PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Burnett Street Nominees Pty Ltd v Sunshine Coast Regional Council* [2019] QPEC 35
PARTIES:	**BURNETT STREET NOMINEES PTY LTD A.C.N. 114 814 630 as trustee for THE CHURCH STREET TRUST** (applicant) **SUNSHINE COAST REGIONAL COUNCIL** (respondent)
FILE NO/S:	D 66 of 2019
DIVISION:	Planning and Environment
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court at Maroochydore
DELIVERED ON:	14 August 2019
DELIVERED AT:	Maroochydore
HEARING DATES:	21 June 2019 and 19 July 2019
JUDGE:	Long SC DCJ
ORDER:	**Application refused.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – APPLICATION – Where the applicant seeks an order pursuant to s 78 *Planning Act* 2016 to change a development approval by allowing the development to be in stages – Whether the proposed change is a "minor change" – Whether the proposed change would not result in a substantially different development
LEGISLATION:	*Planning Act* 2016, ss 68, 78(1), 78A, 80, 81(2), 85, 86 *Planning Regulation* 2017, s 44 *Planning and Environment Court Act* 2016, s 46(3) *Sustainable Planning Act* 2009, ss 350, 369
CASES:	*Highgate Developments Pty Ltd v Sunshine Coast Regional Council* [2017] QPELR 841 *ISPT Pty Ltd as Trustee v Brisbane City Council & Ors* [2011] QPEC 31 *Jimboomba Lakes Pty Ltd v Logan City Council & Anor* [2015] QPEC 52

COUNSEL:	K. W. Wylie for the applicant
	M. S. Birks (solicitor) for the respondent
SOLICITORS:	Andrew Fogg Solicitors for the applicant
	Sunshine Coast Regional Council Legal Services for the respondent

The Application

[1] By originating application filed 16 May 2019, the applicant seeks to make changes to a development approval granted by order of this Court on 19 September 2014, as changed by further order of this Court on 16 December 2016.

[2] More expansively, the history of the prior approvals is as follows:

(a) On 9 October 2013, the applicant lodged with the respondent council a development application for development permits for material changes in use for shopping complex and multiple dwelling units (20 units) ("Development Application"), in respect of land situated at 4-6 Church Street; 14, 20 and 22 Main Street; and 5, 5A and 7 Hill Street, Palmwoods;[1]

(b) The application was subject to impact assessment and two properly made submissions were made, including one by Bayblue Management Pty Ltd;[2]

(c) On 27 December 2013, the respondent decided to approve the Development Application and gave a development approval for development permits for material changes in use for shopping complex and multiple dwelling units (20 units) ("Council Approval");[3]

(d) On 4 February 2014, Bayblue Management Pty Ltd appealed the respondent's decision to give the Council Approval to the Planning and Environment Court and, following a compromise of the proceeding, on 19 September 2014, this Court allowed the appeal and substituted for the Council Approval, a further approval ("Court Approval");[4]

1 Affidavit of JL Brownsworth filed 18/7/19 at [4].
2 Ibid at [5]-[6].
3 Ibid at [8].
4 Ibid at [9]-[10].

(e) On 25 November 2016, the applicant applied to the Planning and Environment Court, pursuant to s 369 of the *Sustainable Planning Act* 2009, to make a permissible change to the Court Approval and, on 16 December 2016, the Planning and Environment Court approved the application and issued a changed development approval;[5] and

(f) On 3 August 2018, the applicant applied to the respondent, pursuant to s 86 of the *Planning Act* 2016 ("*Planning Act*") to extend the currency period of the changed development approval and, on 22 October 2018, the respondent approved the application and extended the currency period to 21 September 2020.[6]

[3] This application is made pursuant to s 78(1) of the *Planning Act* and it may be noted has the support of the respondent. That support remains consistent with the pre-request response notice response provided by the respondent, by correspondence dated 16 April 2019.[7] However, it is necessary to note that this response is allowed and was provided because the respondent is an "affected entity"[8] and because s 80(2) of the *Planning Act* allows such an affected entity to give such a notice stating whether the affected entity "objects to the change" and "the reasons for any objection".

[4] Because the application is made on the basis of seeking a "minor change" to the approval previously given and changed by this Court and there were properly made submissions to the Development Application, this Court is the "responsible entity" for the purpose of assessing and deciding the application.[9]

[5] As to the matters prescribed by the *Planning Act* in order to engage that jurisdiction of this Court, it may be noted that:

(a) The applicant is the owner of all parcels of land with the exception of Lot 21 on RP178340 and the owner of that parcel of land has provided written consent;[10]

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5 Ibid at [12]-[14].
6 Ibid at [16]-[17].
7 Ex. JLB-3 to the affidavit of JL Brownsworth, filed 16/5/19, at pp 28-53.
8 Pursuant to s 80(1)(c) of the *Planning Act.*
9 *Planning Act*, s 78A(2).
10 Affidavit of AC Fogg filed 19/7/19; *Planning Act*, s 79(1A).

(b) The applicant has served the application on all "affected entities", being the original assessment manager (the respondent) and the original referral agencies;[11]

(c) Prior to the commencement of this proceeding, request for a "*pre-request response notice*" was served upon the respondent council[12] and, on 16 April 2019, the respondent gave the applicant a pre-request response notice in support of the proposed application;[13] and

(d) In circumstances where the original referral agency (being the Chief Executive administering the *Sustainable Planning Act* 2009 due to "public passenger transport and railways triggers")[14] has not filed in the Planning and Environment Court a "response notice" within 15 business days after service of the application, s 80(5) of the *Planning Act* provides that this Court must decide the application as if the referral agency had no objection to the change.

[6] In order to assess and decide this application, this Court must be satisfied that what is proposed is "for a minor change to a development approval".[15] Schedule 2 of the *Planning Act* provides the following definition:

> "***minor change*** means a change that—
> …
>
> (b) for a development approval—
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> (i) would not result in a substantially different development; and
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> (ii) if a development application for the development, including the change, were made when the change application is made would not cause—
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> (A) the inclusion of prohibited development in the application;
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> (B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application; or
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> (C) referral to extra referral agencies, other than to the chief executive; or
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> (D) a referral agency to assess the application against, or have regard to, matters prescribed by

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11 Affidavit of JL Brownsworth filed 18/7/19 at [5(b)]; Affidavit of AC Fogg filed 18/7/19 at [4]-[5]; *Planning Act*, s 80(2)(c).

12 Affidavit of JL Brownsworth filed 16/5/19 at [7]; *Planning Act*, s 80(3).

13 Affidavit of JL Brownsworth filed 16/5/19 at [8] and Ex. JLB-3.

14 Affidavit of JL Brownsworth filed 18/7/19 at [5(b)].

15 *Planning Act*, s 78A(2)(a).

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."

[7] Having regard to the evidence before the Court and the common position of the parties in this respect, it may be accepted that none of the criteria set out in sub-paragraph (ii) of that definition are engaged, so as to preclude this from being an application for a minor change to a development approval. However the position is not so straightforward in respect of the potential application of sub-paragraph (i) of that definition.

[8] This is because the motivation or impetus for this application is explained in the affidavit of the applicant's town planner, in the following terms:

"[3] Subsequent to the Judgment made on 16 December 2016, the Applicant has raised proposals with the Respondent for one further and minor amendment to the Development Approval conditions in order to better facilitate the proposed development of the land.

…

[6] As the Applicant's planning consultant, I have engaged with the Respondent to consider the prospect of the development being staged, so that the shopping centre construction can commence as the first stage of the development with the unit development as the second stage. The advantages of this proposal are:

(a) the Applicant will have the ability to commence construction of the shopping centre within the foreseeable future;

(b) the growing Palmwoods catchment area will enjoy the benefits of a major shopping centre facility being delivered to a more advanced timetable;

(c) that part of the land to be dedicated to the unit development will be promoted by the undertaking of landscaping works; and

(d) the commencement of the shopping centre construction is likely to generate interest in the proposed units and act as the catalyst for the commencement of the unit development.

…

[12] Due to difficulties experienced by the Applicant in securing contracts for the sale of the proposed residential units, development of the land is not able to commence. In order that the Applicant can deliver to the Palmwoods community the

much needed approved commercial and residential facilities, it is considered essential that the Applicant be permitted the flexibility to stage the development by commencing construction of the shopping centre in advance of the units."[16]

[9] Further, it is necessary to note that the support of the respondent comes with two caveats:

(a) That, as the applicant is prepared to accept, the following conditions are to be added to the approval:

"**Development Staging**

2A The development may be staged in accordance with the stage boundaries shown on the Approved Plans. If staged, the development need not be completed sequentially in the stage order indicated on the Approved Plans provided that:

(a) Any road access and infrastructure services required to service the particular stage are constructed with that stage. In particular, the repurposing and refurbishment of the existing heritage dwelling (Station Masters Residence) on the corner of the Hill and Main Street, undergrounding of power, all external road work upgrades and all frontage works requirements (including on street parking) must occur with the first stage of the development.

(b) All necessary services must be installed as part of Stage 1 to service Stage 2 (i.e. power, stormwater, water and sewer). This must be demonstrated as part of subsequent operational works applications.

(c) Stage 1 must be constructed with all foundations and other necessary infrastructure to support and service the future residential development including weight bearing foundations and structural supports and service corridors.

(d) Register one or more easements as necessary for services and access, providing for all services and conduits required to service Stage 2 residential development in favour of the residential allotment or created as common property.

Sunset Date for Completion of Approved Development

2B Pursuant to s342 of the *Sustainable Planning Act 2009*, the uncompleted aspects of this development approval lapse if the whole of the approved use has not happened within 4 years of commencement of the approved use.

Treatment of Temporarily Vacant Land

2C Where some or all of the land remains vacant or undeveloped for more than three (3) months the following works must to be [sic] carried out:

[16] Affidavit of JL Brownsworth, filed 16/5/19.

(a) the site must be cleared of all rubble, debris and demolition materials
(b) the site must be graded to prevent ponding (to the same level as the adjoining footpath wherever practicable), turfed and mown at a minimum three (3) weekly intervals
(c) the Stage 2 sites must be landscaped with perimeter planting consisting of advanced specimens of fast growing tree species which will provide maximum screening of the shopping centre walls. Details of the landscape buffering must be provided with the operational works (landscape) application
(d) the site must be maintained to ensure no nuisance to adjacent premises, roads or footpaths
(e) where fencing is installed to secure boundaries:
    (i) the fencing must be durable and not capable of being pushed or blown over
    (ii) the fencing type must not detract from local amenity and must be a minimum 50% transparent (barbed wire is not acceptable)
    (iii) vandalism must be promptly repaired and any graffiti removed.

2D As part of Stage 1, the shopping centre walls fronting Main Street and Hill Street must be architecturally treated by way of materials, colours and finishes. Details of these wall treatments must be submitted with the future operational works (landscaping) application for council approval."[17]; and

(b) That it is ultimately for this Court to be satisfied that the proposal is for a minor change to a development approval.

[10] Whilst the applicant accepts that it could be said that the proposal to stage the development may introduce the potential for delivery of only a part of the development, it is submitted that this is not a relevant factor. It is contended that of potential relevance is Schedule 1 of the Development Assessment Rules, which identifies matters that may be relevant to determining whether a change could be said to result in a substantially different development, and which describes at s 4(d) a change that may "*change the ability of the proposed development to operate as intended*". It is further submitted that:

> "…the criterion identifies consideration of whether the development will change from what is intended, and in this instance the *intention* of the development is to deliver both stages of the approved development form".

[17] Ibid at Ex. JLB-3, pp 29-30.

And it is contended that:

> "… the finding that staging, of itself, may not comprise a minor change is not novel, and division of development into stages was made without controversy recently in *Highgate Developments Pty Ltd v Sunshine Coast Regional Council* [2017] QPELR 841."

[11] Reliance is also placed on the further evidence of a town planner, Mr Brownsworth, who expresses the following opinion:[18]

> "Further to the above opinion, and in particular as to whether the proposed change could be said to comprise a substantially different development, my opinion is that the Proposed Staging would not meet that threshold, because:
>
> (a) The proposed development would still permit and promote the delivery of the entirety of the development, albeit in a staged form;
> (b) The risk of partial development upon completion of one stage only would be low, because:
> (i) Staging the development will permit capital to accrue to the developer, so as to permit it to fund the residual development. For this reason, it is my opinion that the risk of partial development was higher without the Proposed Staging;
> (ii) Proposed condition 2A requires "front-loading" of all infrastructure and easement delivery works associated with both stages of development to be completed as a part of the first stage, which minimises the financial risk of the subsequent stage being delivered as the capital required to undertake those works would otherwise be 'wasted' if the residual stage were not to be completed; and
> (iii) Proposed condition 2B, being a completion condition, provides a compelling motivating force to the developer to complete the second stage within a *reasonable time period;*
> (c) The staging of development of this type in this manner is orthodox and commonplace; and
> (d) Proposed conditions 2C and 2D require on-site ameliorative works to be undertaken to reduce any adverse amenity impacts that would arise upon the staging of the proposed development."

[12] And, it may be further noted, also on the following further expression of opinion by the same witness, in respect of the assessment which the Court would undertake pursuant to s 81(2) of the *Planning Act*:[19]

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18 Affidavit of JL Brownsworth filed 18/7/19 at [20].
19 Ibid at [21].

"Having regard to the matters that this Honourable Court must consider pursuant to s.81(2) of the Planning Act when assessing and deciding this application:

(a) As to s.81(2)(b), the Submissions, being either supportive of the development, or concerned only with acoustic impacts that were resolved as a consequence of the Court Approval, would not tend against the approval of this application;
(b) As to s.81(2)(c), the Respondent, in its pre-request response notice attached at Exhibit JLB-3 to my Previous Affidavit, supports the approval of this application;
(c) As to s 81(2)(da), given there are no changes to the nature or form of the proposed development, in my opinion there is nothing of significance that would tend against approval of this application. However, for completeness, I note that:
    i) The original Application required assessment against the Maroochy Plan 2000, under which the Land was included in the Palmwoods Planning Area and, within that area, in part in the Palmwoods Village Centre Precinct and in part in the Palmwoods Village Residential Precinct. In this context, both the Respondent (in giving the Council Approval), and this Honourable Court (in giving the Court Approval) found the proposed development to be ultimately appropriate for this locality; and
    ii) Since the giving of the Council Approval, the Maroochy Plan 2000 has been replaced by the Sunshine Coast Planning Scheme 2014. Under that scheme, the Land falls entirely within the Local centre zone code area and, within the Local centre zone code. Uses promoted in that zone under that scheme comprise local activity centres, in addition to a limited range of complementary multiunit residential dwelling premises in a mixed-use format. In my opinion, the development the subject of this application is consistent with the planning intentions sought to be achieved in the current planning scheme; and
(d) As to s.81(2)(e), other matters that would support approval of the application comprise the fact that, absent the Proposed Change being approved, there is a risk that the approved development may not be delivered, which would result in:
    i) Prejudice to the Applicant, as the expenses incurred in obtaining and maintaining the development would be wasted; and
    ii) Prejudice to the community, through the failure to delivery [sic] centre-type development desired in this location by the current planning scheme, and associated and complementary residential development."

[13] Subsequently to the resumed hearing of the application on 19 July 2019, and with the consent of the respondent, the applicant was granted leave to read and file further written submissions. The effect of those further submissions was to engage with and clarify the applicant's position in respect of issues which had been the subject of oral submissions on 19 July 2019:

(a) First and in seeking to address:

> "the proper application of the test considering whether a change '*would not result in a substantially different development*' to a change that introduces staging, but does not otherwise propose any change to the development form";[20]

reference is made to the following definition of "Development", in Schedule 2 to the *Planning Act*:

> "***development*** *means—*
> *(a) carrying out—*
> *(i) building work; or*
> *(ii) plumbing or drainage work; or*
> *(iii) operational work; or*
> *(b) reconfiguring a lot; or*
> *(c) making a material change of use of the premises.*"

And it is submitted that:

> "…. the proper application of the relevant provision requires consideration of changes to the proposed <u>form</u> of the approved development, rather than the hypothetical (and potential) manner of its delivery. In those circumstances, where the nature and form of the approved development remains entirely unchanged, this provision is satisfied."[21]

And it is further submitted that such an approach is consistent with the reasoning in *ISPT Pty Ltd as Trustee v Brisbane City Council & Ors*,[22] and that "[s]taging development as part of a permissible change was similarly considered … in *Jimboomba Lakes Pty Ltd v Logan City Council & Anor*".[23]

(b) Alternatively and after contending that the use of the word "would" in the test "introduces a requirement for certainty of the change before non-satisfaction may be determined"[24], it is then submitted that:

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20 Written supplementary submissions for the applicant dated 24/7/19 at [1].
21 Ibid at [3].
22 [2011] QPEC 31.
23 [2015] QPEC 52.
24 Written supplementary outline of argument for the applicant dated 24/7/19 at [6].

> "…. in determining whether the proposition is satisfied, a finding that it is "more likely than not" that the change would result in a substantially different development is insufficient to satisfy this criterion—more certainty is needed";[25]

and that:

> "…. when considering the risk of development of one stage of the development being constructed and not another, this Court could not prognosticate with any level of certainty that this would occur, such that the provision cannot be said to be offended."[26]

(c) Finally, it is submitted that:

> "….the uncontested evidence of Mr Brownsworth that the proposed change, enabling commencement of the shopping complex use, would have the effect of catalysing development of the complementary multiple dwelling uses, and that the risk of partial development of the site is low, would satisfy the Court that, more likely than not, there would be no change to the practical delivery of the approved development were the proposed change allowed. In this context, it is relevant that proposed condition 2A requires all undergrounding of power, external road upgrades, frontage works (including on-street parking), and all on-site power, stormwater, water, sewer, foundations and infrastructure works for both stages of development to be undertaken as a part of whichever stage of development is commenced first."[27]

Discussion

[14] In the first instance and with the benefit of the material filed after the matter came before the Court on 21 June 2019 and some apparent deficiencies in the material were identified, in addition to the need to specifically address the issue as to whether the proposed changes to the approval "would not result in substantially different development", it may be noted that the deficiencies in the materials have been addressed. That has been by the filing of a further affidavit of the solicitor for the applicant, which particularly addressed issues related to the bringing and service of the application and the consent of an owner of a lot in the parcel of land to which the development approval relates, other than the applicant. It is to be noted, however, that the only additional evidence provided in respect of the more substantive issue was the further affidavit of the applicant's town planner,

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25 Ibid at [7].
26 Ibid at [8].
27 Ibid at [9].

Mr Brownsworth, with the result being that the only relevant evidence before the Court in respect of that issue, is that contained in his affidavits and as has been particularly noted above.[28]

[15] The determination of that remaining question is clearly one for this Court. And that is so, even if a conclusion in favour of an applicant is supported by any respondent and as may be expected, the evidence of a town planner. So much was expressly noted as a caveat to the respondent's support of the application, in submissions to the Court. It involves, unlike the more discrete questions that might arise, essentially as questions of law, pursuant to sub-paragraph (b)(ii) of the definition of "minor change", an exercise of judgement, having regard to the factual circumstances of each such application. And it may be further noted that it is the applicant's desire to have the Court make this necessary finding, so as to allow the assessment of the change application which is permitted by s 81 and as distinct from the different assessment process of a change application that may otherwise be engaged pursuant to s 82 and for assessment by the respondent. This is because s 78A(2)(a) of the *Planning Act* provides that one of the criteria necessary to make this court the "responsible entity" and therefore with jurisdiction to act under s 81 of that Act, is that: "the change application is for a minor change to a development approval".

[16] Accordingly, a determination as to whether or not the proposed changes to this development approval would not result in substantially different development is critical to the outcome of this application. And, obviously, the onus rests upon the applicant as to the establishment of reasonable satisfaction in the Court as to a favourable conclusion. Here, that may be appropriately described as simply requiring satisfaction upon the mere balance of probabilities.[29]

[17] In considering that question, it is to be noted that as the parties acknowledged, an effect of the evidence here is to raise a prospect or risk that as a consequence of approval of the proposed changes, only the first stage of the presently approved and integrated development may be completed within the currency of the approval. And it is necessary to note that absent any successful application for extension of that currency period, the

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28 See paras [8] and [11], above.

29 See *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-362.

effect of s 85 of the *Planning Act* is that the approval would lapse in respect of permitting any uncompleted aspect of the development.

[18] It is necessary to note that the prospect or risk that the approved development will not be completed arises not merely from the fact that the change application is to allow staging of the approved development. And neither is it necessarily a concern, in itself, that the changes sought involve what may be accepted to be a not uncommon feature of approved developments, in merely allowing staging. Rather, the concern is because such a prospect arises as such a distinct one, from the circumstances of the application made in this case, including the expressed reason for making it and the proposed changes to the development approval conditions, to be included in any changed development approval.

[19] Accordingly and except to the extent that they may relate to the identification or elucidation of matters of principle, there is not likely to be much to be gained by simple reference to the outcomes of other decided cases. Axiomatically each will necessarily relate to the particular circumstances of the individual case. More particularly, in relation to those cases to which reference has been made:

(a) It must be noted that the original reference to *Highgate Developments Pty Ltd v Sunshine Coast Regional Council*,[30] is a prime example. In that case there was the allowance of an application for "permissible changes",[31] to a development approval, which already provided for staging of the approved development. Although the proposal was for the third stage of the approved development to be further divided into stages 3A and 3B, the primary impact of the proposed changes were noted to have been to effect change to the layout or configuration of the approved subdivision and to realign an access road, so as to respond to the natural topography of the site and to facilitate the completion of the third and final stage of the subdivision. There was nothing in what was proposed that gave rise to any sense of prospect or risk that the approved development, as changed, might not be completed, or more particularly, as to any result being a substantially different development;

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30 [2017] QPELR 841.

31 As the question arose under s 369 of the *Sustainable Planning Act* 2009, but, it may be noted, in reference to a definition which similarly included a requirement that the proposed changes "would not… result in a substantially different development".

(b) Similarly and in respect of *ISPT Pty Ltd as Trustee v Brisbane City Council & Ors*,[32] it is apparent that no such prospect or risk was seen to arise upon the material. And it is to be noted that there were findings expressly made that the proposed changes represented "improvements" to a very substantial and approved development and that "the change to the approval would not result in substantially different development". Although particular attention is drawn to the expressed conclusion: "the staging will not change the proposal in any way," that is clearly expressed broadly and not in any identified context of any issue having arisen, such as arise in the present case; and

(c) As noted in *Jimboomba Lakes Pty Ltd v Logan City Council*,[33] that decision was in respect of an application in a pending proceeding and in respect of what was contended as a "minor change" to a development application and therefore the consideration of the definition of "minor change" in s 350 of the *Sustainable Planning Act* 2009. It may be noted in the context of the ultimate refusal of the application the following is included in the reasons:

> "The appellant also proposes staging the proposed development and this of itself appears uncontentious. However the staging plan contemplates the emergency access referred to above and in these circumstances it is not an entirely discrete issue."[34]

[20] In the *Jimboomba Lakes* decision, it was ultimately a finding as to the significance of the proposed inclusion of an emergency access, which prevented the conclusion that it was a minor change that was proposed, with the positive finding being that "the proposed emergency access will result in a substantially different development". To the extent that this case, in particular, is relied upon to support the applicant's submission that what is required is consideration of changes to the proposed form of the approved development rather than the hypothetical (and potential) manner of its delivery, it is necessary to first understand the test that was the subject of the decision was found in the definition of "minor change" in s 350 of the *Sustainable Planning Act* 2009 and in respect of proposed change to the application which was the subject of appeal to the

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32 [2011] QPEC 31.
33 [2015] QPEC 52.
34 Ibid at [9].

Court. And this required attention to the test that the change "does not result in a substantially different development". This was because of the statutory restriction that the court "must not consider a change to the application on which the decision being appealed was made unless the change is only a minor change". It may be noted that:

(a) similar provisions are now, respectively, reflected in sub-paragraph (a)(i) of the definition of "minor change" in the *Planning Act* and s 46(3) of the *Planning and Environment Court Act* 2016; and

(b) the expression of that test in the present tense, by way of the words "does not", is particularly apt to make the test applicable to the effect of the proposed changes to the extant and disputed application.

[21] However, neither that test nor the more prospective formulation in respect of proposed change to a development approval, lend themselves to the restrictive approach contended by the applicant. In none of the cases to which reference is made is it evident that the consideration of the proposed change did not extend beyond the proposed form of the changed development and to the practical effect of what would be expected to be developed pursuant to the proposal.

[22] Neither is there support for such a restrictive approach when regard is had to the legislative definition of "development",[35] nor the guidelines provided in s 4 of Schedule 1 of the Development Assessment Rules:[36]

> "4. A change may be considered to result in a substantially different development if the proposed change:
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> (a) involves a new use; or
> (b) results in the application applying to a new parcel of land; or
> (c) dramatically changes the built form in terms of scale, bulk and appearance; or
> (d) changes the ability of the proposed development to operate as intended; or
> (e) removes a component that is integral to the operation of the development; or
> (f) significantly impacts on traffic flow and the transport network, such as increasing traffic to the site; or
> (g) introduces new impacts or increase the severity of known impacts; or

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35 See para [13], above.

36 As made pursuant to s 68(2)(e) of the *Planning Act* and published pursuant to s 44 of the *Planning Regulation 2017*.

(h) removes an incentive or offset component that would have balanced a negative impact of the development; or
(i) impacts on infrastructure provisions."

In particular, it may be noted that there is reference to "built form" in (c), in (d) there is focus on the "ability…to operate as intended", with the footnoted example that: "…. reducing the size of a retail complex may reduce the capacity of the complex to service the intended catchment". And in (f) and (g), there is reference to impacts of the development, extending beyond the mere form of the proposed development.

[23] A problem if the applicant's submission were accepted, is that it may mean that the issue as to the prospect that only part of the proposed development might then eventuate, would remain relevant to the assessment process pursuant to s 81(2)(e) if not (da). However, the more immediate difficulty is that in couching the alternative proposition in terms of "the hypothetical (and potential) manner of its delivery" there is the tendency to avoid rather than engage with the issue. In this instance the concern is not with the manner in which the development will be delivered but whether all of the approved development would be delivered, if the change were to be allowed.

[24] That issue arises directly from the material provided by the applicant in support of this application. In the context of the history set out above,[37] which includes the approval of this Court being in place since 19 September 2014, being changed on 16 December 2016 and now having an extended currency period to 21 September 2020, or in accordance with proposed condition 2B,[38] if the application is allowed, it is expressly stated that "development of the land is not able to commence" and that this is "[d]ue to difficulties experienced by the applicant in securing contracts for the sale of the proposed residential units". It is clear, despite the proposed conditions at one point leaving the options open, that the motivation for the application is to have the ability to construct the shopping centre without the units, in the first instance.

[25] The effective supporting evidence for the application comes only from the town planner and particular reliance is placed on his statements as to the advantages of the proposal.[39] Further and although couched in terms of permitting "flexibility to stage the

37 See para [2] above.
38 See para [10] above.
39 See para [11] above.

development" and that this is "in order to better facilitate the proposed development of the land", it is first to be noted that it is stated only that there will be "ability to commence construction of the shopping centre within the foreseeable future". And it is to be also noted that apart from being made, the statements or opinions expressed in sub-paragraphs 6(c)-(d) of the first affidavit of the town planner,[40] are not otherwise supported by any elaboration, whether as to the basis upon which the assertions are made or by any particular evidence from the applicant as to what level of commitment there is as to completion of the units or as to what level of interest would need to be generated before there would be sufficient financial interest in doing so. The same observations can be made as to the further assertions in the subsequent affidavit of the town planner,[41] and as to the risk of partial development upon completion of the first stage, being low. There is also what must be observed to be an argumentative and illogical assertion that "the risk of partial development was higher without the proposed staging". Clearly the fact of this application evidences, as might be expected, that the applicant developer is not prepared to commence the development without being satisfied of having the financial ability to complete it.

[26] Further and as underlies the approach of the respondent, the reliance upon the proposed conditions 2A to 2D, also appears to assume such commitment, at least in part. However, the inherit problem remains and is further exemplified by those conditions. Whist it may be accepted that the effect of proposed condition 2A is to provide incentive towards completion of the approved development, by requiring the incurrence of expenditure in the first stage in provision of the foundational and infrastructure requirements for stage two, the other conditions clearly contemplate the prospect that the second stage will not be developed, by providing for:

(a) the lapsing of "the uncompleted aspects of this development" in 2B; and

(b) the extensive landscaping of the stage two sites in 2C.

[27] Despite any tendency to pose the question in terms of whether "the change would result in substantially different development"[42] it is necessary for the applicant to satisfy the

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40 See para [11] above.

41 See para [12] above.

42 See the applicant's supplementary written submissions at [7] and also schedule 1 of the Development Assessment Rules at 3.

court that the proposed change "would *not* result in substantially different development". It may be accepted that:

(a) the question is not posed in terms of excluding mere prospect or possibility, by for instance the use of the word "could"; and

(b) the use of the word "would" allows for assessment upon the balance of probabilities.

[28] However and in this instance, the circumstances of and evidence provided upon this application, does not appropriately permit such a finding on the balance of probabilities. And, this is notwithstanding the support of the respondent council for the application, coming with proposed development conditions being understood as intended to provide incentive towards completion of the whole development, but, as has been noted, serving largely to demonstrate the inherent and realistic extent of the prospect that this may not occur.

Conclusion

[29] For the reasons given, I am not sufficiently satisfied that the jurisdiction of the Court is engaged pursuant to s 78A(2)(a) of the *Planning Act*, so that the Court may proceed pursuant to s 81(1) of that Act, by finding that this is an application for minor change to a development approval.

[30] Accordingly, the application is refused.