PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*The Village Retirement Group Pty Ltd v Brisbane City Council* [2019] QPEC 32
PARTIES:	**THE VILLAGE RETIREMENT GROUP PTY LTD** (Appellant) **v** **BRISBANE CITY COUNCIL** (Respondent)
FILE NO:	1201 of 2019
DIVISION:	Planning and Environment Court
PROCEEDING:	Application in pending proceeding
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	16 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2019
JUDGE:	Williamson QC DCJ
ORDER:	-
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – where appellant appeals against the respondent's decision to refuse a development application – where respondent sought an order defining the issues in dispute – whether the order should define the issues in dispute by reference to provisions of the respondent's planning scheme that were not cited in the reasons for refusal – whether the respondent was required to seek leave to rely upon provisions in its planning scheme that were not cited in the reasons for refusal – whether leave should be granted.
LEGISLATION:	*Planning Act 2016*, ss. 45, 60, 63 and 230 *Planning and Environment Court Act 2016*, ss.10, 43 and 47
CASES:	*Chalk & Anor v Brisbane City Council* (1966) 13 LGRA 228 *Goldicott House Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 25 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 *LMRM Pty Ltd v Brisbane City Council* [2017] QPEC 7 *Walker v Noosa Shire Council* [1983] 2 Qd R 86 *Waterman & Ors v Logan City Council & Anor* [2018] QPEC 44

COUNSEL:	Mr K Wylie for the appellant Mr T Sullivan QC and Mr M Batty for the respondent
SOLICITORS:	Mullins Lawyers for the appellant City Legal for the respondent

[1] On 24 June 2019, I heard a contested application for directions in this proceeding, which is an applicant appeal against a refusal. The dispute between the parties was limited to one point. It concerned the form of the order to be made defining the issues in dispute in the appeal.

[2] The Council sought the following order:

> "***Issues in dispute***
>
> 1. *The issues in dispute for this appeal are those stated in paragraph* (sic) *13 to 15 of the notice of appeal and paragraph 4 of City Legal's letter dated 9 May 2019 in exhibit "AOD-1" to* (sic) *affidavit of Anthony John O'Dwyer filed on 23 May 2019.*"

[3] The order sought by the Council defined the issues in dispute by reference to two documents, namely the appellant's notice of appeal, and correspondence dated 9 May 2019. It was the second of these documents that was the subject of controversy between the parties.

[4] The correspondence of 9 May 2019 was sent by City Legal to the appellant's solicitor after the notice of appeal was filed, but prior to the Court making any orders defining the issues in dispute. The purpose of the correspondence was to put the appellant on notice that the Council, in resisting the appeal, would rely upon additional provisions of City Plan 2014 that were not referred to in the reasons for refusal.

[5] The additional provisions of City Plan 2014 the Council seeks to rely upon fall into one of four categories. The category about which there was a dispute involved an alleged non-compliance with overall outcome 3(f) of the Wynnum-Manly neighbourhood plan code. The Council wishes to put this provision in issue, particularly that part which states:

> "*...Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.*"

[6] The appellant opposed the order sought by the Council, but on a limited basis only. It accepted the issues in dispute should be defined to include the letter of 9 May 2019, save for that part alleging non-compliance with overall outcome 3(f) set out above. It relied upon this Court's decision in *Waterman & Ors v Logan City Council & Anor* [2018] QPEC 44 (***Waterman***) to oppose the order.

[7] In reliance upon *Waterman*, it was submitted the Council required the leave of the Court to '*enlarge its issues*' as notified in the letter of 9 May 2019. Leave was opposed in relation to the alleged non-compliance with overall outcome 3(f) on three bases: (1) the Council had not proffered sufficient reasons to '*warrant the granting of leave*'; (2) overall outcome 3(f) was not applicable to the subject development; and (3) the grant of leave may have a prejudicial consequence for the appellant. The prejudice relied upon involved a requirement for the appellant to engage additional experts to deal with the need issue raised in overall outcome 3(f).

[8] Upon completion of the oral argument, I indicated to the parties that I would make an order defining the issues in dispute inclusive of the alleged non-compliance with overall outcome 3(f). I adjourned the appeal to allow the parties to agree on the terms of the orders. I made an order by consent on 28 June 2019 defining the issues in dispute. The issues defined by that order include the alleged non-compliance with overall outcome 3(f).

[9] Before adjourning the application to enable the parties to agree on the terms of the orders, both parties, particularly the Council, indicated they required reasons. My reasons for making an order to define the issues in dispute to include overall outcome 3(f) are as follows.

[10] By way of background, this is an appeal against the Council's decision to refuse a code assessable development application seeking approval for a Retirement facility (103 units) on land situated at Oceania Terrace, Lota. The decision notice for the development application is dated 3 April 2019. The appeal was filed on 9 April 2019. It was listed for mention before this Court on two occasions prior to 24 June 2019. Whilst orders were made about the proceeding at these earlier mentions, no orders had been made defining the issues in dispute.

[11] The order sought by the Council on 24 June 2019 defined the issues in the appeal by reference to, in the first instance, paragraphs 13 to 15 of the appellant's notice of appeal. There was no suggestion by the appellant that the issues should not be defined by reference to those paragraphs of its notice of appeal. It is to be noted that paragraphs 13 to 15 of the notice of appeal do not incorporate the Council's reasons for refusal stated in the decision notice dated 3 April 2019.

[12] Paragraph 12 of the appellant's notice of appeal joins issue with the Council's reasons for refusal. It alleges the reasons notified '*do not provide a sufficient basis for the refusal*'. The Council's reasons for refusal are set out at paragraph 11 of the appellant's notice of appeal. In summary terms, the reasons disclose the development application was refused because: (1) it conflicted with three codes in City Plan 2014, namely the Community facilities zone code, the Community facilities code and the Multiple dwelling code; (2) it conflicted with a draft code, namely the Retirement and residential care facility code; and (3) the development could not be conditioned to comply with all current assessment benchmarks. Central to the decision to refuse is a conclusion that the bulk, scale and form of the proposed development would be inconsistent with the character of the local area.

[13] An application for directions was filed by the appellant on 9 April 2019. The application was listed for hearing on 18 April 2019, but was adjourned on the papers by the ADR Registrar. It was adjourned to 10 May 2019. On 9 May 2019, the day before the review listed by the ADR Registrar, the Council notified the appellant, in writing, that it would resist the appeal in reliance upon five further provisions of City Plan 2014. The five provisions were not referred to in the Council's decision notice dated 3 April 2019.

[14] Paragraphs 4 to 7 inclusive of the City Legal letter dated 9 May 2019 state (footnotes omitted):

> *"4. With the benefit of the visual amenity expert's advice, Council's issues associated with the proposed development are that:*
>
> *(a) the bulk, scale and height of the proposed development are not consistent with or complementary to the built form, scale, character and streetscape of the surrounding area;*
>
> *(b) the bulk, scale and height of the proposed development are not consistent with the amenity of the surrounding area, and causes unacceptable amenity impact to the surrounding area;*
>
> *(c) the proposed development does not provide (or lacks) built form and building height transitions or sensitive design and articulation to appropriately manage the impact the proposed development has on the surrounding area;*
>
> *(d) low density development of 1 to 2 storeys is expected in the area and no community need and economic need has been demonstrated to support the proposed development.*
>
> *5. The issues outlined in paragraph 4(a) and (b) above are contemplated in Council's reasons for refusal dated 3 April 2019.*
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> *6. The issues outlined in paragraph (4)(c) and (d) above are additional issues, which were not raised in Council's reasons for refusal. These issues are raised in consequence of the proposed development being inconsistent with the built form, scale, character, streetscape and amenity and the community expectations intended for the surrounding area.*
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> *7. Further, upon review of Council's reasons for refusal, Council will not contend for a refusal of the proposed development by reference to PO8 of the draft Retirement and residential care facility code."*

[15] Paragraph 4(d) of the letter of 9 May 2019 was footnoted, which states:

> "*Non-compliance with* ***OO3(f) of Wynnum-Manly neighbourhood plan code***."

[16] At the hearing on 24 June 2019, the appellant did not oppose an order defining the disputed issues by reference to the matters stated in paragraphs 4(a) to 4(c) of the letter of 9 May 2019. It was conceded that the '*the tenor of those grounds were not novel, and reflected the substance of Council's reasons for refusal contained in the relevant decision notice*'. I agree with this concession.

[17] The appellant adopted a different position with respect to paragraph 4(d) of the letter of 9 May 2019. As I have said, it opposed any order that permitted the Council to rely upon paragraph 4(d) of the letter of 9 May 2019 on three bases, which are identified in paragraph [7] above. The three points were advanced on the assumption the Council required the Court's leave to resist the appeal in reliance upon the matters identified in paragraph 4 of the letter of 9 May 2019.

[18] The assumption on which the appellant's submissions were founded raised a threshold issue for consideration: Did the Council require leave to rely upon the matters identified in its letter of 9 May 2019?

[19] This question is answered in the negative. The Council did not require leave to rely upon any of the matters identified in its letter of 9 May 2019. This is so for the following reasons.

[20] First, it has been a long established practice of the Court to define the issues in dispute in a proceeding by way of an order. Ordinarily, this order is made at an early stage of a proceeding. The rationale for doing so is obvious enough. It is to ensure all parties to a proceeding know the case they are to meet at trial, and to avoid ambush and surprise. Where disputed issues have been defined by an order of the Court, a party may only vary or augment those issues where permitted to do so by a further order of the Court.

[21] At the time of the hearing on 24 June 2019, no order had been made by the Court defining the issues in dispute. The issues were not formally defined. There could, in those circumstances, be no application to '*enlarge*' the issues in dispute. The appellant's submissions wrongly characterised the Council's position as one seeking to '*enlarge*' the issues.

[22] Second, the matters raised in paragraph 4 of the letter of 9 May 2019 were not new matters raised for determination in the appeal. Each of the matters identified in paragraph 4 of the letter had already been raised by the appellant's notice of appeal.

[23] The Council's draft order proposed that the issues in dispute be defined as including paragraphs 13 to 15 of the appellant's notice of appeal. This was not opposed by the appellant. Paragraph 14 of the notice of appeal, which was filed on 9 April 2019, states:

> *"14. The Development Application ought to be approved because the proposed development* ***complies with all of the assessment benchmarks for the development****. Alternatively, the Development Application ought to be approved even if the proposed development does not comply with some of the assessment benchmarks."* (emphasis added)

[24] Paragraph 14 of the notice of appeal positively asserts that the proposed development complies with '*all of the assessment benchmarks for the development*'. The matters raised in paragraph 4 of the letter of 9 May 2019 are responsive to this assertion. Each of the matters raised in the letter go to the issue of compliance with an assessment benchmark for the development. Paragraph 4(d) is no exception. It was common ground that overall outcome 3(f) is an assessment benchmark against which the application must be assessed. The notice of appeal positively asserts the development complies with this provision of the planning scheme. The appellant bears the onus of proving compliance with overall outcome 3(f).

[25] This point was reinforced by an oral submission made by Mr Wylie who appeared for the appellant. He confirmed during the course of oral argument that the appellant would be advancing a need case in favour of approval. This, in my view, is consistent with the first sentence of paragraph 14 of the notice of appeal, which asserts compliance with overall outcome 3(f). It is also consistent with the second sentence of the same paragraph of the notice of appeal, which advances an alternative case for approval where non-compliance with the planning scheme is established. In circumstances where the appellant's notice of appeal foreshadows that it will run a '*compliant development case*', and, in the alternative, '*a need case*', both of which involve proving a town planning and community need, it is difficult to accept that the Council's reliance upon overall outcome 3(f) raises a new or novel issue for determination.

[26] Third, the appellant's submissions were advanced on the basis that this Court's decision in *Waterman* was applicable to this case. It was said that this decision required the Council to provide an adequate explanation for its intention to enlarge the issues beyond those contained in its reasons for refusal. In support of this proposition, particular reference was made to paragraph [56] of *Waterman* where her Honour Judge Kefford said:

> "*In those circumstances, and having regard to the purpose of the Planning Act 2016, this court should be slow to give its imprimatur to a local authority expanding the issues to be determined in an appeal in the absence of an adequate explanation for the change in its position as notified in the decision notice…*"

[27] Caution needs to be brought to bear in the application of what was said by her Honour Judge Kefford at paragraph [56] of *Waterman*. It should not be considered in isolation. Rather, it needs to be considered against the background of the particular circumstances of that matter, which are quite different to the present case. The factual differences are such that paragraph [56] of *Waterman* has no application to the present case. There are two key factual differences.

[28] In the first instance, *Waterman* involved an application by a respondent local government to vary existing orders that defined the issues in dispute. There were no such orders in this proceeding at the time of oral argument. This point of difference puts *Waterman* into a different category to the subject proceeding and explains, in part, the importance her Honour attached in paragraph [56] to the need for the local authority to provide an '*adequate explanation*'.

[29] The importance her Honour attached to the need for an '*adequate explanation*' is also explained by reference to the second point of distinction between this case and *Waterman*. The reasons for judgment in *Waterman* disclose that the purpose of the application was to vary earlier orders of the Court to permit the Council to rely upon a new document reflecting a change in attitude to the development application. The Council's original decision approved the application subject to conditions. The new document signalled that the Council no longer supported approval and wished to contend for a refusal. This context gives particular meaning to the phrase '*change in position*' in paragraph [56] of *Waterman*. It conveys a change to the decision, not a change to the reasons for refusal. The need for an explanation in such circumstances, as observed by her Honour, is hardly surprising. Relevantly, circumstances of this kind do not apply to the present case.

[30] Fourth, the appellant's submissions about the requirement for the Council to obtain leave to enlarge its issues, and to provide a sufficient explanation for doing so, sit uncomfortably with the legislative regime for appeals to this Court, and long-established authority.

[31] With respect to the legislative regime, I was not directed to any provision of the *Planning Act 2016* (**PA**) or the *Planning and Environment Court Act 2016* (**PECA**) that would require the Council to obtain leave to resist the appeal for reasons other than those articulated in its decision notice. It is unlikely that a provision of this character exists given the right of appeal conferred by the PA, and the nature of the appeal.

[32] The appeal right conferred by s.230 of the PA, as was exercised by the appellant here, is an appeal against a '*decision*', namely a refusal. That appeal right is not against the '*reasons*' for refusal. The decision, and the reasons for it, are separate and distinct under the PA. The distinction is clear having regard to ss.60(2) and (3) of the PA, contrasted with s.63(5)(d) of the PA. The distinction is maintained in s.47(1) of PECA. This provision provides the Court's power in deciding the appeal, which may involving setting aside '*the decision*'. This point of difference (between a decision and the reasons for it) is one indicator the Council was not required to seek leave to contend for a refusal of the application, for the reasons set out in the letter of 9 May 2019.

[33] As to the nature of the appeal, s.43 of PECA provides that an appeal is by way of a hearing anew. In a hearing of this nature, the court hears the matter afresh on fresh material, and may overturn the decision appealed against regardless of error[1]. In this context, an assessment manager is not bound by, or limited to its reasons for refusal. It is a fresh hearing, on fresh material where the correctness or otherwise of the original decision does not determine the outcome of the appeal. This is but a further indicator the Council was not required to seek leave to contend for a refusal of the application, for the reasons set out in the letter of 9 May 2019.

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1 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573, 597 [57].

[34] As I have said, the appellant's submissions also sit uncomfortably with long-standing authority. The authorities confirm that an assessment manager is not restricted to its reasons for refusal, and may raise such other relevant matters in an appeal against its decision. The authorities do not suggest this may only occur with the leave of the Court, and when an adequate explanation is given for raising a further relevant matter that did not appear in a decision notice. As long ago as 1966, Judge Byth in *Chalk & Anor v Brisbane City Council* [1966] 13 LGRA 228 (***Chalk***) said at 230:

> *"In my opinion the issues on the hearing of an appeal are not necessarily restricted to the reasons stated by the council pursuant to s.21(1)(a) for its refusal of the application. This view is reinforced to some extent by consideration of s. 21(3), which provides for an appeal when there has been no decision by the council (and consequently no reasons for refusal have been stated)... The appellants' onus, on appeal, is not merely to show that the council's stated reasons for refusal are wrong, but to show affirmatively that the zoning of the land should be changed or that the circumstances are such that the council should be ordered to make application for such change of zoning."*

[35] *Chalk* was applied by the Full Court in *Walker v Noosa Shire Council* [1983] 2 Qd R 86 (***Walker***). At 88, Thomas J (with whom Campbell and McPherson JJ agreed) said:

> *"The Council succeeded in the Local Government Court on a ground that had not been mentioned in its initial refusal. That however did not preclude the Council from raising such other matters at the hearing, provided that such matters were relevant considerations to uphold the decision appealed form (sic). That is the ordinary rule in appeals, and is applicable to an appeal to the Local Government Court.*
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> *Such an approach has been taken in the Local Government Court since its inception (see Chalk v B.C.C. (1966) 13 L.G.R.A. 228, at p. 230 ... The real issue on such an appeal is "whether the application should be approved or disapproved, not whether the Council's decision was correct or not". ...Such a conclusion is strengthened by the fact that the jurisdiction includes appeals from deemed refusals where, of course, no grounds have been given."*

[36] The decisions in *Chalk* and *Walker* pre-date: (1) the Court's practice of defining the issues in dispute by an order; and (2) the express recognition the legislature has given to the implied undertaking each party gives to each other, and the Court, under s.10(2) of PECA. This does not, in my view, mean the principle stated at p.88 of *Walker* no longer has application, or is distinguishable. Rather, the Court's practice, and the implied undertaking, have in mind that the '*other matters*' to be raised are identified as early as is practicable to facilitate the just and expeditious disposition of the proceeding.

[37] The above authorities were referred to, and applied in *LMRM v Brisbane City Council* [2017] QPEC 7 (***LMRM***). In that decision, his Honour Judge Rackemann confirmed that a Council may, in responding to an applicant appeal which proceeds by way of a hearing anew, contend for '*the same conclusion, but for different reasons*'[2]. I agree. His Honour also confirmed that a Council who seeks an order to include additional reasons for refusal in its response to an applicant appeal need not explain why those issues were not part of the original reasons for refusal[3]. I agree, subject to one qualification. This statement in my view applies where the Court has not previously made an order defining the issues in dispute. Where such an order has been made, different considerations will apply[4]. The considerations applicable may include considerations of the kind identified by her Honour Judge Kefford in *Waterman* at paragraph [57].

[38] If contrary to the above, leave was required for the Council to rely upon the matters raised in subparagraph 4(d) of the letter of 9 May 2019, I would have granted that leave in any event.

[39] Contrary to the submissions made on behalf of the appellant, I am satisfied the explanation given by the Council for raising the matters in paragraph 4 of the letter of 9 May 2019 is adequate. The explanation is a simple one. It is contained in an affidavit of Mr Grice, a senior urban planner employed by the Council in its appeal section of development services.

[40] The affidavit reveals that Mr Grice was allocated the appeal after it was commenced. He reviewed the Council's file. He also reviewed the appellant's notice of appeal. Based on that review, Mr Grice formed the opinion there were numerous provisions of City Plan 2014 that had not been included in the reasons for refusal, but were relevant to the assessment of the application, one of which was overall outcome 3(f). In support of this, he sought independent advice from consultants external to the Council. The consultants that were consulted included a visual amenity expert and an economist. The advice received from these experts supported Mr Grice's view that the reasons for refusal need to be supplemented.

[41] The explanation given by Mr Grice is consistent with a local authority keeping its position in an appeal under review. The review occurred at an early stage of the proceeding before any substantive steps had been taken. This is to be encouraged. It is consistent with the Council's implied undertaking to ensure the appeal proceeds in an expeditious way, as is required by s.10(2) of the PECA. It is also consistent with the observations made by his Honour Judge Rackemann at paragraph [12] of *LMRM*.

[42] It was also submitted on behalf of the appellant that overall outcome 3(f) is not applicable to the determination of the appeal. During oral submissions, Mr Wylie confirmed this was intended to convey that overall outcome 3(f) was irrelevant to the development application.

[43] I reject this submission.

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2 At paragraph [12] of the reasons.

3 At paragraph [18] of the reasons.

4 For example in the recent decision of *Goldicott House Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 25.

[44] The overall outcome is relevant to the appeal by reason that it forms part of an assessment benchmark against which the appellant's development application must be assessed[5]. Paragraph 14 of the notice of appeal puts the question of compliance with this provision of City Plan 2014 in issue. These two matters, in combination, make the provision relevant to the appeal. The proper interpretation of the provision, and the application of the facts to it, is a matter for the trial judge.

[45] Finally, I am satisfied the appellant would not suffer prejudice of any consequence if leave was granted. By paragraph 14 of its notice of appeal, the appellant put overall outcome 3(f) in issue. It bears the onus of proving that it is a provision with which its development application complies. Granting the Council leave to advance a contrary position does not require the appellant to do anything other than prove a matter that it has already put in issue. In this light, the issue will not require the appellant to advance evidence that was not otherwise required for it to discharge the onus.

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5 s.45(2)(a) of the PA.