

19.2 MATZIN CAPITAL PTY LTD V REDLAND CITY COUNCIL - PLANNING AND ENVIRONMENTAL APPEAL NO. 3797/19 - APPEAL AGAINST REFUSAL OF ADVERTISING SIGN - 22 OCTOBER 2019

Objective Reference:

Authorising Officer: Amanda Daly, Acting General Manager Community & Customer Services

Responsible Officer: Graham Simpson, Group Manager Environment & Regulation

Report Author: Mervyn Collins, Development Control Officer
Samantha Keenan, Technical Compliance Officer

Attachments: 1. Site Location and Proposed Signage

The Council is satisfied that, pursuant to Section 275(1) of the *Local Government Regulation 2012*, the information to be received, discussed or considered in relation to this agenda item is:

- (f) *starting or defending legal proceedings involving the local government.*

PURPOSE

To outline the grounds of appeal and set out relevant facts and circumstances to enable Council to provide instructions with respect to the progress of the appeal.

BACKGROUND

Redland City Council, by notice dated 4 October 2019, refused an application (S001813 - Electronic Display Component – High Impact Sign) made under *Subordinate Local Law 1.4 (Installation of Advertising Devices) 2017* to change an existing large static sign to an Electronic Display Component - High Impact Sign on land at 80-82 Finucane Road Alexandra Hills, described as Lots 2-3 on RP81387, with the sign located on Lot 2.

The sign is categorised as an 'Electronic Display Component – High Impact Sign', a 'Not Approved Sign' in an open space zoned area according to the table in *Schedule 5 – Zone categorization (sic) criteria for installation, erection and display of advertising devices*.

Delegated Council officers decided that the change to the already non-standard billboard at that location to an electronic variable message sign (a high impact sign under the provisions of the local law):

- was not in keeping with the amenity of the residential and passive recreational uses of the locality;
- represented an increase in impact of an already non-standard advertising device in the context of the suburban location; and
- was proposed to be located outside the preferred zone category for the type of sign proposed i.e. the Industrial or Centre category.

The two lots forming the subject site are otherwise vacant and appear, and are used, as part of the adjoining park drainage corridor known as Valentine Park. However, the lots remain in private ownership.

Wooden bollards along the Finucane Road boundary of the park extend across the developed private lots to the west and east, and the area appears grassed and mowed as one with the official park.

The appellant, Matzin Capital Pty Ltd, has owned the lots since 12 September 2016.

Prior to 2016 a billboard sign was erected in the vicinity of the site, partly on the adjacent Council-owned open space. That sign was replaced through an Operational Works approval granted in 2016, and varied in 2017, to Espin Capital Pty Ltd (OPW002073) – resulting in the 9.5m high 37.5m² faced traditional (non-electronic) billboard display now existing on Lot 2.

A search of Council records has revealed no account of the original sign having been formally approved, nor any record of building approval having been granted for the sign.

The subject application sought to replace the face of the existing (2017) sign with a Light Emitting Diode (LED) electronic message sign, having a variable display changing every 10 seconds.

On 4 October 2019 Council issued a refusal in response to the application.

The refusal reflected the subordinate local law provisions with respect to the size and nature of the sign proposed; the proximity of the large sign to residential development, in particular some close dwellings with direct line of sight to the sign; its impacts on the users of the adjacent recreational and passive open space; and the principle of not allowing such commercial intrusion into the otherwise established residential community.

The provisions of the subordinate local law indicate that such signs, if approved at the unusually large size, should be located within industrial or centre zone categories.

Attachment 1 depicts the site location and proposed signage.

On 28 October 2019 MacDonnells Law, acting on behalf of the Matzin Capital Pty Ltd, served a Notice of Appeal No. 3797 of 2019, filed in the Planning and Environment Court on 22 October 2019.

ISSUES

The current advertising device is a static billboard sign located on a vacant block of land zoned Recreation and Open Space (ROS). This is a vacant block adjacent to a Council park. The site is grassed and has the appearance of being part of the Council-maintained community level park, giving the impression that the sign is on Council Land.

While acknowledging the presence of a service station at the intersection located approximately 130 metres to the east of the property, the existing static billboard introduces a large and dominant commercial element and is considered non-standard in the suburban setting.

The assessment and approval of the current static sign in 2017 specifically referred to its being a replacement for an earlier (and similarly non-standard) sign in the park area.

The 'Response to the Information Request' supplied by Jensen Bowers Pty Ltd on 27 September 2016, in support of the then proposed replacement sign (OPW002073) on the site, stated (at p.7) in relation to amenity:

It is important to note that as the proposed sign is not to be animated or digital, there will be no potential for distraction due to moving or changing images. As such, the proposed sign will not cause undue distraction to pedestrians throughout either the adjoining parklands, or utilising the pathways throughout the verge along Finucane Road.

As such, the proposal is deemed to be compliant with Specific Outcome S6 of the Advertising Devices Code.

Legal advice is that the 2016/17 application for Operational Works was arguably in error as there was no connected use of the land for which the 'works' were associated as an 'operational' aspect. The application might alternatively have been for use of the land for the purpose of roadside third party advertising.

The Department of Transport and Main Roads' Roadside Advertising Manual (RAM) refers to the type of sign now proposed as being a High Impact Advanced Technology Sign. The sign would be a 9.5m high, 5m wide, frame, with an LED panel 7.5m high, by 5m wide (37.5m²), illuminating a changing commercial message every 10 seconds.

The RAM 'Advance Visibility Criteria', current at the time of the application, calls for a minimum visibility of such signs from state controlled roads, as is Finucane Road. On the subject section a speed limit of 70km/h is in place. According to RAM there needs to be a three (3) second period for any driver to view and read a message.

The applicant maintains through its traffic consultants that the required 58m of road that represents such a time frame exists, and that the sign meets the criterion. The visibility of the current sign, and the proposed electronic sign, is arguably shorter than the required distance and is in part hindered by the bus stop shelter.

The major objection to the proposed change of the current static sign to a changing electronic display is the amenity of the immediate locality, comprising residents within 70m and a well-used passive recreation pedestrian promenade described by Valentine Park (and, in practice, the site itself).

Under *Subordinate Local Law 1.4 (Installation of Advertising Devices) 2017 Schedule 5* the sign type proposed is classed as a "Not Approved Sign".

Electronic Display Component - High Impact Signs, as is proposed, require an approval in Industry and Centre Zones - and are a "Not Approved Sign" in all other Zones Categories, including the subject land's open space/community purpose category designation.

The proposed sign also fails to meet the criteria set out at Schedule 4 of *Subordinate Local Law 1.4 (Installation of Advertising Devices) 2017*, which calls for the maximum face area for a free-standing advertising device to be 22.5m², and of a maximum height of 7.5m (unless otherwise permitted by the subordinate local law).

Council officers consider that the scale and type of sign proposed would impose an unwarranted intensification of the present commercial presence in a residential and recreational open space area.

Amenity issues to consider relate to the impacts of the sign, in both its size and type, on the nearest residential dwellings, 70m to the west and 76m to the south.

The constantly flickering and changing LED display component of the sign will be visible from nearby habitable rooms. This will directly impact the resident's amenity and wellbeing, with the potential to cause stress and mental health issues from lighting and glare associated with the sign.

The sign would affect the amenity of local residents' right to enjoy the park without interference from a constantly changing sign.

Opportunity

There is considered little opportunity, having regard to the context and nature of the sign proposed, to achieve a mutually agreed result other than a confirmation of the refusal.

A 'without prejudice' meeting was held with Council officers following the notice of appeal, and the applicant has since proposed that the LED Panel be reduced in size to 4.02m wide and 6.21m high (20.01m²). The proposed LED panel would be 3.18m above ground level and the top of the LED panel 9.5m above ground level.

Further discussions with the applicant to move the LED panel closer to ground level might further reduce the impact on the amenity and minimise impact on the wellbeing of nearby residents, however the nuisance and loss of amenity for park users in the early evening in particular would still result in an outcome contrary to current Council policy as expressed in subordinate local law 1.4.

Any proposal would need to include reduced dwell times for each advertisement and restrictions to hours of operation, to essentially daylight hours, for there to warrant any further consideration of a negotiated outcome.

However, Council officers consider and recommend that the site should fundamentally not have an LED signage panel given the issues discussed in this report.

STRATEGIC IMPLICATIONS

Legislative Requirements

The appeal is lodged under s.229 of the Planning Act (Qld) 2016, Item 6 Table 2 Schedule 1.

6. Local laws

An appeal may be made against a decision of a local government, or conditions applied, under a local law about—

(a) the use of premises, other than a use that is the natural and ordinary consequence of prohibited development; or

(b) the erection of a building or other structure.

The local government is the prescribed respondent to such appeals.

Risk Management

There is risk that an appeal will highlight weaknesses in Council's administration of the signage laws in terms of the strength of local law provisions to effectively regulate signage, including associated administrative procedures and consistency of policy measures across the current application and various past determinations.

An issue exists in regards the access to the private land on which the current structure is located. The current sign is accessible to children and others. A ladder to a walkway along the top of the 9.5m high structure is observed to be accessible, with two safety gates preventing the scaling of the structure unlocked and in fact open at the time of the latest inspection. A feature of the approved design for the sign, which has not been carried through into the construction, was a covering decorative metal screen to the rear of the sign. No ladder access was shown in those approved plans in 2017. The current sign is in that respect non-compliant with the operational works approval.

The change to the sign, introducing a major electrical source, would necessitate the fencing off of the area and a stark change to the present arrangements that appear to see the large privately owned site unofficially incorporated into the Council-owned and maintained park.

There appears to be no means to access the sign or the rest of the site for maintenance or construction activity other than through the Council park.

None of these issues were canvassed by the applicant in the application made, or in the discussions subsequent to the appeal being lodged.

Financial

The implications for Council are financial risks in defending an appeal action through the courts. In this instance, the principle of maintaining residential amenity is considered to justify the expense.

People

The recommended option involves human resources from the Legal Services Unit and Development Control Unit (DCU).

Environmental

Impacts on the environment are on the existing visual amenity. This larger third party sign is considered to have the potential to materially detract from the existing visual amenity of the park.

Social

The sign is located within an established built up residential area and within the practical confines of a neighbourhood park.

Alignment with Council's Policy and Plans

The appeal is based on a particular coverall provision of Subordinate Local Law 1.4 at Schedule 1 section 4(3) that provides that a proposal might override the specific prescribed criteria of signs of any type and location if it can be shown not to result in loss of amenity, nuisance or environmental harm.

Council officers have made the determination that the change to an electronic LED sign at the subject location does in fact cause loss of amenity, nuisance and environmental harm.

Council has historically supported business advertising, relating to a premises on which signage is located, and has assessment levels and set fees that encourages modest and discreet signage of a variety of types. Typically an assessment level not requiring application to Council or alternatively an annual licence exemption to annual registration has been applied to effect such a preference in behaviour.

In this case there is no business operating that allows the display of advertising from the premises.

The proposed sign exceeds the dimensions expected of a sign under Schedule 4 of the subordinate local law, and specifically the criteria for a Pylon sign to have a maximum width of 2.5m; and not have a face area in excess of 20m² per side. The proposed sign is 5m wide and 37.5m² in area.

CONSULTATION

Consulted	Consultation Date	Comments/Actions
Service Manager Legal Services	Ongoing	Provided legal advice and to facilitate advice from experts, and Counsel.

Consulted	Consultation Date	Comments/Actions
Service Manager Development Control	Ongoing	Provided technical and management advice in respect to the application and subject appeal.
Group Manager, Environment and Regulation	Ongoing	Provide advice with regard to application of policy and the merits of the DCU position.

OPTIONS

Option One

That Council resolves as follows:

1. To instruct officers to maintain a refusal of the application and take appropriate action through the courts.
2. To identify the remaining issues in dispute in accordance with legal advice and appropriate experts and prepare the appeal for a hearing.
3. That this report and attachment remain confidential until after the final determination of the matter is made, subject to maintaining the confidentiality of legally privileged, private and commercial-in-confidence information.

Option Two

That Council resolves as follows:

1. To instruct officers to negotiate a resolution based on an amended proposal.
2. That this report and attachment remain confidential until after the final determination of the matter is made, subject to maintaining the confidentiality of legally privileged, private and commercial- in-confidence information.

OFFICER'S RECOMMENDATION

That Council resolves as follows:

1. To instruct officers to maintain a refusal of the application and take appropriate action through the courts.
2. To identify the remaining issues in dispute in accordance with legal advice and appropriate experts and prepare the appeal for a hearing.
3. That this report and attachment remain confidential until after the final determination of the matter is made, subject to maintaining the confidentiality of legally privileged, private and commercial-in-confidence information.

Attachment 1

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SOURCE: <https://www.nearmap.com.au/>

Aerial of sign location - 80-82 Finucane Road, Alexandra Hills



Existing sign – the structure is proposed to remain with the face converted to an electronic LED display – note the private site is indistinguishable from the adjacent Valentine Park