Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-038
Appellants:	Barry John Fitzhenry, Lindy May Fitzhenry, Barry John Fitzhenry as Trustee for B & L Fitzhenry Unit Trust
Respondent:	Southern Downs Regional Council
Site Address:	22-24 Project Street and East Street, Warwick described as Lots 5 and 11 on SP 129493 ─ the subject site

Appeal

Appeal under section 229 and Schedule 1, Table 1, Item 4 of the *Planning Act 2016* against an infrastructure charges notice given by Southern Downs Regional Council on the ground the notice involved an error relating to the working out of extra demand, for section 120.

Date of decision:	12 July 2022
Date and time of hearing:	24 March 2022
Place of hearing:	Online hearing
Tribunal:	Michelle Pennicott Chair Michael Pickering Member
Present:	**Appellants:** Barry Fitzhenry **Council:** Angela O'Mara, Manager, Planning & Development Scott Riley, Director, Planning & Environmental Services

Decision:

On the limited basis of giving effect to the resolution between the parties in relation to water and sewerage and revised GFA, the appeal will be allowed to enable the amended infrastructure charges notice prepared by the Council to be given, attached to this decision as Annexure A.

Background

1. On 30 June 2021, the Council gave a decision notice approving a change application for Low impact industry (Storage sheds) on the subject site ('change approval').

2. The effect of the change is to expand an existing self-storage use which operates on Lot 11 onto Lot 5.

3. The Appellants helpfully provided the following aerial photo with their appeal documents which shows the existing self-storage use on Lot 11 (marked 'Existing sheds') and an outline of the new self-storage on Lot 5 (marked 'Proposed Sheds'):

4. At the same time as the change approval, the Council gave an infrastructure charges notice dated 30 June 2021 ('Infrastructure Charges Notice').

5. The Infrastructure Charges Notice:

   (a) levied a charge of $34,036.50;

   (b) showed the charge calculation as being:

      (i) $416.50 for the stormwater network, based on 3,889.4m^2 at $5/impervious m^2, with a credit of 3,806.1m^2 (90%);

      (ii) $33,620 for the other networks based on 2,364m^2 at $50/m^2 GFA, with a credit of 1,691.60m^2 (40%); and

   (c) showed the proportion of charge for each network, with water being 20% and sewerage being 20%

6. On 22 July 2021, the Appellants commenced the subject appeal against the Infrastructure Charges Notice. The notice of appeal alleged there would be no extra

demand on the water and sewer networks for the purpose of section 120 of the *Planning Act 2016* as the property would not be connected to either service.

7. The Appellants requested the appeal be placed on hold while negotiations with the Council continued.

8. On 9 September 2021, the Appellants amended their grounds of appeal to include Council's failure to deduct $24,000 expended by the Appellants on stormwater infrastructure relating to the existing self-storage use:

> "(2) The Council has not deducted a financial contribution to infrastructure in this Change Application, in respect of the original Decision Notice for Lot 11 & 5. Proof of expenditure is attached. The Amount claimed is $24,000."

9. Communications were exchanged between the Appellants, the Council and the Registry as to whether the negotiations between the Appellants and the Council were still on foot.

10. On 7 December 2021, the Council provided the Appellants with an updated infrastructure charges notice dated 7 December 2021, together with Council's response to amended plans. The 7 December 2021 infrastructure charges notice:
    (a) no longer included a charge for the water network or sewerage network; and
    (b) had a reduced GFA to reflect the amended plans; and
    (c) still showed the stormwater component of the charge.

11. The effect of the communications between the Appellants and the Council would seem to be that the representations were not treated as having been made pursuant to section 125 of the *Planning Act 2016*,[1] but the Council considered them on a without prejudice basis with a view to resolving the dispute.

12. On 21 December 2021, the Appellants notified the Registry and the Council that the removal of the water and sewerage component of the charge in Council's updated infrastructure charges notice was accepted, but the stormwater component of the charge remained unacceptable.

13. The parties confirmed that they would consent to an amended infrastructure charges notice being made by the Tribunal to reflect the removal of the water and sewerage component and the revised GFA, with the remaining issue in dispute of the stormwater credit proceeding to a hearing.

Material considered

14. The Tribunal has considered the following material:
    (a) Appellants' Form 10-Notice of Appeal and supporting documents under cover of letter to the Registry dated 22 July 2021;
    (b) Appellants' amended Form 10-Notice of Appeal and supporting documents to the Registry on 9 September 2021;
    (c) Council's email of 7 December 2021 with letter, generally in accordance approved plan and amended infrastructure charges notice dated 7 December 2021;
    (d) Appellants' email submissions of 11 February 2022

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[1] Section 125 provides for representations to be made during the appeal period and a negotiated notice to be issued if the local government agrees with a representation.

(e) Council's email submissions of 22 February 2022 and supporting material;

(f) Appellants' further submissions of 23 February 2022;

(g) Appellants' email of 27 March 2022.

(h) Council's email of 31 March 2022 and supporting material.

Jurisdiction

15. The appeal is within the jurisdiction of the Tribunal. Section 229 and Schedule 1, Table 1, item 4 of the *Planning Act 2016*, allows an appeal to be brought against an infrastructure charges notice on grounds which include the notice involved an error relating to the application of the relevant adopted charge or the notice involved an error relating to the working out of extra demand for section 120.

Conduct of appeal

16. The appeal is by way of a reconsideration of the evidence that was before the person who made the decision appealed against.[2] 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.*[3]

17. The appellant must establish the appeal should be upheld.[4]

18. 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.[5]

Decision framework

19. The approach to be followed for the levying of infrastructure charges has been examined by the Court of Appeal in *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191.

20. That approach has since been applied by the Planning and Environment Court to the current provisions in the *Planning Act 2016.*[6]

21. Applying that approach, the levied charge under an infrastructure charge notice must pass three requirements:

(a) *First*, there must be demand on relevant trunk infrastructure as a consequence of the proposed development;

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

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

4 *Planning Act 2016* s253(3) (Conduct of appeals)

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

6 *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

(b) *Second*, that demand must be over and above the existing demand generated by the premises (that is, there must be extra 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 charges resolution.

22. As the Infrastructure Charges Notice is given here for approval of a change application, it is the development the subject of the change which is the focus of the exercise.

23. The charges resolution in effect at the time of the Infrastructure Charges Notice was *Adopted Infrastructure Charges Resolution (No. 2) 2015*.

24. At the hearing, the Council explained that the *Charges Resolution (No. 3.1) 2022* commenced on 28 February 2022.

25. In an appeal on the grounds that the infrastructure charges notice involved an error, the laws in place at the time the notice was given must necessarily be used to examine whether an error was made. Therefore, *Adopted Infrastructure Charges Resolution (No. 2) 2015* ('2015 Charges Resolution') will be examined.

Demand on relevant trunk infrastructure

26. The 2015 Charges Resolution, in section 5, indicates that trunk infrastructure for the local government area is shown in Schedule 3 of the Southern Downs Planning Scheme, *Priority infrastructure plan mapping and supporting material*.

27. Local Government Infrastructure Plan Maps LGIP 20 to 27 show the trunk stormwater infrastructure for the local government area.

28. The subject site is on Map 25, which shows trunk stormwater infrastructure for the catchment.

29. The development the subject of the change approval involves the start of a new self-storage use on Lot 5. As noted earlier, there is an existing self-storage use on Lot 11.

30. Prior to the giving of the change approval and the Infrastructure Charges Notice, Lot 5 was vacant.

31. As the Infrastructure Charges Notice records, the new self-storage shed use on Lot 5 comprises over 2,000m^2 of GFA and 3,889.4m^2 of impervious area.

32. Condition 17 of the change approval requires stormwater from the development to be disposed of to a legal point of discharge

33. The new self-storage shed use on Lot 5 will place a demand on the trunk stormwater network to which the development discharges.

34. The first pre-condition is satisfied – there is demand which links the development with the relevant trunk infrastructure.

Extra demand

35. As a levied charge can only be for the extra demand generated by the development, section 120(2) of the *Planning Act 2016* requires the demand generated by the following activities on the premises to not be included:

(a) an existing use on the premises if the use is lawful and already taking place on the premises;

(b) 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;

(c) other development on the premises if the development may be lawfully carried out without the need for a further development permit.

36. The premises the subject of the change approval is both Lot 5 and Lot 11.

37. Consistent with that, the Infrastructure Charges Notice is also in respect of both lots.

38. As the aerial image referred to earlier shows, the existing self-storage use is on Lot 11 and the new storage sheds will be on Lot 5 which was vacant.

39. The Infrastructure Charges Notice records the 'proposed' impervious area as being 3,889.4m^2.

40. It was confirmed by both parties at the hearing that the 3,889.4m^2 represents the impervious area of the new self-storage use on Lot 5 only. The existing impervious area on Lot 11 is not part of that figure.

41. Therefore, in conformity with section 120(2), the demand generated by the existing use on Lot 11 has not been included.

42. There is not an existing use, previous use or other lawful development on Lot 5 which generates existing demand required to be excluded.

43. The second pre-condition is therefore satisfied – there is extra demand.

Calculation following the methodology in the charges resolution

44. As the two pre-conditions are satisfied, the amount of the charge must then be calculated by applying the methodology in the 2015 Charges Resolution.

45. There is no requirement to calculate the charge by reference to the actual extra demand on a first principles basis.[7] As acknowledged by the Court of Appeal, the adopted charge in the charges resolution is used even though it might involve a 'broad brush' approach.[8]

46. The 2015 Charges Resolution sets out, in section 14(c), a formula for the calculation of the adopted charge for material change of use for non-residential development:

> "Charge = (the sum of (ACR x N) for each defined use x D%) + (IA x SW) – C"

47. The formula is the sum of a calculation relating to gross floor area (for the parks, transport, water and sewerage networks) and a calculation relating to impervious area (for the stormwater network), and then the subtraction of a credit calculation in accordance with section 12.

48. Section 12 is headed 'Credits for existing uses or previous payments'. It provides that the credit for the premises is calculated as an amount which the greater of five matters set out in the section:

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

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

"(a) The amount of an adopted infrastructure charge previously paid for the development of the premises;

(b) Where an applicant can provide evidence of a financial contribution previously paid for trunk infrastructure for the premises, the amount of the financial contribution paid;

(c) Where the premises are subject to an existing lawful use, the amount stated for an adopted charge for the existing lawful use in Table 2 Adopted infrastructure charges. This allows the charge to be discounted to take into account the existing usage of trunk infrastructure by the premises on the subject site;

(d) For a residential, rural residential or rural land or the like, the amount per lot as stated for subdivision in Column 3 of Table 2; or

(e) For commercial or industrial land or the like, the amount that would be payable if the land was developed, based on a gross floor area (GFA) of 40% and an impervious area of 90%."

49. It is apparent from the Infrastructure Charges Notice that the Council gave a credit on the basis of paragraph (e) because the credit calculation on the Infrastructure Charges Notice shows a 40% GFA credit and a 90% impervious area credit.

50. Of the five matters of potential credit in section 12, the only one which potentially covers the $24,000 which the Appellants say should be deducted for what they previously expended on stormwater infrastructure is paragraph (b):

"(b) Where an applicant can provide evidence of a financial contribution previously paid for trunk infrastructure for the premises, the amount of the financial contribution paid"

51. According to the documents provided by the Appellants and the Council, the history of the stormwater infrastructure for which the Appellants seek a credit is as follows:

(a) On 23 November 2005, a development permit for material change of use was given to Mr Fitzhenry for Low Impact Industry – Storage Sheds on Lot 11;

(b) Condition 13 of the 2005 development permit required the applicant to construct, at no cost to Council, stormwater drainage system serving the development and the stormwater to be disposed of to a legal point of discharge, to the satisfaction of the Director Technical Services;

(c) On 4 January 2006, the Council informed Mr Fitzhenry that in respect of the requirement to discharge stormwater to the legal point of discharge, the existing stormwater infrastructure which the development was required to connect to was located at the intersection of Project Street and Industrial Ave and that the pipe connecting to that system was required to cater for upstream design flows. That letter also referred to a request made by Mr Fitzhenry "*for Council to contribute to the cost of increase in pipe size to cater for stormwater runoff generated upstream of your development"* and indicated it had been referred to Council for consideration;

(d) A 12 January 2006 Council Technical Services memorandum records that a meeting was held with Mr Fitzhenry on 9 January 2006 at which Mr Fitzhenry accepted the requirement to construct the new stormwater main, designed and sized to allow for other design stormwater flows generated upstream. The memorandum states, "*In light of the above I consider that the issue has been resolved and that a referral to Council is not necessary*". At the hearing, Mr Fitzhenry recalled his mindset at the time as being to just get on with it and make things happen; and

(e) Mr Fitzhenry provided to the Tribunal a spreadsheet titled 'Operational Works – Stormwater 2006' with a total figure of $24,643 for 7 items (described as excavator, plumber, run pipe, pipe, manhole, pipe and engineering–guess) and who each was

'paid to'. Mr Fitzhenry also provided copies of various quotations and tax invoices from February and March 2006.

52. The documents show that Mr Fitzhenry paid various contractors/suppliers to construct the stormwater infrastructure in satisfaction of Mr Fitzhenry's obligation to do so for the development of the self-storage use on Lot 11, at no cost to Council, pursuant to condition 13 of the 2005 approval.

53. The potential credit in paragraph (b) of section 12 is for a "*financial contribution previously paid for trunk infrastructure for the premises*".

54. Mr Fitzhenry pointed out that paragraph (b) does not expressly say the contribution must have been paid *to Council* and therefore his payments to his contractors/suppliers should be treated as 'a financial contribution previously paid'.

55. Despite paragraph (b) not stating specifically that the contribution is one paid *to Council*, when paragraph (b) is construed in the context of the legislative regime for infrastructure charges and the historical predecessor of contributions under planning scheme policies, it is apparent that:

    (a) paragraph (a) is concerned with recognising payment of adopted charges;

    (b) paragraph (b) is concerned with recognising the payment of financial contributions under planning scheme policies,

    both of which are paid to Council.

56. While it could be said that land and works are '*contributed*' by applicants towards infrastructure networks, the language of paragraph (b) is consistent with the language used in the historical legislative regime which used the term 'contribution' in a financial sense of money paid and distinct from land or works provided.[9]

57. The 2006 stormwater works claimed by the Appellants do not fall within paragraph (b) of section 12.

58. As the methodology in the 2015 Charges Resolution must be strictly applied in working out the levied charge, no error was made by the Council in not giving a credit for the historical stormwater works constructed in compliance with the conditions associated with the development of Lot 11.

59. The adopted charge and the methodology behind it cannot be appealed against,[10] nor can an appeal be brought to the Tribunal on an unreasonableness ground.[11]

60. The Appellants' arguments relating to the 2015 Charges Resolution being flawed and not in accordance with the Minister's Guidelines are not matters which can be the subject of appeal.

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9 ss 847 and 848 of the *Sustainable Planning Act 2009* (Planning scheme policies for infrastructure) and ss 6.1.20, 6.1.31 and 6.1.32 of the *Integrated Planning Act 1997* (Planning scheme policies for infrastructure)

10 *Planning Act 2016* section 229(6)(a) (Appeals to tribunal or P&E Court)

11 *Planning Act 2016* Schedule 1, Table 1, Item 4(d)

61. The development of Lot 5 from its vacant state to a self-storage use generates an extra demand which attracts the adopted charge less the 90% impervious area credit in paragraph (e) in accordance with the 2015 Charges Resolution.[12]

62. Therefore, there was no error in the stormwater network charge of $416.50.

63. On the limited basis of giving effect to the resolution between the parties in relation to water and sewerage and revised GFA, the appeal will be allowed to enable the amended infrastructure charges notice prepared by the Council to be given, attached to this decision as Annexure A.

Michelle Pennicott
Development Tribunal Chairperson

Date: 12 July 2022

[12] The 90% impervious area credit is no longer afforded by Charges Resolution (No. 3.1) 2022 which commenced on 28 February 2022. But as stated earlier, in an appeal to the Tribunal on the grounds the infrastructure charges notice involved an error, it is necessarily the laws in place at the time which must be used to examine whether an error was made.

Appeal Rights

Schedule 1, Table 2, item 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:

The Registrar of Development Tribunals
Department of Energy and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833
Email: registrar@epw.qld.gov.au

Annexure A

AMENDED INFRASTRUCTURE CHARGES NOTICE
Planning Act 2016

Southern Downs REGIONAL COUNCIL

Development Summary

Application number: MCU\01139.01

Applicant: B & L Fitzhenry
3 Stewart Street
LENNOX HEAD NSW 2478

Application Details: Extension to Low Impact industry (Storage sheds)

Date of Notice: ~~7 December 2021~~ 12 July 2022

Land to which the infrastructure charge applies

Property: 22-24 Project Street and East Street, Warwick
Lots 5 and 11 SP129493

Charge calculation

The below charges are in accordance with the Adopted Infrastructure Charges Resolution (No.2) 2015

Development Type	Network	Charge Rate	Proposed	Credit	Charge
Industry	Stormwater	$5/impervious m^2	3,889.4m2	3,806.1m2 (90%)	83.3m2 x $5 = $416.50
	Roads Parks	30% of $50/m^2 GFA	2,146m2	1691.60m2 (40%)	454.4m2 x $15 = $6816.00
				TOTAL:	$7,232.50

Office use only			
Network	Proportion of Charge	Charge/ Network	Receipt Code
Roads	20%	$4,544	RC241
Parks	10%	$2,272	RC243
Stormwater	$5/m^2	$416.50	RC242

Amount of infrastructure charge

Applicable Charge: $7,232.50 **plus annual adjustments and/or reviews**

If payment is made more than two years after the date of the Infrastructure Charges Notice, the charge will increase in line with the Road and Bridge Construction Index for Queensland. **Prior to making a payment, you may contact Council's Planning Services Section to obtain details of the charge that will be payable.**

When charge is payable

The infrastructure charge is payable in accordance with Section 122 of the *Planning Act 2016*. The infrastructure charges are payable when the change of use of the land happens.

Goods and Services Tax

No GST has been included in this Infrastructure Charges Notice.

Payment information

Payment is to be made to the Southern Downs Regional Council. Payment can be made at either the Warwick or Stanthorpe office, or by cheque to PO Box 26, Warwick Qld 4370. Please note that payment by credit card is not accepted.

Enquiries

All enquiries regarding this Infrastructure Charges Notice should be directed to Planning Services on 1300 697 372, during office hours, Monday to Friday.