extent that the public notification referred to child care and religious activities, the removal of the possibility of these uses does not, in this case, remove an incentive or offset component that would have balanced a negative impact of the development. Those uses were not uses that the application indicated would be included as part of the proposed local centre. They were only uses that might be included in the local centre under a code assessable application. The distinction is a material one: it places the current application for a minor change in a distinctly different position to that considered by the court in *Carillon Development Ltd v Maroochy Shire Council*.[21]

---

20 cf *Westfield Limited v Gold Coast City Council* [2000] QPELR 121, where the change resulted in a significantly smaller centre and a change to the relative importance of the retail elements within the shopping centre.

21 [2000] QPELR 216.

[122] Having regard to the matters identified in paragraphs [73] to [121] above, I am satisfied that the proposed change is a minor change.

Should ANH be permitted to change its development application?

[123] As I have already noted in paragraph [73] above, pursuant to s 46(3) of the *Planning and Environment Court Act 2016*, the court cannot consider a change to the development application unless the change is only a minor change.

[124] Although the legislation precludes the court from considering a change to the application unless it is only a minor change, it does not require the court to permit an appeal to proceed based on a minor change. The court retains a residual discretion. ANH accepted this to be so.

[125] The potential prejudice to the other parties in the proceedings is relevant to the exercise of the discretion.

[126] BGM submits prejudice has been caused by ANH's conduct. In particular, BGM refers to three consequences it submits follow from ANH seeking to use the court's processes to change its development application after the expiration of the original three-week period that these trials were allocated to be heard. First, despite the amount of time that these appeals have been in court, it has been a very long time since the court has had to consider the merits of the shopping centre for which BGM was granted approval. Second, BGM is being held out of the fruits of their approved supermarket based development in circumstances where it is accepted there is a need for such development and the delays in this litigation are in no way attributable to the conduct of BGM. Third, the residents of the agreed trade area are being held out of the benefits of BGM's development.

[127] BGM also submits the court is not dealing with two truly comparable applications. BGM submits that the ANH proposal was not, and is not, ready to be properly assessed.

[128] ANH's conduct, whatever the cause of it, has been disappointing. It has acted in a way that delayed the resumption of the substantive hearing about the merits of both its development application and that made by BGM. It exacerbated the delays caused by its first application by the untimely realisation that its prospects of securing leave to adduce further traffic evidence might be enhanced by applying to change its development application, which it sought to do at the end of the hearing of its first application. Further delay, cost and inconvenience was caused to the other parties when, after the hearing of its minor change application but before it was determined, ANH applied for leave to amend its minor change application.

[129] Having said that, as would be apparent from the background outlined above, BGM's conduct was hardly exemplary.

[130] It is evident from the history that the respective developers (or their lawyers) sought to progress the hearing based on an unrealistic timetable. They did so, no doubt, on the misguided apprehension that it would secure them an outcome at the earliest possible opportunity. It is far from axiomatic that a directions order that provides for hasty preparation of an appeal will produce a result in the timeliest manner. Nor is it axiomatic that hasty preparation will be conducive to discharge of the parties' obligation to proceed in an expeditious way. A disease borne of a directions order

that provided inadequate time to prepare infected the efficient and effective progress of the hearing of the merits of the appeals. That the establishment of a new local centre for the benefit of the residents will be delayed is a consequence of the timetable in the directions order being the stuff of fantasy rather than reality.

[131] Further, any complaint of prejudice occasioned by delay should be considered in context. The court offered further hearing dates for the resumption of the hearings in the weeks commencing 18 and 25 February 2019. The parties have chosen not to avail themselves of those dates and have requested that the appeals, whether heard separately or together, be listed for further hearing on 8, 9 and 10 April, 15 to 18 April and 13 to 17 May 2019.

[132] In the circumstances, I am satisfied that it is appropriate to permit ANH to proceed to further hearing based on its changed development application. Further preparation will be required before the hearing resumes, but I am satisfied that, at the moment and depending on progress, there is likely to be sufficient time for that additional preparation to be undertaken before hearings resume on 8 April 2019.

[133] In light of that finding, it is not necessary for me to address separately whether ANH should be permitted to rely on a new site plan and/or adduce further traffic evidence at this stage of the proceedings.

Should the appeals be heard separately?

[134] BGM seeks an order that the appeals proceed by way of separate hearings. The Council supports this position. At the time BGM first made its application, it sought an order that its appeal proceed in the week commencing 17 September 2018. Even though no order was made to facilitate that hearing, BGM maintains its application.

[135] BGM principally advances four bases on which it relies to support the orders. First, significant delays have been encountered in the hearing of the two appeals and none involve changes to, or issues about, BGM's proposed development. Second, BGM submits the two proposals are not truly comparable. Third, the ANH proposal was not ready, and is not ready, to be properly assessed. Fourth, the ongoing joinder of the appeals will result in delay and prejudice that affects BGM and the Council, as well as the public of Narangba and the resources of the court.

[136] ANH resists BGM's application. It submits there are various aspects of His Honour Judge Morzone QC's decision in *Australian National Homes Pty Ltd v Moreton Bay Regional Council*[22] that support rejection of BGM's application.

[137] First, ANH submits there a number of the potential obstacles foreshadowed before His Honour Judge Morzone QC that no longer exist. They include the lack of common ground that there was need for only one local centre, the potential different legislative regimes, the possibility there would be other submitters and the possibility that there would not be a commonality of experts.

[138] Second, ANH submits that factors that His Honour relied on in favouring a joint hearing are still applicable now. They included that it was a common position that the two appeals should be heard by the same judge, the nature and extent of common

---

22 [2018] QPEC 14.

issues and overlapping evidence and the prospect that the outcome of one proceeding may decide or significantly affect the other proceeding.

[139] Third, ANH submits that the ANH application involved a preliminary approval, which could produce some difference for the two appeals, and he accepted that the BGM application would, or may, endure some impact that it would not otherwise endure.

[140] Although I accept the first three submissions made by BGM, ANH's submissions also have some force.

[141] In *Capricorn Green Pty Ltd v Livingstone Shire Council & Ors*, His Honour Judge Rackemann observed:[23]

> "It should be remembered that, in deciding an appeal with respect to a development application, this Court is not simply dealing with a cause of action or the rights and liabilities of the parties before it, as is the case in ordinary civil litigation. Rather it is dealing with matters of broader public and community interest. Given the importance of these competing applications in the context of Emu Park and its future planning, there is merit in Mr Ure's submission to the effect that an approach should be taken which promotes the achievement of the most appropriate planning outcome for the community. In that regard the Court is likely to be assisted by a contemporaneous and full examination of the planning merits of each of the three competing proposals, assuming that the Buildev application results in an appeal."

[142] I agree with that sentiment. I do not consider it determinative, but I regard it as a relevant consideration in this case.

[143] On balance, I am not prepared to accede to BGM's request to sever the hearing of the two appeals for four reasons.

[144] First, I offered further hearing dates for the resumption of the hearings in the weeks commencing 18 and 25 February 2019. BGM elected not to avail itself of those dates and requested that the appeal with respect to its development, whether separately or together, be listed for further hearing in April 2019. There is no suggestion that the appeal about ANH's development could not be ready to proceed at that time also. As such, while ANH has caused a delay to date, there is nothing to suggest that BGM will continue to be delayed.

[145] Second, there is extensive overlap in the planning scheme provisions that I will need to consider in each appeal.

[146] Third, there are many common experts, some of which have prepared a single joint expert report or individual report addressing both development proposals.

[147] Fourth, in circumstances where the appeals are part heard, to sever them and determine the consequences for the evidence would unnecessarily consume precious court resources. BGM sought to address this issue by submitting that it remained content that evidence in one be evidence in the other. Given evidence includes the oral evidence of the witnesses, it is difficult to appreciate how that might work, or indeed how that would avoid further delay to BGM in that the evidence in both trials would need to conclude before judgment could be delivered in either.

---

23 [2007] QPEC 14; [2007] QPELR 410, 415.

[148] For those reasons, BGM's application is dismissed.

Should ANH be ordered to pay costs?

[149] BGM submits that whether or not the court were to accede to ANH's application, it should be awarded its costs. The costs sought by BGM are:

(a) the costs of the trial to date because allowing ANH to be tied to a particular plan fundamentally changes the nature of the case that BGM and the Council have come to meet; and

(b) the costs incurred for the rest of the trial in relation to the ANH proposal (including the costs of having to have experts conduct further reporting).

[150] The Council seeks its costs in relation to:

(a) the tender of replacement exhibit 25 and the subsequent objection hearing on 14, 21 and 22 June 2018;

(b) the application to admit new evidence dated 31 August 2018, which was heard on 7 September 2018;

(c) the application in pending proceeding filed 13 September 2018 seeking a minor change, which was heard on 19 September 2018; and

(d) the application in pending proceeding filed on 2 October 2018, being an application for leave to amend the earlier application for minor change, and the amended minor change application, which was heard on 3 December 2018.

[151] The general position under the *Planning and Environment Court Act 2016* is that each party must bear its own costs.[24] However, costs can be awarded in certain circumstances set out in s 60 of the *Planning and Environment Court Act 2016*. Section 60 states:

> **60 Orders for costs**
>
> (1) **The P&E Court may make an order for costs for a P&E Court proceeding as it considers appropriate if a party has incurred costs in 1 or more of the following circumstances**—
>
> (a) the P&E Court considers the proceeding was started or conducted primarily for an improper purpose, including, for example, to delay or obstruct;
>
> *Example*—
>
> A party (the *first party*) with similar commercial interests to another party started a proceeding. The P&E Court considers the proceeding was started primarily to advance the first party's commercial interests by delaying or obstructing the other party's development approval from taking effect.
>
> (b) the P&E Court considers the proceeding to have been frivolous or vexatious;

[24] *Planning and Environment Court Act 2016*, s 59.

Example—

The P&E Court considers a proceeding was started or conducted without reasonable prospects of success.

(c) a party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;

(d) a party is required to apply for an adjournment because of the conduct of another party;

(e) **without limiting paragraph (d), a party has introduced, or sought to introduce, new material**;

(f) **a party has defaulted in the P&E Court's procedural requirements**;

(g) **the P&E Court considers an applicant for a development application or change application did not give all the information reasonably required to assess the development application or change application**;

(h) the P&E Court considers an assessment manager, referral agency or local government should have taken an active part in a proceeding and did not do so;

(i) **an applicant, submitter, assessment manager, referral agency or local government does not properly discharge its responsibilities in the proceeding**.

(2) In this section—

change application means an application under the Planning Act, section 78, other than for a minor change.

referral agency see the Planning Act, section 54(2)."

(emphasis added)

[152] ANH accepts that the court's jurisdiction to award costs is enlivened in this case under s 60(1)(e) of the *Planning and Environment Court Act 2016*.[25] It submits this provision should be the focus of the court's consideration. ANH also accepts that it is appropriate to make some order as to costs.[26] ANH submits, however, that if it is successful in the relief it seeks, it would be inappropriate to order ANH to pay all of the Council's costs and all of BGM's costs of the applications. It submits that the costs of further steps arising from the introduction of the new material should be reserved.

[153] The Council provided written submissions addressing each of the four categories of costs sought by Council. BGM joins with the Council in requesting costs on the same basis.

Tender of replacement exhibit 25

[154] The Council submits that the costs of the tender of replacement exhibit 25 and the subsequent objection hearing on 14, 21 and 22 June 2018 were incurred because ANH introduced new material. It submits that those costs are now "*thrown away*" as the plans comprising the Exhibit 25 plans have been made obsolete by the plans the subject of the minor change application. This is because the two sets of plans are

25 T16-16/L20-38.
26 T16-23/L11-15.

different and because the Exhibit 25 plans were indicative, whereas the further amended plans are specifically relied on by ANH. The Council also submits that the costs power in s 60(1)(f) of the *Planning and Environment Court Act 2016* is engaged as ANH defaulted in the court's procedural requirement by failing to proceed in an expeditious way. It submits s 60(1)(g) is engaged as the information was not, but could have been, provided during the assessment phase of the development application. It also submits that s 60(1)(i) is engaged as ANH has not properly discharged its obligation to proceed in an expeditious way, which would involve not pursuing an application or appeal unless the application is in a form which is ready to proceed and complying with orders regarding expert reporting process etc.

[155] The Council submits the discretion should be exercised for five reasons. First, that four bases on which the costs power is engaged is a powerful factor. Second, the plans were introduced to show how the development application could address certain issues. In particular, Mr Viney had proposed the amendments to address traffic matters. The Council submits that such conduct smacks of designing the application "*on the run*" and using the court process for that purpose. Third, the Council submits the amended plans could have been avoided by properly considering these matters before lodging and pursuing the development application with the Council and the subsequent appeal against the Council's refusal. Fourth, the new material was proposed after the joint expert meeting process and exchange of individual statements of evidence. It was sought to be tendered on the first day of hearing. The Council submits that timing is unacceptable and unfair to the other parties and contrary to orderly case management, particularly considering a minor change application had been urgently brought before the Court, and refused, one month earlier on 10 May 2018. Fifth, ANH has delayed the hearing of the appeals.

[156] ANH resists these costs on the basis that Exhibit 25 was responsive to issues raised in the appeal and it was successful in its application to rely on the new material.

[157] Exhibit 25 was admissible as responsive to issues raised in the appeal. As is apparent from my ruling delivered *ex tempore* on 22 June 2018, the only issue determined by me was whether the exhibit was admissible. This is because, immediately before delivering my ruling, the parties confirmed that the only issue I was requested to decide was its admissibility.[27] The parties indicated an intention to discuss amongst themselves the consequences for the hearing should the document be determined admissible.

[158] The extensive design possibilities inherent in ANH's original application and ANH's insistence, until well into the trial, on eschewing reliance on a single plan was clearly a matter of concern to the other parties in the lead up to the hearing. As would be apparent from the background cited above, BGM had, on a number of occasions, taken steps intended to avoid the possibility of ANH placing reliance on further new plans during the hearing. Those steps included requesting an order on 4 May 2018 that ANH make any application to change its development application by 4 pm that day.

[159] In light of the matters that had transpired prior to the commencement of the hearing, I accept the Council's submission that the timing of delivery of Exhibit 25 was unacceptable and unfair to the other parties and contrary to orderly case management.

---

27 T8-14/L1-8.

Had the exhibit been delivered in advance of the hearing, the lengthy interruptions to the progress of the trial to determine the question of the admissibility of the document could have been avoided. Such matters could have been determined in advance of the commencement of the hearing.

[160] For those reasons, and having regard to the fact that ANH now relies on different plans, but also having regard to ANH's success on that issue, I consider it appropriate to order that ANH pay half of the costs incurred by the Council and BGM for the objection hearing on 14, 21 and 22 June 2018.

Application to admit new evidence

[161] BGM and the Council incurred costs in relation to ANH's application to admit new evidence because ANH sought to introduce new material. ANH accepts that s 60(2)(e) of the *Planning and Environment Court Act 2016* is engaged.[28]

[162] The Council submits that these costs are now "*thrown away*" as the plans comprising of this new material have been made obsolete by the effect of the approval of the minor change application and therefore s 60(1)(f), (g) and (i) of the *Planning and Environment Court Act* 2016 are engaged. The Council submits the discretion should be exercised for the same reasons identified as that with respect to exhibit 25. It submits the case to exercise the costs discretion is even stronger in relation to the application to admit new evidence because the application sought to introduce further traffic evidence in response to issues raised during the oral evidence of the traffic engineers and some months after the traffic evidence was completed.

[163] The Council further submits that it is no answer for ANH to say that the changed plans the subject of the application to admit new evidence were the result of the adjoining Satterley development approval granted by the Council on 1 August 2018. It submits that overlooks two important factors. First, ANH chose to link the access to its proposal the subject of Appeal No. 694 of 2018 to the Satterley development. That came with significant risks and uncertainty. The Satterley development is within the control of a third party. Further, the development application to enable the Satterley development to proceed had not even been made at the time the proposal the subject of the Appeal No. 694 was lodged. The changed access has resulted from taking those risks. It is not the result of either the Council's actions or any random third-party event. Second, the changes appear to be designed to resolve shortcomings in ANH's proposed development by moving the access to allow a greater area for manoeuvring within the services area at the rear of the proposed supermarket.

[164] These submissions have force. ANH could have taken steps to address the risk that another entity may seek an approval impacting on its proposed access from Raynbird Road. For example, it could have sought contractual terms that would allow its design to prevail in the event of inconsistency.

[165] ANH submits the further traffic evidence was necessitated by the grant of the Satterley approval on 1 August 2018. It submits that approval was inconsistent with the plans considered in the traffic evidence.

[166] While the Satterley approval is inconsistent with the plans considered in the traffic evidence, it does not follow that further traffic evidence was necessitated by the grant

---

[28] T16-18/L5-12 and T16-19/L5-12.

of the Satterley approval. It should be recalled that at this stage of the hearing ANH was adamant that it did not rely on the plans in question as demonstrating the design they sought. The plans were no more than an example of what might be achieved. On that basis, there was no need to change the design to accommodate the Satterley approval, as there was no set design to change.

[167] For those reasons, and having regard to what transpired at the hearing on 7 September 2018 as outlined at paragraphs [59] to [68] above, I am satisfied that it is appropriate to order that ANH pay BGM and the Council's costs of the application dated 31 August 2018.

The minor change applications

[168] The Council submits the costs of the minor change application filed 13 September 2018 have been thrown away because of ANH's application for leave to amend that application and the resultant amendments. It submits the hearing of the minor change application on 19 September exposed the fact that the minor change application did not tie the development application to the proposed amended plans of development. The solicitor for ANH has since indicated that was unintended and it was not until the exchanges in Court on 19 September that it was understood that the amended plans were not tied to the development application. The Council submits the application for leave to amend the minor change application and amended minor change application sought to rectify that and effectively have the matter reheard on 3 December 2018.

[169] The Council submits that, as a result, s 60(1)(f) of the *Planning and Environment Court Act 2016* is engaged. It says ANH failed to particularise properly the changes it was seeking as directed by the Court on 7 September 2018. It also submits ANH has failed to proceed expeditiously.

[170] The Council also submits that in addition, or alternatively, s 60(1)(e) and s 60(1)(i) of the *Planning and Environment Court Act 2016* are engaged. It submits the discretion to award costs should be exercised for three reasons. First, there are three bases on which the costs power is engaged. It says this is a powerful factor in favour of the discretion being exercised. Second, ANH has used the court process to identify faults in its own approach and then sought to rectify it by way of further court processes. Third, the fault in ANH's approach could readily have been addressed had it properly turned its mind to the structure of its amended application.

[171] The Council relies on similar reasons to seek costs with respect to the application for leave to amend the minor change application.

[172] I accept that the fault in ANH's approach could readily have been addressed had it properly turned its mind to the structure of its amended application.[29] However, the submissions with respect to the originally framed minor change application, and the time spent in hearing that application on 19 September 2018, informed my decision with respect to the amended minor change application. As such, I do not intend to order ANH pay costs of its applications filed 13 September 2018 and 2 October 2018.

---

[29] The inadequacies were well articulated by Mr Hughes QC – see T16-30/L7 – T16-L28.

Costs of the trial to date and the changed development application

[173] BGM seeks the costs of the trial to date. It submits that allowing ANH to be tied to a particular plan fundamentally changes the nature of the case that BGM and the Council have come to meet. Although that may be the case, it is not possible at this stage to ascertain the extent to which the costs incurred to date will be thrown away.

[174] I reserve the question of an award of costs thrown away as the consequence of the change.

[175] I accept the submission of the Council that the costs that will be incurred as a result of the changed development application will depend on the extent to which further expert joint meeting reports, individual statements and oral evidence are required, and the legal work associated with this as well as the identification and addressing of any amended issues in dispute.

[176] As these costs have not yet been incurred, and are unknown at this point in time, all parties accepted that the question of an award of those costs should be reserved. I accept that as the appropriate approach.

Future conduct of the appeals

[177] On 3 December 2018, I indicated to the parties that I was prepared to provisionally list the matter for hearing on 8, 9 and 10 April, 15 to 18 April and 13 to 17 May 2019. I did so on the basis that the parties indicated that if I delivered this judgment before the end of the year, they expected they could be ready for hearing by those dates, regardless of the outcome of the applications.

[178] Although I have determined that ANH's proposed change to its development application is a minor change, it is nevertheless appropriate that the Council and BGM have an opportunity to amend the issues on which they seek to rely in opposition to ANH's proposed development. At the time their issues were previously notified, ANH's proposal was one that did not rely on any particular plan. It is also likely that additional preparation will be required before the hearing resumes.

[179] I propose to order that the matter be listed for a lengthy review at 9 am on 31 January 2019. At that time, I expect to hear from the parties about the further directions that should be made, including about whether orders should be made requiring the following steps:

(a) BGM and the Council file and serve notice of their respective positions with respect to ANH's changed development application and particularise the basis for their respective positions (including by reference to planning scheme provisions if appropriate).

(b) The appeal be reviewed to identify the issues in dispute to be addressed by further evidence.

(c) The parties provide notice of the names of any experts that they intend to call with respect to the issues in dispute, including experts already retained in the appeal, and any availability constraints those experts have prior to June 2019.

(d) The relevant experts meet and produce joint reports with respect to the new issues in dispute. A working copy of the joint expert reports be delivered to the court.

(e) The parties provide notice of any availability constraints up to June 2019 of those experts retained and yet to be called in the appeal with respect to BGM's proposed development.

(f) Each party notify the other parties of any issues no longer maintained or contested having regard to the further joint expert reports.

(g) The matter be listed for further lengthy review for the purpose of hearing submissions with respect to the need, if any, for individual statements of evidence.

[180] Although I do not intend to order that BGM and the Council notify any amendments to the issues in dispute prior to the review on 31 January 2019, given their concerns about delays to date, they are, of course, at liberty to undertake that step in the interim to progress the further preparation of the appeals. Further, the absence of a review prior to the end of January 2019 should not be regarded by the parties as precluding them from agreeing to undertake other steps in preparation for the hearing.

Conclusion

[181] For the reasons given above, I propose to make the following orders:

(a) BGM's application in pending proceeding filed 3 September 2018 is dismissed.

(b) The further hearing of Appeal No 694 of 2018 proceed based on the change to the development application identified in the amended application in pending proceeding attached to ANH's application in pending proceeding filed 2 October 2018.

(c) ANH pay half of the costs incurred by the Council and BGM for the objection hearing on 14, 21 and 22 June 2018, such costs to be assessed on the standard basis unless otherwise agreed.

(d) ANH pay BGM and the Council's costs of the application dated 31 August 2018, such costs to be assessed on the standard basis unless otherwise agreed.

(e) Both appeals be listed for lengthy review at 9 am on 31 January 2019.