
20171122 Item 17.1.1 Report Confidential Report - MCU012812 - King of Gifts Appeal Update

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| Objective Reference: | A2709404 Reports and Attachments (Archives) |
| Attachments: | <u>Notice of Appeal Judgment 3641/15</u> |
| Authorising Officer: | Louise Rusan General Manager, Community and Customer Services |
| Responsible Officer: | David Jeanes Group Manager, City Planning and Assessment |
| Report Author: | Emma Martin Senior Appeals Planner |

PURPOSE

This matter is referred to the General Meeting of Council to provide a briefing on the Judgment of Her Honour Judge Kefford DCJ to allow the appeal (3641 of 2015, King of Gifts (Qld) Pty Ltd v Redland City Council and Department of Transport and Main Roads), therefore approving the proposed Service Station (including car wash) and Drive Through Restaurant at 604-612 Redland Bay Road, Alexandra Hills. The report also details advice on, and seeks direction in relation to, Council's rights to appeal that decision to the Queensland Court of Appeal (QCA).

BACKGROUNDSite and Locality

The subject site has an area of 35,220m² and is currently improved by two dwelling houses and associated outbuildings. It is located on the corner of two state controlled arterial roads being Redland Bay Road and Boundary Road in Alexandra Hills, which intersect at a roundabout with a high volume of traffic. The site is mostly grassed other than an area of approximately 6000m² of dense native vegetation in the north-west corner and a smaller less dense area along the middle eastern side boundary. The land slopes away from the roundabout to the northern rear of the site. Hilliards Creek is located in the north west of the site.

The subject site forms part of the Kinross Road Structure Plan area, which is located to the north and east. The area to the west of Redland Bay Road contains Park Residential zoned lots located outside of the structure plan area, along with Rural Non-Urban zoned lots to the south of Boundary Road. The surrounding area is predominantly characterised by detached acreage housing and agricultural land uses. Sheldon College is located approximately 450m to the south; the Victoria Point Shopping Centre is approximately 5.5km to the south-east and the Capalaba Park Shopping Centre is approximately 6.5km to the north-west.

There are two fauna crossings nearby, with one at the low point in Redland Bay Road (adjacent to the north-west corner of the site) and the other adjacent to 10-16 Boundary Road (two lots east of the subject site). There is also a fauna/koala corridor to the north of the site along Hilliards Creek.

The northern part of the site is located within the Open Space zone in the Redlands Planning Scheme, with the remainder of the site identified as Environmental Protection Zone.

Original Application

Council received an application seeking a Development Permit for a Material Change of Use on land at 604-612 Redland Bay Road, Alexandra Hills for the purpose of a Service Station (including ancillary Carwash Facility) and Drive Through Restaurant.

The application was amended a number of times during the course of the original assessment and during the course of the trial, however the version upon which the Court decision was made comprised the following:

- Service Station, including:
 - 8 fuel pump stations with 14 filling positions - 473m²
 - Shop – 316m²
 - Toilet facilities – 75m²
- A Car Wash Facility with 4 bays, office and equipment area – 234m²
- A Drive Through Restaurant – 251m²
- Unenclosed Courtyard – 600m²
- 69 car parking spaces
- 2 noise barriers and a significant landscape buffer to the adjoining dwelling to the east
- Road widening to Redland Bay Road and Boundary Road;
- A vegetated environmental buffer in the north of the site;
- On site effluent disposal with sub-surface irrigation of 5000m²
- A 10m high pylon sign on each road frontage
- Operation hours are 24 hours a day, seven days a week
- Vehicular access is via a left-in-left-out access from Redland Bay Road, with a left-out-only facility to Boundary Road.

The application was assessed against the Redlands Planning Scheme and considered to conflict with it. The key issues identified in the original assessment were:

- Strategic intent of the land
- Scale of development and character of the surrounding area
- Environmental impacts and landscape setting
- Insufficient need for the development

The application was refused by officers under delegated authority on 19 August 2015.

Appeal

The applicant filed an appeal on 16 September 2015 (**Attachment 1**) alleging no conflict with the Redlands Planning Scheme. During the course of the appeal and following the appointment of expert witnesses the appellant did eventually accept the existence of conflicts.

The matters in dispute in the appeal are summarised below:

- **Visual Amenity**

The impact of the development on the bushland setting and semi-rural character of the locality and encroachment into an important inter-urban break (visual amenity); specifically that the scheme intends low-impact, low-key development with a visual impact akin to detached dwellings within a native habitat area (i.e. bushland living). Whereas the proposal presents an intensively developed complex of concrete surfaces, buildings, signs and lighting with a distinct urban character.

- **Ecology**

The development fails to provide the corridor enhancement and re-vegetation required by the Redlands Planning Scheme, in particular the effluent discharge area in the north of the site conflicts with the scheme's requirement to provide a sub-regional habitat and movement corridor in this location.

- **Use/Scale**

The nature and location of the use and the character of the built form.

- **Need**

Insufficient need for the development, being only mild to moderate.

Judgment

On 6 November 2017 the Judgment for appeal 3641 of 2015 was delivered by Judge Kefford DCJ (**Attachment 2**). The appeal was allowed and the development application was approved. The Judge concluded that although the proposal conflicted with parts of the Redlands Planning Scheme with respect to Visual Amenity, Ecology and Land Use/Scale, the impact of these conflicts were "low, even negligible".

In making this point with respect to visual amenity the Judge gave weight to the following:

- The catchment from which the built form on the subject site is visible is limited as a result of the topography, the extent of existing vegetation to the north and the low-rise design of the buildings;
- The majority of those within the visual catchment will be the occupants of vehicles travelling along the state-controlled road network. Their attention will be drawn by other things, not least the major roundabout that will need to be navigated.

- The proposal is set down below the road and is not overbearing or visually prominent, instead presenting as subservient in height to the surrounding mature trees.
- The pylon signs will be visible but would not be so discordant with the character of the area (e.g. Hoya Garden Plaza and significant signage associated with the road network)

With respect to ecology Her Honour had regard to the following:

Although a less extensive development as encouraged by the scheme may permit greater opportunity for enhancement of environmental values the scheme requires only (for the part zoned Environmental Protection) that the development maintain and protect the values that exist. The Judge found that the existing values are generally isolated to the northern part of the site (zoned Open Space), which are proposed to be revegetated and comprise effluent irrigation.

Values are enhanced to a limited degree by landscape planting and fauna proof fencing (directing fauna to safe road crossing points);

Despite contestation from Council's expert the judge decisively accepted the evidence of the appellant's wastewater engineering expert that native grasses can be effectively used for effluent irrigation areas. The grass will be allowed to grow to 100mm before requiring mowing, which Her Honour concludes satisfies the requirement for the area to be rehabilitated for native habitat.

With respect to the nature and location of the use and the character of the built form, the Judge acknowledges a clear conflict with the Redlands Planning Scheme, accepting that the proposal is not a low-key use and is fundamentally different in nature and size to the types of uses and development envisaged by the Redlands Planning Scheme in this location. The Judge found however that seriousness of the conflict was tempered by the following factors:

- The low visual amenity impact;
- The absence of environmental impact;
- The low-key appearance that is achieved by the low-rise (single storey) scale of the buildings, the location of the buildings set down below the tree line, the landscaped presentation to the road frontages and the generous setback to the road;
- The park-like appearance of the effluent treatment area;
- The absence of impact from the 24-hour operation given its location away from residential development and the incorporation of acoustic barriers and landscaping to ensure potential impacts are negated or controlled; and
- The co-location of the drive-through restaurant with a service station which adds to the convenience of its use.

Conversely the Judge found that the level of economic need for the development was clear and strong. On this basis the Judge determined that the need for the proposed development was sufficient to justify approval notwithstanding the conflicts identified.

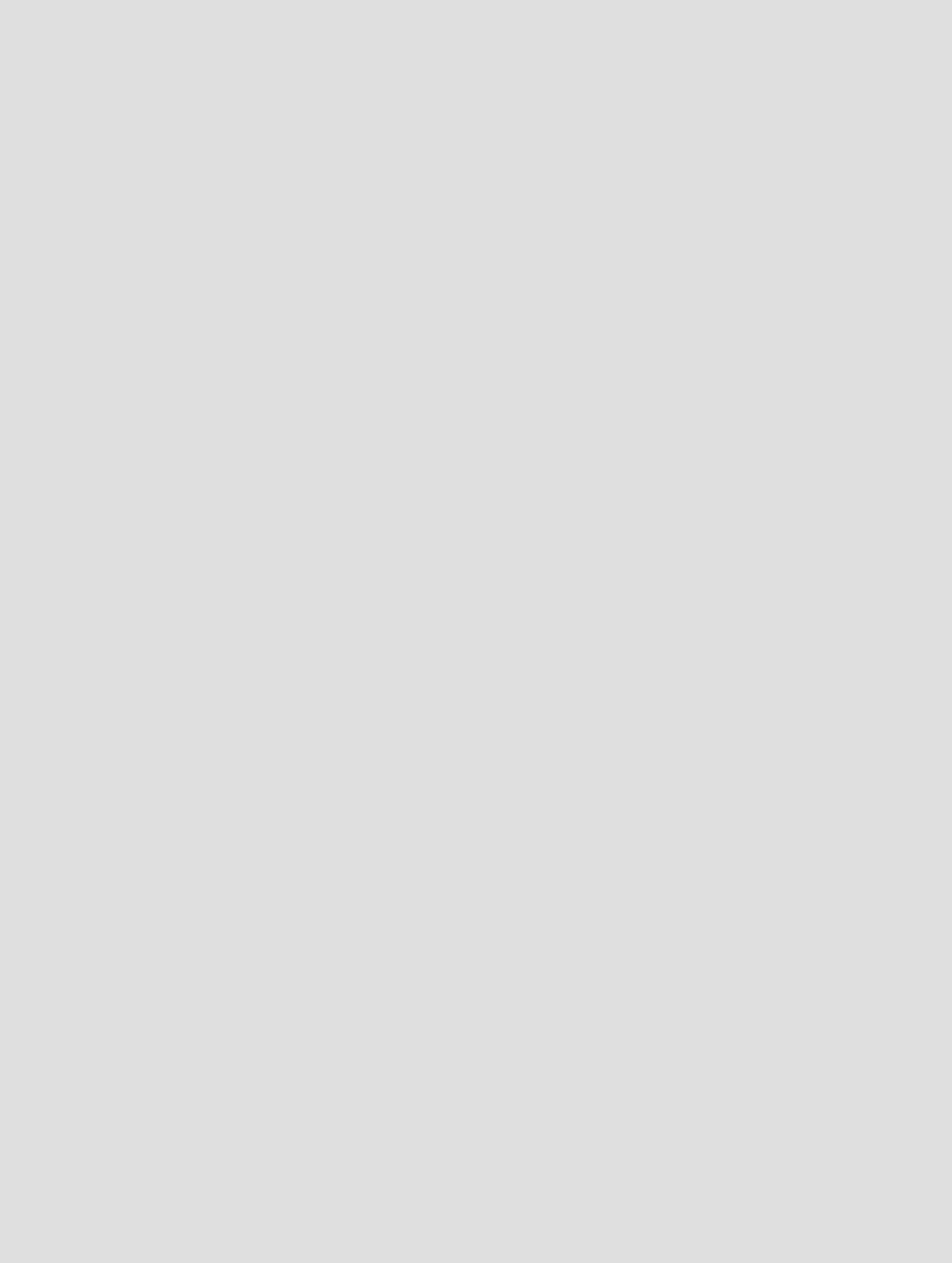
ISSUES

Appeal

Pursuant to section 498 of the *Sustainable Planning Act 2009*, a party to a proceeding may appeal a decision of the court on the following grounds only:

- (a) *Of error or mistake in law on the part of the court; or*
- (b) *That the court had no jurisdiction to make the decision; or*
- (c) *That the court exceeded its jurisdiction in making the decision.*

Further, a party may only appeal a decision with the leave of the Court of Appeal.



STRATEGIC IMPLICATIONS

Legislative Requirements

Pursuant to section 499 of the *Sustainable Planning Act 2009* Council has 30 business days after the Court's decision to apply to the QCA for leave to appeal the decision. This means if Council opts to appeal the decision of QPEC it must file an application on or before 18 December 2017.

Risk Management

The financial risk is discussed under the Financial heading below.

Financial

If Council opts to appeal the Judgment it will incur legal expenses in the form of a junior barrister and a Q.C. [REDACTED]

[REDACTED] There is also the potential of the Court awarding costs against Council if it lost the appeal.

People

It is anticipated that there should not be an impact

Environmental

Part of the development comprises treated effluent irrigation within an area the Redlands Planning Scheme seeks to protect and enhance for native habitat.

Social

Nil

Alignment with Council's Policy and Plans

Notwithstanding the decision of Planning and Environment Court it is the view of officers that the proposal represents a serious conflict with the Redlands Planning Scheme and draft City Plan. It proposes a large scale Service Station (14 fuelling positions, 69 car park spaces) and Drive Through Restaurant in an area anticipated for low-key development that complements the environmental values associated with the Hilliards Creek corridor.

CONSULTATION

The planning assessment unit consulted with Council's General Counsel Group.

OPTIONS

Option 1

1. Instruct Council's solicitors to seek an adjournment for the conditions hearing scheduled for 8 December 2017; and
2. Instruct Council's solicitors to appoint a Queen Counsel (Q.C.) and junior barrister to file an application with the Queensland Court of Appeal for leave to appeal, and draft a notice of appeal, against the decision of Judge Kefford DCJ, dated 6 November 2017.

Option 2

1. Accept the decision of the Court and instruct Council officers to seek an adjournment for the conditions hearing scheduled for 8 December 2017; and
2. Instruct Council's solicitors to negotiate conditions with the appellant; and
3. Report back to Council on draft agreed conditions.

CONCLUSION

In weighing up the two options to either (1) appeal the Judgment or (2) accept the decision of the court, the following matters should be considered:

- The prospects of success are only fair;
- The risk of an adverse costs order;
- Despite significant concerns with the Judge's conclusions on the merits of the case, an appeal to the QCA is limited in its scope to errors of law; and
- Even if an appeal were successful the most likely outcome is a remittal to QPEC, where a complete decision reversal is highly unlikely.

OFFICER'S RECOMMENDATION

That Council resolves to:

1. **Accept the decision of the Court and instruct Council officers to seek an adjournment for the conditions hearing scheduled for 8 December 2017; and**
 2. **Instruct Council's solicitors to negotiate conditions with the appellant; and**
 3. **Report back to Council on draft agreed conditions; and**
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4. Maintain this report as confidential.