PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Johnston v Cassowary Coast Regional Council* [2008] QPEC 102
PARTIES:	**B JOHNSTON** (Appellant) v **CASSOWARY COAST REGIONAL COUNCIL** (Respondent)
FILE NO/S:	175 of 2007
DIVISION:	Planning & Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Cairns
DELIVERED ON:	26 November 2008
DELIVERED AT:	Cairns
HEARING DATE:	11 November 2008
JUDGE:	Everson DCJ
ORDER:	**Declare that the development application, the subject of this appeal, is a development application for the reconfiguration of a lot**
CATCHWORDS:	PLANNING – PLANNING AND ENVIRONMENT – reconfiguration of a lot – material change of use – whether change to the boundary constitutes a material change of use.
COUNSEL:	Mr W Cochrane for the appellant Mr D Morzone for the respondent
SOLICITORS:	Miller Bou-Samra Lawyers for the appellant MacDonnells Law for the respondent

Introduction

[1] The appellant, Mr Johnston is a cane farmer. On his land at Old Tully Road, to the north of Tully there are four dwellings. He applied to the respondent to reconfigure his land so that all four dwellings would be located on one lot and the land which is used for sugar cane production would be located entirely on another lot. The respondent refused the development application and he appealed. A preliminary question of law has arisen for determination by the Court. This relates to the correct categorization of the development application. Is it a development application for

the reconfiguration of a lot or is it for the reconfiguration of a lot and a material change of use?[1]

The issues

[2] The land in question comprises two lots described as Lot 1 and Lot 2 on RP 715238 comprising an area of 5.06 hectares. Lot 1 is a small lot containing a duplex dwelling and curtilege. I am informed that it is 1517.56 m☐ in area. Lot 2 is much larger. It contains two houses immediately adjacent to the boundary it shares with Lot 1. It also contains a large area under cultivation for growing sugar cane. I am informed that it is 4.9043 hectares in area. The proposal, the subject of the development application is summarised in the report of the respondent's officer dated 10 May 2007 in the following terms:-

> "The applicant has proposed to relocate the northern boundary of existing lot 1 approximately 5 to 6 metres north of the existing dwellings located on existing lot 2. The rear boundary will remain at the same distance from the front boundary as existing lot 1 and simply extended north to meet the proposed northern boundary.
>
> The proposed allotments are of the following size:
> - Proposed Lot 101 – 3520 m☐
> - Proposed Lot 102 – 4.7 ha [2]"

[3] It is uncontroversial that each of the dwellings (the duplex and the two houses) are lawful and that it is proposed that the dwellings and the land which is currently used for sugar cane production will continue to be used in the same manner as at present. All of the land in question is located within the Rural Zone pursuant to the respondent's planning scheme.[3] There is no legal obligation either pursuant to the respondent's planning scheme or as a consequence of past development approvals which requires any of the dwellings to be used in connection with rural activities.

[4] On 24 September 1992 the respondent refused a subdivision application in practically identical terms to that the subject of this appeal.

[5] A number of provisions of the *Integrated Planning Act* 1997 ("IPA") need to be considered. Section 1.3.2 is in the following terms:-

> ***"Development*** is any of the following –
> (a) carrying out building work;
> (b) carrying out plumbing or drainage work;
> (c) carrying out operational work;
> (d) reconfiguring a lot;
> (e) making a material change of use of premises."

The term "reconfiguring a lot" is defined in s 1.3.5 as, inter alia, "creating lots by subdividing another lot" and "rearranging the boundaries of a lot by registering a plan of subdivision".

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1 Although two lots are proposed to be reconfigured, s 32C of the *Acts Interpretation Act* 1954 provides that words in the singular include the plural

2 Affidavit of Mr Pettigrew filed 29/9/08, Ex "JP1" p 49

3 Cardwell Shire Council Planning Scheme dated 28 June 2007

[6] In s 1.3.2 material change of use of premises means, relevantly "the start of a new use of the premises" or "a material change in the intensity or scale of the use of the premises".

[7] On behalf of the appellant Mr Cochrane submits that the proposed reconfiguration merely consists of rearranging the boundary of Lot 1 and Lot 2 and that this does not fall within the definition of making a material change of use of premises because the change in the location of the boundary does not start a new use of the premises nor does it cause a material change in the intensity or scale of the use of the premises. All that changes is that the dwellings will be located on one lot instead of two lots.

[8] On behalf of the respondent, Mr Morzone submits that whilst ordinarily a reconfiguration would not trigger a material change of use, the result is different on the facts before me. He submits that the consolidation of the residential uses on the smaller proposed lot constitutes the start of a new use or an intensification of the residential use when compared to the existing configuration. In support of the former proposition he makes reference to the definition of Multiple Dwelling in the respondent's planning scheme which refers to the presence of three or more dwelling units on one lot. The result, he submits, is that the realignment of the boundaries of the lots will cause the start of a new use of Multiple Dwelling as distinct from the relevant existing uses of duplex dwelling and dwelling houses on the current configuration. A Multiple Dwelling is an impact assessable use in the Rural Zone. In support of the latter proposition Mr Morzone submits that the proposed realignment would sever the existing "nexus" between the farming use and the dwelling houses on Lot 2 with a resultant higher concentration of residential uses on proposed Lot 101. He also notes the potential for an additional dwelling house on proposed Lot 102 as this is a self-assessable use in the Rural Zone.

[9] The difficulty for the respondent is that the size of the lot and the intensity or scale of a use are not necessarily related concepts. Support for this view is found in the definition of material change of use in s 1.3.5. It is framed in terms of "the premises" not "the lot". The term "premises" is defined in Schedule 10 of IPA as meaning "a building or other structure" or "land (whether or not a building or other structure is situated on the land)". The term "lot" is defined in s 1.3.5 as "a lot under the *Land Title Act* 1994" and pursuant to other legislation which creates a separate and distinct interest in real property. The development application, the subject of this appeal, will not result in a change in the use of the residential buildings or of the land itself and, as noted earlier, there is no requirement that the existing residential uses are connected with the existing farming use.

Conclusion

[10] Reconfiguring a lot is a different type of development to making a material change of use of premises. Premises are distinct from a lot. On the facts before me the reconfiguration of the lots proposed by the appellant will not change the use of the premises within the lots in question. It is not relevant in this regard that the consequence of the reconfiguration will be to bring the existing lawful residential uses into a different category pursuant to the respondent's planning scheme. Any development applications in the future will obviously be constrained by the definitional status of the dwellings and the fact they are within the Rural Zone but a change in the categorization of the use pursuant to the planning scheme as a result

of the reconfiguration cannot without more "make" a material change of use of the premises in question. As Brabazon QC DCJ noted in *Fox & Anor v Brisbane City Council & Ors*[4]:-

> "All of the concepts in the definition of "development" depend on actions rather than the result of actions."

[11] It follows that the development application, the subject of this appeal, is correctly described as one for the reconfiguration of a lot.

Order

[12] I declare that the development application, the subject of this appeal, is a development application for the reconfiguration of a lot.

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4 [2003] QPELR 215 at 221