

ORDINARY COUNCIL MEETING 11 MARCH 2014	
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REQUEST TO EXTEND RELEVANT PERIOD – SUPERSEDED SCHEME APPROVAL - MATERIAL CHANGE OF USE FOR FOUR (4) MULTIPLE DWELLINGS (TOURIST) – 27 MURPHY STREET, PORT DOUGLAS

Jenny Elphinstone: 43.2008.2770 : 412993

PROPOSAL: REQUEST TO EXTEND RELEVANT PERIOD – SUPERSEDED SCHEME APPROVAL - MATERIAL CHANGE OF USE FOR FOUR (4) MULTIPLE DWELLINGS (TOURIST)

APPLICANT: FRED & LOLA LANGTON
C/- RPS AUSTRALIA EAST PTY LTD
PO BOX 1949
CAIRNS QLD 4870

LOCATION: 27 MURPHY STREET, PORT DOUGLAS

PROPERTY: LOT 113 ON PTD2091

PLANNING SCHEME: DOUGLAS SHIRE PLANNING SCHEME 1996

STRATEGIC PLAN: URBAN AREA

DCP: DCP 2 PORT DOUGLAS, MEDIUM DENSITY TOURIST ACCOMADATION AREA & SPECIAL AREA 5 OF FLAGSTAFF HILL

ZONE: RESIDENTIAL B

CURRENT PLANNING SCHEME:

LOCALITY: PORT DOUGLAS AND ENVIRONS

PLANNING AREA: RESIDENTIAL 1 (SPECIAL MANAGEMENT AREA 1 – OUTSIDE THE TOURIST CENTRE)

REFERRAL AGENCIES: NONE APPLICABLE

NUMBER OF SUBMITTERS: ONE TO THE ORIGINAL APPLICATION

STATUTORY ASSESSMENT DEADLINE: 3 APRIL 2014

APPLICATION DATE:

3 SEPTEMBER 2008 (ORIGINAL APPLICATION)
16 JANUARY 2014 (REQUEST TO EXTEND)

APPENDIX:

1. DEVELOPMENT PERMIT
2. APPLICANT'S SUPPORTING REASONS

LOCALITY PLAN



RECOMMENDATION:

- A. That Council refuse the request to extend the period of approval to the Development Permit for Material Change of Use for Four (4) Multiple Dwellings (Tourist), over land described as Lot 113 on PTD 2091, located at 27 Murphy Street, Port Douglas, on the following grounds:
1. Since the issue of the Development Permit the 1996 Douglas Shire Planning Scheme has been superseded by new planning controls. The development approved under the Development Permit is inconsistent with the current Planning Scheme and planning controls;
 2. The delay in effecting the Reconfiguration of a Lot due to suppressed market conditions and the Applicant's economic circumstances and constraint on ability to develop and sell the Multiple Dwellings (tourist) are not planning considerations permitted to be considered for approving an extension to the period of the approval;
 3. Based on the information provided in the Applicant's request to extend the Relevant Period of the Development Permit it is not considered that the request has sufficient merit, having regard to section 388 of the *Sustainable Planning Act 2009*, to support an extension to the relevant period. Having regard to the *Sustainable Planning Act 2009* it is inappropriate for Council to extend the period of approval;

4. **There is no demonstrated planning need for the proposed use of Multiple Dwellings (tourist) on the land to enable supporting the consolidation of Port Douglas as a major tourist accommodation centre. There is other land available in the Port Douglas and environs area that enable major tourist accommodation;**
 5. **The extension to the Development Permit is contrary to the expected outcomes for the land held by the community;**
 6. **The development would, if applied for under the current Scheme, be likely to give rise to submissions against it.**
- B. In respect to the development of Holiday Accommodation on the land Council advise the Applicant that there remains opportunity to lodge an application for a Material Change of use under the current Scheme as the use is not prohibited development under the *Sustainable Planning Act 2009* and that any application would be considered on its merits.**

EXECUTIVE SUMMARY:

An application was lodged in 2008 for assessment against the superseded 1996 Douglas Shire Planning Scheme for a Material Change of Use for four Multiple Dwellings (Tourist). Cairns Regional Council (CRC) agreed to assess the application against the superseded 1996 Scheme and at the Planning and Environment Committee Meeting held on 10 February 2010 CRC supported the development subject to conditions. Subsequently a Development Permit was issued by the Queensland Government through the Douglas Iconic Places Panel.

By agreeing to assess the applications against the superseded Scheme, Cairns Regional Council negated the risk of substantial compensation potentially being payable to the land owner and provided the land owner with a window to develop as per the requirements of the 1996 Planning Scheme. The support of the superseded Planning Scheme application and issue of the Development Permit follows the “use it or lose it” principle.

The superseded scheme, under which the current Permit was assessed and approved came into effect in 1996, nearly twenty years ago. The current Scheme was adopted by the former Douglas Shire Council on 21 August 2006 and came into effect on 4 September 2006. Under the *Integrated Planning Act 1997* Applicants had two years to lodge for assessment against the superseded scheme. The Scheme was amended by the Cairns Regional Council in 2008 and remains in effect. The land is included in the Special Management Area Flagstaff Hill. Flagstaff Hill is also affected by the Cultural Heritage and Valuable Sites Code. The land currently has a low Scale Plot Ratio designation and is in the Residential 1 Planning Area.

The Development Permit has a period of approval for four years and is due to expire if the use is not commenced prior to 3 August 2014. The land owners have requested a four year extension to the approval period.

The *Sustainable Planning Act 2009* (SPA) sets out the specific, limited matters that Council must as Assessment Manager apply to determine the request. These are:

- “(a) the consistency of the approval, including its conditions, with the current laws and policies applying to the development; and*
- (b) the community’s current awareness of the Development Permit; and*

- (c) *whether, if the request were refused –*
 - (i) *further rights to make a submission may be available for a further development application; and*
 - (ii) *the likely extent to which those rights may be exercised; and*
- (d) *the views of any concurrence agency for the approval.” S.388 SPA*

The Applicant’s individual economic circumstances or the downturn of economies are generally not matters which the Act permits Council to consider.

Under the 1996 Planning Scheme, and the interpretation of the Scheme by the *Integrated Planning Act 1997*, the use of Multiple Dwellings (tourist) was impact assessable and required a compliance assessment against the Planning Scheme provisions. Under the current Scheme the use falls in the defined use of “Holiday Accommodation” which is impact (inconsistent) development on the land.

A significant difference between the two Schemes is the previously clear support for Multiple Dwellings (tourist) to be established on the land and the current Scheme that seeks the development of a single House. The current Scheme specifically nominates a Tourist Centre for Port Douglas that excludes Murphy Street and gives a high degree of protection to Flagstaff Hill including considerations of land use, sensitive and natural environments, and impacts from activities and land use.

Section 1.7 of the current Scheme states that development must satisfy outcomes identified in the Scheme including the:

- a. Desired Environmental Outcomes;
- b. Overall Outcomes for Localities;
- c. Specific Outcomes for areas affected by an Overlay;
- d. Specific Outcomes for Planning Areas or particular development; and
- e. Performance Criteria for Specific Outcomes and Overall Outcomes.

The Applicant acknowledges that the use is stated as “inconsistent” impact assessable development in the Port Douglas and Environs Locality Assessment Table. However, despite this, the Applicant submits that the development is consistent with the Purposes of the Planning Scheme Codes and Desired Environmental Outcomes of the current Planning Scheme. In support of the Applicant’s contentions the Applicant cites the circumstances of the land being in close proximity to the Tourist Centre around Macrossan Street, the limited amenity due to the land being adjacent to commercial development that fronts Macrossan Street, the location of other nearby Holiday Accommodation, and the character of the southwest side of Murphy Street. The Applicant contends that the development existing in Murphy Street reflects tourist accommodation, similar to what is proposed, and not a residential area.

Officers do not agree with the Applicant’s contentions, the development is inconsistent with the current Planning Scheme in a number of respects as detailed in the Town Planning Considerations section of this report. An application of the same form against the current Scheme would require consideration against the Scheme’s Desired Environmental Outcomes. Under section 329 of the SPA Council has opportunity to approve a new application where development that is in conflict with a relevant instrument where, *“there are sufficient planning grounds to justify the decision, despite the conflict.”* This decision rule is not available to Council when considering an extension to the period of approval under Section 388 SPA.

There has been no recent community engagement to varying the Scheme intent or direction of approvals for Murphy Street land under the current Planning Scheme. Should the request be refused and a new application be lodged this application would require public notification

and would be likely to raise submissions. There is a community expectation that the current scheme would apply.

The test by which SPA requires Council to determine the request has not been met. Accordingly, this report recommends the request be refused. Should an appeal be lodged against the refusal then these same tests will be considered by the Planning and Environment Court.

The Act does not prohibit the Applicant lodging new applications for the development under the current Scheme.

TOWN PLANNING CONSIDERATIONS:

Background

The application was lodged for assessment against the superseded 1996 Douglas Planning Scheme. Cairns Regional Council at its Ordinary Meeting held on 25 September 2008 agreed for the assessment against the superseded scheme and acknowledged the application accordingly. By agreeing to this assessment process Council's determination of the application was limited to consideration only against the superseded 1996 Planning Scheme. Regard for considerations against the then and still current Planning scheme could not be made.

At the time the application was lodged the *Iconic Queensland Places Act 2008 (IQP)* affected the land. On referral of the application under s44 *IQP* the Douglas Iconic Places Panel advised Council that the Panel would determine the application.

Cairns Regional Council considered the application to be compliant with the relevant requirements of the Superseded 1996 Planning Scheme and at the Planning and Environment Committee Meeting held on 10 February 2010 the Council resolved to recommend the Panel approve the application subject to conditions. The Panel approved the development on 11 June 2010 and issued a Decision Notice on 18 June 2010. The Decision was issued to the submitter on 5 July 2010 who did not lodge an appeal. The Decision has a four year currency commencing on 3 August 2010. A copy of the Decision is included in Appendix 1.

Approved Development

The site has an area of 1012 m², is currently vacant and contains sloping land falling from the Murphy Street frontage down to the rear of the site adjoining the Juniper "Saltwater" commercial /residential complex. The development entails the construction of four Multiple Dwellings (Tourist) contained within two building envelopes over two storeys. A copy of the approved plan of development is included in Appendix 1.

Multiple Dwellings (Tourist) is defined under the 1996 Scheme as:

"Multiple dwelling (tourist)" - Any premises comprising two or more dwelling units, where not dwelling-houses nor dwelling house/attached flat, and any of the following:

- (a) a reception area;*
- (b) an administration office; and/or*
- (c) any signage visible from the road adjoining the subject premises indicating the presence of a reception area or administration office, whether in the subject premises or elsewhere, or in any other way indicating that the premises are available for holiday accommodation;"*

The definition of *Multiple dwelling (tourist)* allows for the normal ancillary functions associated with letting for tourist purposes. In this case there is not currently any proposed

additional features such as reception area/office etc. The 1996 Scheme use of *Multiple dwelling (tourist)* equates to the use of “Holiday Accommodation” under the current Scheme.

Since the issue of the Development Permit there has been no lodgement of the amended plans required under Condition 3 "Amendment to Design" nor of the geotechnical report required under Condition 19 "Geotechnical Assessment." Council holds no record of any Building Certifier having been appointed for any Development permit for building work and no application has been lodged for any Operational Work associated with the proposed development.

Applicant's Request

Under SPA the approval has a four year currency period. The land owners have requested Council extend the period of approval for a further four years. The Applicant nominated reasons by which Council should support this request which are included in Appendix 2. These are summarised as follows:

1. The economic climate has not been conducive to undertaking the development;
2. The form of the development is consistent with the current Planning Scheme;
3. The development is a "good fit" for the locality; and
4. Council (Cairns Regional Council) has approved extensions to the period of approval for similar development over nearby land.

The Applicant contends the development is consistent with the existing development established on the south-western side of Murphy Street, being tourist accommodation. This existing tourist development, which backs onto the commercial spine of Macrossan Street, was either permitted under the superseded 1996 Scheme or the previous 1981 Scheme. The Applicant advises that some of this tourist accommodation includes onsite management facilities and others are managed off-site. The Applicant finds the existing development lacks consistency with the current Planning Scheme provisions. The Applicant claims the current Scheme should support tourist accommodation to align new development with the existing development.

The Applicant contends that the lack of consistency of the proposed development with the current planning scheme is not considered to be a ground to justify refusal of the request to extend the approval.

The Applicant contends that there are grounds to support the development under the current Scheme through the Outcomes of the Purposes of the Port Douglas and Environs Locality Code and the Residential 1 Planning Area Code.

The Applicant contends that:

- a. the development of tourist accommodation on the land supports the consolidation of Port Douglas as a major tourist accommodation centre;
- b. the building design and landscaping will yield a high quality tropical seaside resort design;
- c. the development of tourist accommodation on the land will compliment the intent to consolidate the area between Macrossan Street and Marina Mirage as the major tourist, retail, dining and entertainment centre of the Shire;
- d. the development is compatible with existing development along the south-western side of Murphy Street. The limited number of vacant lots on the south-western side of Murphy Street do not provide for a discreet residential environment. The land will be impacted by tourist vehicles and pedestrian traffic and would be subject to noise and amenity related impacts from the adjacent commercial strip. The approval is a better type and form of development on the land and achieves the Code's preferred outcomes better than the development of a single House intended for permanent residential occupation; and
- e. the land has been cleared of all natural vegetation. The land is located on the foothill

of Flagstaff Hill and is adjacent to other multi unit development and commercial development. The approved development will protect the sensitive environment of Flagstaff hill and will have a negligible impact on sensitive environment of Flagstaff Hill.

Having regard to the above circumstances the Applicant claims that the development of tourist accommodation on the land is a good fit for the site and location and is supported by the Outcomes of the Scheme.

The Applicant has indicated a willingness to amend the conditions of the approval should this be required by Council in order to support the extension of the period of approval.

The Applicant notes that only one submission as previously received by Council to the notified application. The submission included grounds that the development was inconsistent with the current Scheme and the Submitter did not lodge an appeal. The Applicant claims that the lodgement of a single submission reflects the community's expectancy that this type and form of development will be established on the land. Since the issue of the approval the owner has maintained a sign on the site advertising the development and that the land is for sale. This signage gives land owners in the immediate locality an awareness of the development approval. Given the previous single submission the Applicant does not consider the development if reapplied for would raise any further submissions.

Detail of the Applicant's submission is included in Appendix 2.

Planning Assessment

Officer's Comment

In deciding a request made under s.383 SPA Council as assessment manager must only have regard to the following matters in deciding a request to extend the relevant period of an approval:

- “(a) the consistency of the approval, including its conditions, with the current laws and policies applying to the development; and*
- (b) the community's current awareness of the Development Permit; and*
- (c) whether, if the request were refused –*
 - (i) further rights to make a submission may be available for a further development application; and*
 - (ii) the likely extent to which those rights may be exercised; and*
- (d) the views of any concurrence agency for the approval.” S.388 SPA*

- a) Consistency of the approval with current requirements.

An assessment against the current Douglas Shire Planning Scheme is as follows.

Douglas Shire Planning Scheme Assessment

Douglas Shire		Code Applicability	Compliance
Locality	Port Douglas and Environs Locality Code	✓	Does not comply
Planning Area	Residential 1 (Special Management Area 1)	✓	Does not comply
Defined Use	Multi-Unit Housing	✓	Does not comply
Overlay Codes	Acid Sulfate Soils Code	✗	-
	Cultural Heritage and Valuable Sites Code	✓	Has not been sufficiently demonstrated
	Natural Hazards Code	✓	Has not been sufficiently demonstrated

Douglas Shire		Code Applicability	Compliance
General Codes	Design and Siting of Advertising Devices Code	X	-
	Filling and Excavation Code	✓	Requires further demonstration
	Landscaping Code	✓	Does not comply
	Natural Areas and Scenic Amenity Code	X	-
	Reconfiguring a Lot Code	X	-
	Vehicle Parking and Access Code	✓	Does not comply
	Sustainable Development Code	✓	Has not been sufficiently demonstrated
Amendment	Vegetation Management	✓	Can comply through conditions

Compliance Issues

The use of *Holiday Accommodation* doesn't allow permanent residency and is an impact inconsistent use on the land.

The current Scheme gives clear direction for the intended future development of Flagstaff Hill, through the Locality Code, Planning Area mapping and associated Code and the Overlays for Flagstaff Hill that this be for single House development. Flagstaff Hill includes both sides of Murphy Street. The Scheme states Flagstaff Hill is a Residential 1 Planning Area with high levels of protection from intrusion of further tourist activity and consideration of the sensitive and natural environments of the Hill.

Assessment of development that is "inconsistent" impact assessable development under the SPA for the 2008 scheme is likening to considering a rezoning under the former *Local Government (Planning and Environment) Act 1990* for the 1996 Planning Scheme. Impact "inconsistent" development challenges the basis of the appropriateness of the use against the whole of the Scheme and in this instance is considered to set a precedent to change the consideration of what is the protected area of Flagstaff Hill and what is the tourist area along Macrossan Street. Approving this request to extend the Development Permit would acknowledge the development as being appropriate and consistent with the current 2008 Planning Scheme. In turn, approval of the extension also sets a precedent that the redevelopment of other land, vacant or otherwise developed, in Murphy Street should also be developed for tourist accommodation.

There has been no need identified for additional land for tourist residential accommodation. There has been no demonstration that if such need existed this would be the best location to meet that need. The land is not within the area between the major tourist, retail, dining and entertainment centre of the Shire, being between Macrossan Street and Marina Mirage. The land is not within the identified area of the Tourist Centre in the Port Douglas and Environs Locality.

The development does not protect the existing and future residential area of Murphy Street from the further intrusion by tourist accommodation and activity. The development is a further intrusion of tourist activities to the Flagstaff Hill area and further imposes in the already reduced residential amenity of this area. The development does not meet the Locality Code Purposes, "*protect existing and future residential areas from the intrusion of tourist accommodation and activity*" or the purpose to, "*protect sensitive environments and natural features which give Port Douglas its distinctive character and identity, in particular ... Flagstaff Hill.*"

The development does not protect the sensitive environment of Flagstaff Hill. The visibility of the development is not minimised in comparison to a single House. The development does not create a vegetated backdrop to the Tourist Centre.

The development does not maintain or enhance the residential character of the established residential neighbourhood of Murphy Street.

It is agreed that the residential amenity of land that abuts commercial development is lower than the residential amenity of land that is surrounded by other residential land. However the Scheme already addresses this issue by the Commercial Planning Area Code.

Landscaping Code

Insufficient landscaping is provided to suitably screen the development, in particular along the northern boundary.

Vehicle Parking and Access Code

Concern is raised with the number of parking spaces provided on site in particular due to the very limited on-street parking available in Murphy Street.

b & c) Community awareness – Further submissions

The original application was impact assessable development and a submission was received against the original application. The consideration of the submitter's grounds was limited to the assessment against the superseded Planning Scheme. This also applied to any appeal grounds.

A proportion of the community is aware that a Development Permit is in effect over the land due to the advertisement thereon.

The community is also aware of the limited period of approval and that a new Scheme now has effect over the land which is dissimilar to that under which the application was determined.

The community is not aware of the request for the extension of the period of approval other than the reporting of this matter to Council for determination.

Should the application be refused and a new application be lodged then the community will be able to lodge submissions and these submitter's would hold third party appeal rights. It is likely submissions will be lodged. Through the public notification of an application against the current Scheme submitters could lodge submissions regarding the Desired Environmental Outcomes and the intent of the Scheme as a whole for the Murphy Street and Flagstaff Hill area. This is a wider area of consideration than was available under the Superseded Scheme application and approval.

d) Concurrence agency views

There are no current Concurrence agencies.

Planning Conclusions

Council agreed with the Applicant's original request and resolved to consider the application under the Superseded Scheme offering the Applicant the ability to develop under a superseded Scheme, rather than potentially paying compensation for the loss of rights.

The consideration of an extension of time cannot impose further conditions.

Under the current Douglas Shire Planning Scheme the land lies within the Residential 1 Planning Area of the Port Douglas & Environs Locality outside the Tourist Centre. The land is included in the Special Management Area Flagstaff Hill and Flagstaff Hill is also affected by the Cultural Heritage and Valuable Sites Code. The land has a Low Scale Plot Ratio designation.

Where the superseded Scheme supported development of Holiday Accommodation the current scheme does not. The expected outcome under the current scheme would be a single House. The approved development is tabled by the current Scheme as "impact (inconsistent) development." Neither the land use or extent of development subject to the Development Permit is consistent with current planning requirements. The development is considered inconsistent with the Planning Scheme.

The notification of an application under the current Scheme is likely to give rise to further submissions. The grounds of these submissions can have regard to conflict and inconsistencies of the development with the current Planning Scheme.

By adopting the 2006 Scheme and the amendments in 2008 the community has identified the future desired outcomes for the land. There has been no demonstrated need for additional land for tourist accommodation or that this is the best location if further land was needed. Given that the current Scheme seeks significantly different outcomes to that of the 1996 Scheme it is not considered appropriate that the request be supported.

Infrastructure Charges

These remain applicable for the life of the approval. Council's Policy has not varied the amount due, except indexing, since the issue of the approval.