



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 21-044
Appellant: JJS Developing Pty Ltd
Respondent: Unitywater
Site Address: 19 Elizabeth Street, Everton Hills described as Lots 1 and 111-115 RP881955 – the subject site

Appeal

Appeal under section 99BRBF of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* against the Respondent's decision to give an infrastructure charges notice dated 9 August 2021, on the ground the decision involved an error relating to the working out, for section 99BRCJ, of additional demand.

Date of decision: 24 July 2022
Date and time of hearing: 4 March 2022
Place of hearing: Online hearing
Tribunal: Michelle Pennicott Chair
Michael Pickering Member
Present:
Appellant:
John Murphy
Nathan Belling
Respondent:
Noel Killip, Team Leader, Connection Approvals
Jarrod Murphy, Principal Development Engineer
Ashley Radbourne, Development Services Manager

Decision:

The Development Tribunal, in accordance with section 254(2)(a) of the *Planning Act 2016*, confirms the decision of the Respondent to give the Infrastructure Charges Notice dated 9 August 2021.

Background

1. On 24 June 2021, the Respondent gave the Appellant:
 - (a) a decision notice approving a connection application to connect to the Respondent's water supply and sewerage networks ('water approval'); and
 - (b) an infrastructure charges notice dated 23 June 2021.
2. The water approval and infrastructure charges notice were both issued in respect of Lots 1, 111, 112, 113, 114 and 115 on RP881955.
3. The water approval described the connection as being for reconfiguration of a lot (6 lots into 4 lots).
4. On 4 July 2021, the Appellant applied for internal review of the 23 June 2021 infrastructure charges notice. The grounds of review were that there should be no charge on the basis that there is a reduction in the number of lots and all lots would have paid for water and sewerage at the time of original subdivision in the 1970s.
5. On 9 August 2021, the Respondent responded to the internal review application by:
 - (a) giving an updated infrastructure charges notice dated 9 August 2021 ('9 August 2021 Infrastructure Charges Notice'); and
 - (b) explaining that the Respondent's systems show that only Lot 1 is connected to water and sewer services and located within the current water and sewer connection areas and all other lots are located within the future connection area and not currently connected to or being rated for water and sewer.
6. The 9 August 2021 Infrastructure Charges Notice:
 - (a) levies a charge of \$36,272.04;
 - (b) states the charging instrument as being *Unitywater Infrastructure Charges Schedule (No. 1) 2019*;
 - (c) next to the heading 'About this notice', states:

About this notice	<p>This Infrastructure Charges Notice (notice) is given by the Northern SEQ Distributor-Retailer Authority, trading as Unitywater. This notice is for payment of water and sewerage infrastructure charges that are levied for additional demand placed on the provision of trunk infrastructure to service developments that are to be connected to Unitywater's water supply and sewerage networks.</p> <p>Existing Lot 1 RP881955 is currently connected to water and sewer. All other lots are not connected and are located outside the Current Water and Sewer Connections Area and are not being rated for water and sewer usage. These lots therefore do not attract water and sewer credits. This results in only 1 lot credit and the creation of 4 residential lots.</p>
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- (d) under the heading 'Additional demand', shows:

Additional demand				
Land Use Category	Demand Unit	Proposed Demand (units)	Existing Demand (units)	Additional Demand (units)
Lot - Residential reconfiguring a lot	Lot	4	0	4
Dwelling house - 3 or more bedroom dwelling	Dwelling	0	1	-1

- (e) for both the sewerage infrastructure charge and the water infrastructure charge, shows a calculation for 4 demand units less 1 demand unit:

Land Use Category	Demand Unit	Net Demand (units)	Applied Adopted Charge^ (\$/unit)	Charge (\$)
Sewerage Infrastructure Charge				
Lot - Residential reconfiguring a lot	Lot	4	\$7,254.41	\$29,017.64
Dwelling house - 3 or more bedroom dwelling	Dwelling	-1	\$7,254.41	(\$7,254.41)
Water Infrastructure Charge				
Lot - Residential reconfiguring a lot	Lot	4	\$4,836.27	\$19,345.08
Dwelling house - 3 or more bedroom dwelling	Dwelling	-1	\$4,836.27	(\$4,836.27)
Total Charge				\$36,272.04

[^]Refer to Unitywater's infrastructure charging instrument for details on working out the applied adopted charge.

7. On 12 August 2021, the Appellant commenced the subject appeal against the 9 August 2021 Infrastructure Charges Notice.
8. The grounds for appeal are stated as follows:

We believe that there should be no infrastructure charges for this development of 6 lots into 4 as there is a reduction in the number of lots as agreed by MBRC and them issuing a nil \$ ICN.

Additionally, the large front lot lot 1 was initially 5 lots when the original development was completed meaning there was actually 10 lots on the property. This indicates that to get all the lots titled as shown on the attached survey plan from 1982, that all the necessary infrastructure charges applicable at the time under the now defunct Pine Rivers Council (PRC) were paid to permit plan sealing and titling. In 1996 PRC resumed portions of the rear lots (now 111-115) and a small section of the northwest corner of lot 1 as per attached Survey Plan.

Our position is that Unity Water, which wasn't actually in existing during these times and later took over the water and sewerage infrastructure when council amalgamations occurred in the early 2000's, is double dipping by attempting to charge another IC's on property that has already had them paid for more lots during the original development.

We believe they should be accepting that this is a further reduction in lots and therefore no IC should be issued and potentially a credit given for the lots that are being further reduced and that no further development will occur at this property.

Material considered

9. The Tribunal has considered the following material:
 - (a) Appellant's Form 10-Notice of Appeal dated 12 August 2021 and supporting documents;
 - (b) File provided by the Respondent in response to the Registry's request of 14 September 2021 for all evidence that was before the Respondent in making the decision to give the infrastructure charges notice;
 - (c) Network maps shown by the Respondent at the hearing;
 - (d) Email from the Appellant dated 9 March 2022 in relation to enquiries with Moreton Bay Regional Council about previous payments.

Jurisdiction

10. The appeal is within the jurisdiction of the Tribunal. Section 99BRBF of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* ('SEQ Water Act') allows an appeal to be brought to a development tribunal against an internal review decision to give an infrastructure charges notice. The appeal may be on grounds including that the decision involved an error relating to the application of the relevant charge or an error relating to the working out, for section 99BRCJ, of additional demand.

Conduct of appeal

11. The appeal is by way of a reconsideration of the evidence that was before the person who made the decision appealed against.¹ However the tribunal may, but need not, consider other evidence presented by a party to the appeal with leave of the tribunal or any information provided under section 246 of the *Planning Act 2016*.²
12. The appellant must establish the appeal should be upheld.³
13. The Development Tribunal must decide the appeal by:
 - (a) confirming the decision; or
 - (b) changing the decision; or
 - (c) replacing the decision with another decision; or
 - (d) setting the decision aside, and ordering the person who made the decision to remake the decision by a stated time.⁴

Decision framework

14. Section 99BRCJ of the SEQ Water Act sets out the limitations of a levied charge:
 - “(1) A levied charge may be only for additional demand placed upon trunk infrastructure that will be generated by the connection the subject of the water approval.
 - (2) In working out additional demand—
 - (a) any existing demand for a water service or wastewater service must not be included if it is the subject of an existing water approval for the premises; and
 - (b) the demand on trunk infrastructure generated by the following must not be included—
 - (i) an existing use on the premises if the use is lawful and already taking place on the premises;
 - (ii) a previous use that is no longer taking place on the premises if the use was lawful at the time it was carried out;
 - (iii) other development on the premises if the development may be lawfully carried out without the need for a further development permit under the Planning Act.

¹ *Planning Act 2016* s253(4) (Conduct of appeals)

² *Planning Act 2016* s253(5) (Conduct of appeals)

³ *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* s99BRBJ (Who must prove case for appeals)

⁴ *Planning Act 2016* s254(2) (Deciding appeals to tribunal)

- (3) However, the demand generated by a water approval, use or development mentioned in subsection (2) may be included if an infrastructure requirement that applies or applied to the water approval, use or development has not been complied with.
- (3A) Also, the demand generated by development mentioned in subsection (2)(b)(iii) may be included if—
 - (a) an infrastructure requirement applies to the land on which the development will be carried out; and
 - (b) the infrastructure requirement was imposed on the basis of development of a lower scale or intensity being carried out on the land.
- (4) In this section—
 - charges notice** means—
 - (a) an infrastructure charges notice under this Act or the Planning Act; or
 - (b) a notice mentioned in the repealed SPA, section 977(1).
 - infrastructure requirement** means a charges notice, a water approval condition or a condition of a development approval that requires infrastructure or a payment in relation to demand on trunk infrastructure.”

- 15. The Court of Appeal in *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191 considered similar but not identical limitations in the now repealed *Sustainable Planning Act 2009*.⁵
- 16. Applying that approach with necessary adjustment to the SEQ Water Act regime, the levied charge under the infrastructure charges notice must pass three requirements:
 - (a) *First*, there must be demand on relevant trunk infrastructure generated by the connection the subject of the water approval;
 - (b) *Second*, that demand must be over and above the existing demand generated by the premises (that is, there must be additional demand); and
 - (c) If the two requirements above (described by the Court of Appeal as ‘pre-conditions’) are satisfied, the amount of the charge must then be calculated by applying the methodology in the relevant charging instrument.
- 17. The relevant charging instrument is the *Unitywater Infrastructure Charges Schedule (No. 1) 2019* (‘Infrastructure Charges Schedule’).

Demand on relevant trunk infrastructure

- 18. The Respondent’s water and sewerage network mapping shows both trunk water infrastructure and sewerage infrastructure which the subject site will connect to as a result of the connection the subject of the approval. Indeed, as was identified on the Respondent’s interactive version of the mapping shown at the hearing, there is a trunk sewerage main running through the site.
- 19. The first pre-condition is satisfied – the connection the subject of the water approval will generate a demand on the Respondent’s trunk infrastructure.

⁵ That approach has since been applied by the Planning and Environment Court to the limitations in the current *Planning Act 2016: Woodlands Enterprises Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 67 and *Allen-Co Holdings Pty Ltd v Gympie Regional Council (No.2)* [2021] QPEC 72

Additional demand

20. As a levied charge can only be for the additional demand placed upon trunk infrastructure that will be generated by the connection the subject of the water approval, section 99BRCJ of the SEQ Water Act requires the following to not be included:
- (a) any existing demand for a water service or wastewater service that is the subject of an existing water approval for the premises;
 - (b) the demand on trunk infrastructure generated by:
 - (i) an existing use on the premises if the use is lawful and already taking place on the premises;
 - (ii) a previous use that is no longer taking place on the premises if the use was lawful at the time the use was carried out;
 - (iii) other development on the premises if the development may be lawfully carried out without the need for a further development permit under the Planning Act.
21. The premises the subject of the water approval and the 9 August 2021 Infrastructure Charges Notice are Lots 1 and 111-115 RP881955.
22. Examining each of matters that must not be included:
- (a) For sub-section (a), there is no evidence of an existing water approval for the premises.
 - (b) For sub-section (b)(i), the 9 August 2021 Infrastructure Charges Notice correctly excludes the existing dwelling house on Lot 1 from the demand calculation.
 - (c) For sub-section (b)(ii) and (iii), there is no evidence of a previous use or other lawful development.
23. With the demand generated by the existing dwelling house excluded, there remains additional demand that will be generated by the connection the subject of the water approval. The second pre-condition is therefore satisfied.

Calculation following the methodology in the charges resolution

24. The amount of the charge must then be calculated by applying the methodology in the Infrastructure Charges Schedule.
25. There is no requirement to calculate the charge by reference to the actual additional demand on a first principles basis.⁶ As acknowledged by Court of Appeal, the adopted charge in the charging instrument is used even though it might involve a 'broad brush' approach.⁷
26. The Infrastructure Charges Schedule sets out, in section 4.5, the formula for the calculation of the adopted charge for additional demand created by reconfiguring a lot:
- $$\text{"Levied charge} = (\text{Adopted Charge} \times \text{Demand}) - \text{Credit"}$$
27. Examining each element of the formula in turn.
28. The "Adopted Charge" is in Appendix 3, Table 1 and requires the identification of the use in respect of which the Water Application is made for the relevant local government area.

⁶ *Allen-Co Holdings Pty Ltd v Gympie Regional Council (No.2)* [2021] QPEC 72 at [6]

⁷ *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191 at [79]

For a residential use in the Moreton Bay local government area the Adopted Charge is \$11,476.90 per lot.

29. The "Demand" is the number of lots produced by the reconfiguring of the parent lot(s). The number of lots produced by the reconfiguration is 4 lots.
30. The "Credit" is determined under clause 4.7. Clause 4.7 is headed, 'Determining the Value of Credit'. It provides that credits may be assigned to water and/or sewerage networks and have the highest value of the following:
 - a. A charge previously paid in respect of Unitywater's trunk infrastructure indexed in accordance with the PPI from the date of payment to the date of the Water Application in respect of which the credit is calculated excluding the period 1 July 2011 and 30 June 2015; or
 - b. Where a Certificate of Completion for an existing Water Approval has been issued – the demand generated by the Water Approval; or
 - c. Where a Certificate of Completion for an existing approval for a staged connection has been issued – the demand generated by the stage or stages for which the Certificate of Completion has been issued; or
 - d. When an existing lawful use is already taking place on the premises – the existing demand on Unitywater's infrastructure generated by the use; or
 - e. When there was a previous lawful use that is no longer taking place on the premises – the demand on Unitywater's infrastructure generated by the previous lawful use; or
 - f. For other development that may be carried out on the premises without the need for a development permit:
 - i. The demand on Unitywater's infrastructure generated by that other development; unless
 - ii. An infrastructure charge notice, a Water Approval condition or a development approval condition that requires the provision of trunk water and/or sewerage infrastructure or a payment for additional demand on trunk water and/or sewerage infrastructure applies to the land in respect of development of a lower scale or intensity being carried out on the land."
31. The matters which attract a credit in clause 4.7 bear some similarity to the matters set out in section 99BRCJ of the SEQ Water Act of what must not be included in working out additional demand.
32. The Respondent has given a credit for the existing demand generated by the existing dwelling house on Lot 1, which is the credit contemplated by paragraph (d).
33. There is no evidence to support a credit being available under any of the other paragraphs – namely, charges previously paid, an existing water approval, a previous lawful use or other lawful development.
34. The Appellant, in its grounds of appeal, says that all necessary infrastructure charges applicable at the time the existing lots were created would have been paid.
35. The Appellant relies on survey plans which show that:
 - (a) a 1982 plan of subdivision cancelled five lots (Lots 88 – 92 on RP13577) to create Lot 1 on RP185407;
 - (b) a 1996 plan of subdivision cancelled Lot 1 on RP185407 and five other lots to create the six lots which comprise the lots the subject of this appeal, as well as six other

lots. The plan was created by the then Council of the Shire of Pine Rivers as constructing authority under the *Acquisition of Land Act 1967*.

36. The Appellant submits that it ought be assumed that given the 1982 and 1996 plans of subdivision were registered, any water and sewerage charges would have been paid at the time.
37. The difficulty however is that clause 4.7 of the Infrastructure Charges Schedule exhaustively prescribes the events which give rise to a credit.
38. One of the events recognised under sub-clause 4.7(a) of the Infrastructure Charges Schedule is “a charge previously paid in respect of Unitywater’s trunk infrastructure”.
39. Following the hearing the Appellant was given an opportunity to produce any evidence from the local government of any previous payments.
40. On 9 March 2022, the Appellant provided an email to the Tribunal advising that Moreton Bay Regional Council has confirmed no infrastructure charges were paid in the past.
41. The Appellant’s other ground of appeal as to why no charges should be levied is that there is a reduction in lots from six to four. The Appellant says Moreton Bay Regional Council recognised this reduction in its infrastructure charges notice for the development, with the Council’s charge being a nil charge.
42. The Appellant provided a copy of the Council’s infrastructure charges notice.
43. The comparison is understandable given it is for the same project.
44. When one looks to Moreton Bay Regional Council’s Charges Resolution Version 8 dated 14 August 2018 it can be seen that the credit provisions in section 14 (Credit for existing uses, existing use rights, previous uses or previous payments) are different to those in Unitywater’s Infrastructure Charges Schedule.
45. As Unitywater’s Infrastructure Charges Schedule section 1.7 makes clear:
 - (a) the infrastructure charges imposed under it are separate to infrastructure charges imposed by participating local governments under their infrastructure charges resolution;
 - (b) the infrastructure charges resolutions do not bind Unitywater; and
 - (c) Unitywater reserves the right to impose the maximum adopted charge in circumstances where a participating local government does not impose the maximum charge for the same use.
46. Neither section 99BRCJ of the SEQ Water Act or the Infrastructure Charges Schedule provides that an existing lot of itself is to be excluded in working out additional demand.
47. For a credit to be given under the charging regime applicable to the Respondent, an existing lot must have been put to a use, had charges paid in respect of it or been the subject of a water approval.
48. A credit has been given for the dwelling house use on Lot 1.
49. There is no evidence to support the giving of any greater credit.

50. For the reasons set out above, the levied charge in the Respondent's 9 August 2021 Infrastructure Charges Notice has been calculated in accordance with the methodology in the Infrastructure Charges Schedule.
51. The Appellant has not established any error in failing to give a credit for each existing lot.
52. The Development Tribunal, in accordance with section 254(2)(a) of the *Planning Act 2016*, confirms the decision of the Respondent to give the Infrastructure Charges Notice dated 9 August 2021.

Michelle Pennicott
Development Tribunal Chairperson

Date: 13 October 2022

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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