



## Development Tribunal – Decision Notice

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### **Planning Act 2016, section 255**

**Appeal Number:** 19-013

**Appellant:** Mrs Simonette Gibson and Mr Stephen Gibson

**Respondent:  
(Responsible entity):** Brisbane City Council

**Site Address:** 166 Queens Road, Everton Park Qld, 4053 and described as Lot 1 on SP 290763 (the subject site)

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### **Appeal**

Appeal under *Planning Act 2016* (PA), Section 229(1)(a)(i) and Schedule 1, Section 1, Table 1, Item 2 against the decision of the respondent, assessment manager, in response to an application purporting to seek a minor change to the development approval conditions under s81 of the *Planning Act 2016* to remove vehicular access to the subject site.

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**Date and time of hearing:** 10.00am 15 August 2019

**Place of hearing:** The subject site

**Tribunal:** Dr Christopher Robertson – Chair  
Ms Kim Calio – Member  
Mr Graham Jordan - Member

**Present:** Mr Stephen Gibson - Appellant  
Mrs Simonette Gibson – Appellant  
Mr Glen Porter – Brisbane City Council - Respondent  
Mrs Natasha Bowers – Brisbane City Council - Respondent

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### **Decision:**

- A. This decision relates to the respondent's decision for the appellants' change application made to the respondent on or about 19 September 2018. The respondent's decision (the appealed decision) which refused the change application was conveyed to the appellants by a decision notice under cover of a letter from the respondent to the appellants dated 20 February 2019.
- B. The appellants' change application related to a development condition or conditions contained in each of the following development approvals given by the respondent:
  - i. development approval given by the respondent on 22 December 2016 for reconfiguration of a lot - permit ref. no. DARL328609116 (the ROL approval),

- ii. development approval given by the respondent on 17 March 2017 for material change of use of premises - permit ref. nos. DAMC320696016 and DAMC329696116 (the MCU approval).

which condition or conditions restricted or prevented vehicular access via Queens Road, Everton Park.

- C. The Development Tribunal (Tribunal), in accordance with section 252 of the PA, decides that it has no jurisdiction to entertain this appeal in so far as it seeks to challenge the respondent's decision to refuse the change application so as to alter the said condition or conditions contained in the ROL approval.
- D. The Tribunal, in accordance with section 254(2)(b) of the PA, changes the appealed decision by including a proviso in the appealed decision as follows:

Provided that the change application, so far as it relates to the MCU approval, is allowed in part such that the requirement contained in condition number 9 that says 'No vehicular access is permitted via Queens Road' (and any like condition) is to commence only at the end of the period of twelve (12) months immediately following the date of this decision.

### **Background:**

1. The subject site is located at 166 Queens Road, Everton Park on Lot 1 SP 290763 (Subject site) and is 1054m<sup>2</sup> in area. The subject site has an easement in its favour across the adjacent site of L1/36 SP 296810, 122 Soames St, Everton Park.
2. The Appellants' sold the rear portion of Lot 1 RP 841285 to the adjacent owners for incorporation into the town house development located at 122 Soames Street. The subject site was therefore derived from a reconfiguration of a lot, being Lot 1 RP 841285.
3. On 1 February 2016 an application was lodged by OJ Pippin Homes Pty Ltd (the Primary Applicant). (This application was initially for a Reconfiguration of a Lot and a Material Change of Use). This application (Brisbane City Council (BCC) file No: A004312721) subsequently became an approval for a Material Change of Use only. As part of this application the Appellants provided a signed consent form across their property (Lot 1 RP 841285) dated 24 November 2015.
4. On 29 July 2016 an application (BCC File No: A004445265) was received by Brisbane City Council for a Reconfiguration of a Lot only by the Primary Applicant. As part of this application the Appellants provided a consent form for their property (Lot 1 RP 841285) dated 27 June 2016.
5. On 9 February 2017 the Respondent, as Assessment Manager, was advised by the Primary Applicant's representative, Town Planning Alliance, that they request, regarding Application No: A0004312721, *"that Council removes the permit for Reconfiguring a Lot as a subsequent application has since been lodged and approved for this aspect of the project"*
6. The result of this action was two separate applications to facilitate the development of 122 Soames Street. One for a Reconfiguration of a Lot (BCC file No: A004445265, (thereafter referred to as ROL) and the other for a Material Change of Use (BCC file No: A004312721, thereafter referred to as MCU). Both applications included the subject site under its original Lot 1 RP 841285 identification.

7. Both ROL and MCU applications were approved (22 December 2016 and 17 March 2017 respectively) with a number of conditions. Among these conditions was the removal of the subject site's vehicular access to Queens Road.
8. The Appellants applied for a minor change (BCC File No: A005012146) to ROL and MCU conditions to retain vehicular access for the subject site. This application was received by the Respondent 18 September 2018.
9. Notification dated 20 February 2019 from the Respondent advised of the refusal of the minor change application. The reasons for the refusal addressed both the ROL and MCU approval conditions.
10. The Appellants appealed against the refusal to the Development Tribunal, Appeal No: 19-013.
11. The Appellants have argued 8 grounds for the Appeal:
  - 11.1 The Responsible entity (BCC) did not make a decision within the legislated time frame.
  - 11.2 BCC imposed a prohibited development condition on the approval for a reconfiguration of a lot.
  - 11.3 BCC incorrectly imposed a condition on a development approval for reconfiguration of a lot.
  - 11.4 The proposed change does not conflict with Schedule 1(4) (d) of the DA Rules because it does not change the ability of the development to operate as intended.
  - 11.5 The proposed change is a minor change and not a substantially different change.
  - 11.6 The proposed changes do not conflict with s66(2) of the *Planning Act 2016* (Qld).
  - 11.7 The proposed change does not conflict with the outcomes of the Road Hierarchy Overlay Code, section, 8.2.18 (*Brisbane City Plan 2014*) (BCP).
  - 11.8 The proposed change does not conflict with the outcomes of the Transport Access Parking and Servicing Code, Section 9.4.11, BCP.
12. The Respondents have responded to the grounds of the appeal by the Appellants:
  - 12.1 That the grounds for the refusal as per the Decision Notice of 20 February 2019 (Application No: A005012146) should be upheld.
  - 12.2 That in any event the Tribunal does not have jurisdiction to hear this matter as the grounds for appeal the Appellants' application relates to the conditions of approval on a Reconfiguration of a Lot and that the Tribunal only has jurisdiction to hear matters in relation 'to a change application for a development approval only for a Material Change of Use of a Classified building' (BCC communication to the Tribunal dated 20 August 2019).

#### **Decision Framework:**

1. As per s253(2) of the PA the onus rests upon the Appellant to establish the appeal should be upheld.
2. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (s. 253(4) of the PA).

3. The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under s.246 of the PA.
4. The Tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

**Material Considered:**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal, correspondence and other documents accompanying (including an appeal summary headed "Appeal Against Refusal of Minor Change Application - 166 Queens Road, Everton Park (A000501246))" the appeal lodged with the Tribunals Registrar on 10 March 2019 (Appeal No: 19-013).
2. "Plan of Lots 1 & 2 and Easements of B & C in Lot 2". Land Title Act 1994. Dated: 16 December 2016. Identified as No: SP290763.
3. Signed application consent form by the registered owners of 166 Queens Road, Everton Park. Dated: 24 November 2015.
4. Signed application consent form by the registered owners of 166 Queens Road, Everton Park. Dated: 27 June, 2016.
5. Correspondence between Town Planning Alliance and Brisbane City Council. Dated: 9 February, 2017.
6. Engineering Report Regarding Infrastructure, Transport and Traffic at Queens Road, with specific application to 166 Queens Road by Mr. Glen Porter, Principal Engineering Officer Brisbane City Council. Dated: 12 August 2019.
7. Submission from the Appellants. Dated: 20 August 2019.
8. Correspondence Regarding Tribunal Jurisdiction from Mrs Natasha Bowers, Key Account Manager, Development Services, Brisbane City Council. Dated: 20 August 2019.
9. Email correspondence reply regarding extension times for condition completion, from Mrs Natasha Bowers, Key Account Manager, Development Services, Brisbane City Council. Dated: 28 August 2019.
10. Certificate of Title Search for Lot 1 SP 117842. Dated: 30 July 2019.
11. *Planning Act 2016*. (Queensland).
12. *Brisbane City Plan 2014*. Including, McDowall-Bridgeman Downs–South Neighborhood Plan, Figure b.
13. Brisbane PD Online mapping and file documentation concerning Application File No's: A005012146; A004445265; A004312721.
14. Drawing no: 16-124-PO1 B. Titled "Services Infrastructure Plan." Created by Karamisheff Nagal Consulting Pty Ltd. BCC notations include: "Amended in Red" 19

December 2016, and “Plans and Documents referred to in the Negotiated Decision”, 22 December 2016.

15. *Development Assessment Rules (Qld)* (17 March, 2017).
16. *Local Government Infrastructure Plan 2016-2026*. Brisbane City Council.

### **Findings of Fact:**

1. Land at the rear of the subject site was secured to become part of the adjacent development at 122 Soames Street, Everton Park. As part of the land transfer arrangement an easement was to be created through the new development. This easement was created and is identified as “Easement B” on Plan No: SP290763 and is referred to as Easement No: 718138533 on the Certificate of Title in favour of the title holders of the subject site, the Appellants.
2. From evidence provided by the Appellants, their involvement in the development at 122 Soames Street was limited to the supply of the rear portion of Lot 1 RP 841285 and the creation of an easement in favour of the subject site. Further, that there has been limited ongoing communication between the Appellants and the Primary Applicant of 122 Soames Street, OJ Pippin Homes Pty Ltd.
3. Evidence provided by the Appellants is that they received no notification of the condition requiring removal of the subject site’s vehicular access to Queens Road which was included in both approvals (ROL and MCU).
4. In providing the signed consent to OJ Pippin Homes Pty Ltd to include the subject site as part of both ROL and MCU applications, necessary as part of the ROL process, the Appellants become party to the application and therefore responsible to fulfil conditions (as well as the Primary Applicant) which were imposed as part of the approval over the site which remained under their ownership and control.
5. Regarding the issue of the timeframe of the decision notice (BCC File No: A005012146) raised by the Appellants (“Background”, Paragraph 11.1 above), under PA Schedule 2 the definition of “deemed refusal” (b) (i) regarding a change application, if the decision is not made within the permitted time period a refusal is deemed to have occurred, as per Section 81A PA (Deciding change applications for minor changes). However, as the Decision Notice (20 February 2019) concurred with the deemed refusal and provided further information upon the grounds for the refusal which the Appellant relied upon for their appeal, no further action on this issue is required.
6. In consideration of the appeal points raised by the Appellants (“Background”, Paragraphs 11.2-11.3 above), that the Respondent incorrectly imposed a development condition on a development approval for the Reconfiguration of a Lot, as noted under “Reasons for the Decision”; Paragraph 12, “Jurisdiction”, (below) consideration of the ROL is beyond the jurisdiction of this Tribunal. However, with regard to the applicability of the removal of the Queens Road vehicular access condition to the subject site with reference to the MCU Approval refer to “Reasons for the Decision” paragraph 14 “Parties’ Actions” (below).

7. The Appellant's Appeal points ("Background", Paragraphs 11.4-11.8, above), are not sustained. For direct applicability on these points refer to Paragraph 18 "Minor change" under "Reasons for the Decision" (below).
8. Development condition requirements for the removal of the vehicular access to the subject site are clearly marked on development approval documents provided by the Respondents. In addition to being disclosed on the approved plans that "Existing Access to be in accordance with conditions" and placing a red cross through the notation "Existing access to be retained for new Lot 1" (subject site) (Drawing No: 16-124-PO1 B), both the ROL and MCU approval requirements contained the condition requiring the removal of vehicular access to the subject site from Queens Road, at conditions 3 and 9 respectively.
9. Appellants allowed inspection of the subject site by the Tribunal and demonstrated that the easement access had not been constructed to enable the Queens Road vehicular entry to be removed and that before construction could occur, matters, such as fence boundary positioning had to be negotiated with the new body corporate on the adjacent town house site at 122 Soames Street.
10. The report and evidence provided by Mr. Glen Porter, Principal Engineering Officer – Transport development Services, Brisbane City Council, on behalf of the Respondent, clearly indicates that removal of access on to Queens Road has been a policy adopted and consistently applied by the Respondent since 2010. Noting:  
*As a boundary road, Queens Road is a Suburban Road in the Brisbane Road Hierarchy and as such it is required that any development address the Road Hierarchy Overlay Code. The intent of a Suburban Road is to limit direct driveway accesses from the adjacent lots onto the major road to direct all access onto local and minor roads for safety and network efficiency reasons.* (Report provided by the Respondent to the Tribunal. Dated:12 August 2019).
11. Mr. Porter also further acknowledged that the proposed infrastructure upgrades to Queens Road are long term and are not within the current Brisbane City Council *Local Government Infrastructure Plan 2016-2026*.

## **Reasons for the Decision:**

### **12. Jurisdiction**

The tribunal's jurisdiction arises under the PA section 229(1)(a)(i) and schedule 1, section 1, table 1, item 2.

Section 1(2) of schedule 1 contains preconditions for the application of table 1 to a development tribunal. One of paragraphs (a) to (l) of section 1(2) must be satisfied before the tribunal can have jurisdiction under table 1. In this case, section (1)(2)(f) refers to "a decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use of a classified building". Consideration must therefore be given to the elements which comprise this matter and these include in this instance:

#### **12.1 Applicable files.**

This appeal is for a refusal of a change application for a development approval (BCC File No: A005012146). The approvals were for BCC files ROL (BCC File No: A004445265) and MCU (BCC File No: A004312721).

#### 12.2 Application consideration.

While the MCU and ROL commenced as one application, as per the correspondence by the OJ Pippin Homes Pty Ltd representative of 9 February 2017 the applicant sought to treat the MCU and ROL as separate applications, withdrawing the ROL component of the initial application, later lodging a separate ROL application (BCC File No: A004445265). Further, Brisbane City Council accepted the applications and provided separate approval decisions on both MCU (17 March 2017) and ROL (22 December 2016) applications.

#### 12.3 Subject site relevance.

Significantly in both the MCU and ROL applications the subject site was included in the approvals (being at that time L1 RP841285).

#### 12.4 PA applicable considerations.

The applicable element of the definition of Material Change of Use as defined by Schedule 2 of the PA is that the Material Change of Use is the start of a new use of premises. Further, "premises" as defined by the PA Schedule 2 includes "land, whether or not a building or other structure is on the land." A new use would occur on the land identified when the Material Change of Use was enlivened. However, both the subject site and the adjoining town house development contain classified buildings.

#### 12.5 Treatment of change application.

In their change application, the Appellants noted each of the ROL and MCU file numbers as separate applications and development approvals in which they wished to vary, requesting the subject site to have permanent access to Queens Road. The Respondent in its Decision Notice of the Change Application (dated 20 February 2019) elected to treat both development approvals together in the decision notice. The action by the Respondent of combining the decision on the change request for both Approvals (ROL and MCU) does not erode the relevance of the approval and conditions of the MCU being within the Tribunal's jurisdiction to consider. Further, the Decision Notice also dealt specifically with the material change of use aspect of the appeal, citing in its response the MCU directly (BCC File No: A004312721).

#### 12.6 Jurisdiction Summary.

Therefore, based upon the above information a material change of use is present within this appeal overlaying the subject site and the precondition in section 1(2)(f) of schedule 1 is satisfied such that table 1 (and particularly item 2 of that table) applies to the Tribunal. Accordingly, the Tribunal has jurisdiction to hear the appeal for refusal of a change application relating to the material change of use application.

### 13. **Parties' Involvement**

The town house development site at 122 Soames Street is adjacent to the subject site. Evidence highlights that the only involvement in this town house development at 122 Soames Street by the Appellants was to supply the land at the rear of the subject site to the developer and to gain an easement to the subject site through the development site. The Appellants took no further involvement in the townhouse development and evidence provided by the Appellants indicates an absence of direct or ongoing communication between themselves and the developer of 122 Soames Street (OJ Pippin Homes Pty Ltd).

It is evident that Brisbane City Council took the opportunity to implement its reduction of vehicular access onto Queens Road as a "Suburban Road", as part of the *Road Hierarchy Overlay Code* over the subject site, even though this site, once reconfigured was not part of the town house development nor would result in any outcomes of increased vehicle traffic entering or leaving the subject site. This is of course at least until the subject site is developed. It is noted that Figure b, McDowall-

Bridgeman Downs–South Neighborhood Plan, *Brisbane City Plan 2016*, identifies the subject site as a potential development area. However, there is no application nor current approval for development across this site.

#### **14. Parties' Actions**

Evidence and observations of material and submissions made during the hearing indicate that the Appellants were not aware of the possibility of the vehicular access removal condition being applied to the subject site until being advised of it by the Respondent.

The Respondent has fulfilled its obligations as required under the PA and *Brisbane City Plan 2014* in the development approval process with regards to this matter.

#### **15. Parties to the Development Applications and conditions**

Evidence presented at the hearing by both the Appellants and the Respondent is that the developer of the adjacent site, OJ Pippin Homes Pty Ltd, has not been involved or responsible, as required, in meeting this vehicular access removal condition over the subject site, as would normally be required prior to plan sealing being issued by the Respondent Assessment Manager.

#### **16. Current Status of Vehicular Access and Egress to the Subject Site**

The current access and egress to the subject site from the easement at 122 Soames Street is not constructed, nor has the vehicular access to the subject site been removed. The Appellant advises there is a requirement to finalise negotiations with the new body corporate of this development and to ensure correct boundary fencing and placement of access from the subject site to the easement.

#### **17. Other Considerations**

The only current vehicular access to subject site is from Queens Road. The easement access, through the adjacent site is yet to be completed and will require removal and relocation of the fence, drainage considerations and negotiation with the newly formed body corporate. While this work is undertaken there is a need to ensure there is adequate and suitable vehicular access and egress to the subject site, in particular for emergency vehicles such as fire and ambulance to protect the inhabitants and property, prior to the removal of the vehicular access onto Queens Road.

#### **18. Minor Change**

On 18 September 2018 the Appellants lodged a Change Application form with the Respondent requesting a minor change to both the ROL and MCU Development Permits, to enable the subject site to retain permanent vehicular access to Queens Road.

The Change Application form states that:

*"It is important when making a change application to be aware of whether the application is for a minor change that will be assessed under section 81 of the Planning Act 2016..."*

Under section 81 "Assessing change applications for minor changes", of the PA, section 81(1) states "This section applies to a change application for a minor change to a development approval."



In its Decision Notice of 20 February 2019 the Respondent under “Grounds for Refusal” stated:

*“The proposal conflicts with the definition of ‘minor change’ in Schedule 2 of the Planning Act 2016. The proposal is considered to be substantially different and as a result conflicts with part (i) of the definition of ‘minor change’.”*

In their appeal to the Development Tribunal the Appellants submit:

*“The proposed change is a minor change and not a substantially different change....(as) (ii) the change does not result in any difference for the townhouse development...(iii) The Assertion that the change is not a minor change is greatly inconsistent with recent similar outcomes in the immediate vicinity...”*

Consideration must therefore be given to whether the applied for change is a minor change that does not result in a substantially different development when applied in the context of the subject site and the development.

Under the PA Schedule 2, Dictionary, the definition of "Minor Change", (b)(i) and (ii), a minor change for a development approval is one that:

- (i) would not result in substantially different development; and*
- (ii) if a development application for the development, including the change, were made when the change application is made would not cause—*
  - (A) the inclusion of prohibited development in the application*

Schedule 1 of the Development Assessment Rules (DAR) addresses the meaning of ‘substantially different development’. A change to a condition may be considered to result in a substantially different development if any of the following apply to a proposed change which:

- (d) change the ability of the proposed development to operate as intended; or*
- (e) remove a component that is integral to the operation of the development; or...*

Evidence provided by the Respondents clearly discloses that one of the objectives of the ROL and MCU approvals and conditions that were issued was to remove vehicle access to Queens Road and provide alternative vehicular access and egress for the subject site through (Easement “B”) the adjacent town house development site (122 Soames Street).

The Respondent further demonstrated that since 2010 they have consistently applied the removal/reduction of vehicular access to Queens Road from private property and more specifically that the matter of removing access and egress to and from the subject site to Queens Road had been raised with the Primary Applicant OJ Pippin Pty Ltd from the very beginning of the process, including at the pre-lodgment meeting. Although the Appellant noted at the Hearing that they were not privy to these discussions between the Respondent and the Primary Applicant, it does not alter:

- the intention of how the site was intended to operate and be accessed from the outset of the proposed development, or
- the designation and function of Queens Road as a Suburban Road as identified in the Brisbane City Plan and sought to be preserved through provisions of the Road Hierarchy Code and the Transport Access Parking and Servicing Code.

Based upon the above reasoning the Tribunal concurs with the Respondent’s decision in that the Appellant’s request to retain vehicular access to Queens Road is not a minor change to the conditions of the MCU development approval and that removal of this condition would result in a ‘substantially different development.’

## Conclusions:

19. The Respondent has advised the Tribunal by email correspondence (28 August 2019) that 3 months is the normal time frame permitted for completion of such a condition as vehicle access removal to a site. In consideration of issues in this instance of;
- the current status of the construction of the easement,
  - the need for the Appellants to negotiate with the adjacent new body corporate to ensure the easement meets the needs and expectations of both parties,
  - the need for the Appellants and the Primary Applicant OJ Pippin Homes Pty Ltd of the ROL and MCU applications (who is not party to this hearing) to liaise and adequately fulfil the conditions required to remove of the vehicular access,
  - the long-term expectation of the infrastructure upgrades for Queens Road by Brisbane City Council,
  - the reality that there will be no increase vehicle usage, either through access or egress, from the subject site, and,
  - to ensure at all times emergency vehicles have access to the inhabitants and to the property,

the Tribunal considers with regard to the MCU element of the Decision Notice concerning removal of vehicular access to the subject site, that the Appellants should be given a reasonable time to enable them to meet the conditions of the MCU approval (File No: A004312721) prior to any enforcement action occurring. In all the circumstances, the Tribunal considers that a reasonable time would be twelve (12) months.

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**Dr Christopher Robertson**  
**Development Tribunal Chair**  
**Date: 14 November 2019**

## **Appeal Rights:**

In so far as the Tribunal's decision is to the effect that it does not have jurisdiction to entertain this appeal in respect of a certain matter (refer to paragraph C on page 2, which appears under the heading 'Decision') the appellants may start proceedings in the Planning and Environment Court for that matter and the appeal period for starting such proceedings starts again when this decision notice is given to the appellants – refer to section 252 of the *Planning Act 2016*.

Otherwise, 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.

Any appeal on one or both of the grounds (a) and (b) must be started within 20 business days after the day this decision notice 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 Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone (07) 1800 804 833**

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