

5 June 2023

Enquiries: Daniel Lamond
Our Ref: ROL 2023_5299/1 (1161279)
Your Ref: PR149854

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F A Langton
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Dear Sir/Madam

Development Application for Reconfiguring a Lot

**Two lots into three lots and access easement
At 188 Ferrero Road CRAIGLIE
On Land Described as LOT: 5 SP: 161461, LOT: 11 TYP: N PLN: 157371**

Please find attached the Decision Notice for the above-mentioned development application.

Please quote Council's application number: ROL 2023_5299/1 in all subsequent correspondence relating to this development application.

Should you require any clarification regarding this, please contact Daniel Lamond on telephone 07 4099 9444.

Yours faithfully



For
Paul Hoyer
Manager Environment & Planning

encl.

- Decision Notice
 - Reasons for Decision - non-compliance with assessment benchmark.
- Advice For Making Representations and Appeals (Decision Notice)



Decision Notice

Refusal

Given under s 63 of the Planning Act 2016

Applicant Details

Name: F A Langton
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CAIRNS QLD 4870
Email: owen.caddick-king@rpsgroup.com.au

Property Details

Street Address: 188 Ferrero Road CRAIGLIE
Real Property Description: LOT: 5 SP: 161461, LOT: 11 TYP: N PLN: 157371
Local Government Area: Douglas Shire Council

Details of Proposed Development

Refusal- Reconfiguring a Lot (Two lots into three lots and access easement)

Decision

Date of Decision: 30 May 2023
Decision Details: Refused

Reasons For Refusal

1. The development creates lots which are not of an appropriate size and configuration to retain and sustain the utility and productive capacity of the land for rural purposes. The proposed development will fragment rural land, in particular good quality agricultural land that is identified as Class A Agricultural Land Classification. The development is incapable of being conditioned to achieve compliance with the required codes;
2. The development is inconsistent with the 2018 Douglas Shire Planning Scheme version 1.0 with regard to the Rural Zone Code and the Reconfiguring A Lot Code. The development is incapable of being conditioned to achieve compliance with the required codes;
3. The fragmentation of agricultural land and the size and configuration of the proposed lots is development that is inconsistent with the Far North Queensland Regional Plan 2009-2031,

the State Planning Policy 2017 and the Planning Scheme. There is no identified need for the smaller lots in the rural area in order to achieve the outcomes of: the State Planning Policy 2017, the Far North Queensland Regional Plan 2009-2031 or the 2018 Douglas Shire Planning Scheme version 1.0;

4. There are insufficient grounds to justify approval despite the conflicts with the State Planning Policy 2017, the Far North Queensland Regional Plan 2009-2031 and the 2018 Douglas Shire Planning Scheme version 1.0.

Rights to make Representations & Rights of Appeal

The rights of applicants to make representations and rights to appeal to a Tribunal or the Planning and Environment Court against decisions about a development application are set out in Chapter 6, Part 1 of the *Planning Act 2016*.

A copy of the relevant appeal provisions are attached.

Reasons for Decision

Findings on material questions of fact:

1. The application was properly lodged to the Douglas Shire Council on the 29 March 2021 under s 51 of the *Planning Act 2016* and included a planning report.

Evidence or other material on which findings were based:

1. Council undertook an investigation of assessment of the development, against the State Development Requirements and the 2018 Douglas Shire Council Planning Scheme in making its assessment manager decision; and
2. Council undertook an assessment in accordance with the provisions of section 60 of the *Planning Act 2016*.

Non-Compliance with Assessment Benchmarks

Rural Zone Code:

The minimum lot size for new allotments within the Rural Zone is prescribed within PO7 to be 40 hectares. The proposed new allotment is 1.49 hectares in size. This component of the application is non-compliant with the performance outcome. The purpose the Rural zone code is achieved through compliance with the overall outcomes nominated within the code. Below is an assessment of the overall outcomes within the Rural zone code.

(a) Areas for use for primary production are conserved and fragmentation is avoided.

The proposal is not compliant with Overall Outcome (a) as the proposal further fragments rural land for use for primary production. The land is bound together by a vinculum across the dirt road section of Ferrero Road and the unconstructed section of Ferrero Road further West. The land is somewhat fragmented but the proposal exacerbates this further. The Rural zone code does not accommodate further fragmentation of Rural land regardless of the existing title size or boundary arrangement.

(b) Development embraces sustainable land management practices and contributes to the amenity and landscape of the area.

The proposal for subdivision is non-compliant with Overall Outcome (b) as the only area suitable for future development of buildings on proposed lot 103 is an elevated pad outside the

flood plain assessment overlay area toward the road frontage of Ferrero Road. There exists no vegetation buffer at the road frontage so new house development on this parcel has the potential to decrease the amenity and landscape value of the area by virtue of its siting out in the open with no screening. Currently Lot 5 has an approval for a dwelling and secondary dwelling which are both sited away from the Ferrero Road frontage nestled into the slopes and vegetated areas on the land on the Southern side of the road.

(c) Adverse impacts of land use, both on-site and on adjoining areas, are avoided and any unavoidable impacts are minimised through location, design, operation and management.

Overall Outcome (c) largely relates to applications for Material Change of Use. However, it is notable that the fragmentation and creation of a new lot being Lot 103 represents an opportunity for intrusion of residential development (a dwelling house) into the Rural area. This represents an adverse impact of land use as it diminishes the ability of the land and the residual titles to be utilised to their full potential for agricultural pursuits namely industrialised agricultural uses which may involve spraying, noise and use of heavy equipment. The applicant proposes that the new title will be suitable for a dwelling house or a form of short term accommodation which represents a level of incompatibility.

(d) Areas of remnant and riparian vegetation are retained or rehabilitated.

Overall Outcome (d) is largely irrelevant to the assessment as new boundaries do not intersect areas of remnant or riparian vegetation. However, the applicant proposes that the subdivision and creation of new titles will allow a form of short term accommodation or intensive horticulture to occur instead of retaining the cattle on the land which they claim is an overall benefit for the riparian corridor and ecosystem of Crees Creek.

The existing land title of Lot 5 being the primary parent title which the proposed 1.49 hectare title is to be created from currently has a dwelling house and secondary dwelling approved over it. Subsequent to the construction of this dwelling land use, a type of short term accommodation subordinate to the dwelling use on the land can be supported by Council, but not as a short term accommodation land use by its self. Therefore it is a mute point that the proposal will benefit the riparian ecosystem by replacing cattle with accommodation. There is nothing stopping the current owner from embracing sustainable best practices for grazing around creeks.

The applicant proposes that the application is consistent with the three purpose statements of the Rural zone code. The purpose of the Rural zone code is to provide for:

(a) provide for rural uses including cropping, intensive horticulture, intensive animal industries, animal husbandry, animal keeping and other primary production activities;

The creation of a new small lot 1.49 hectares in size does not provide for rural uses and diminishes the ability for rural uses to occur. There is simply not enough land to undertake stand alone primary production and an no appropriate alternative primary production use has been provided which demonstrates that this small area of land can cater a future use of this nature.

(b) provide opportunities for non-rural uses, such as ancillary tourism activities that are compatible with agriculture, the environmental features, and landscape character of the rural area where the uses do not compromise the long-term use of the land for rural purposes;

The development application states that the land is not suitable for cropping sugar cane and claims that the proximity to Port Douglas, together with the northern boundary of the new title bordering the riparian corridor provides it to be ideally suited to some form of short stay accommodation or intensive horticultural activities.

The short term accommodation land use is not supported by the Planning scheme to establish in the Rural Zone on its own. There is merit in establishing a home based business with a subordinate BNB style accommodation component if a house was established on Rural land but this is the extent of what would be supported here, and it is able to be achieved without the subdivision occurring for the small lot. Noting that the only suitable location on the proposed lot to site a new building is the raised pad which limits the argument for such a use anyway. The rest of the land near the riparian corridor is flood prone and is within the floodplain assessment overlay.

The ability for intensive horticulture to occur on the new lot has not been demonstrated. In particular, the floodplain assessment overlay encompasses most of the cleared land available on the proposed small lot. Leaving the lot the way it is, in a larger format provides for significantly more opportunity to establish an intensive horticulture land use or any other rural use.

It is clear that the two example land uses the applicant has nominated are not compatible with agriculture on such a small and flood constrained site.

(c) protect or manage significant natural resources and processes to maintain the capacity for primary production

This purpose statement is largely relevant to material change of use application and provides limited guidance for assessment. However if agricultural land is to be recognised as a natural resource, then the application to fragment it further is in direct conflict with purpose statement (c) as its capacity for primary production is significantly diminished by further fragmentation through subdivision.

Reconfiguring a Lot Code:

PO1 of the code requires that lot reconfiguration complies with the outcomes of the applicable zone code. As discussed above the proposal does not comply with the 40 hectare minimum lot size as the proposed residual lot is 1.49 hectares.

Overall Outcome (b) from the code is the only relevant overall outcome to the proposal.

(b) lots have sufficient areas, dimensions and shapes to be suitable for their intended use taking into account environmental features and site constraints;

The proposed subdivision to create the new 1.49 hectare allotment is in conflict with Overall Outcome (b) as the intended use(s) for the Rural Zone is for Rural Activities and Rural Purposes (cropping, animal husbandry, horticulture and the like) are further constrained by the diminished property size rendering the land relatively useless for these uses. The proposal does not comply with the Reconfiguring a Lot Code.

Division 2 Changing development approvals

Subdivision 1 Changes during appeal period

74 What this subdivision is about

- (1) This subdivision is about changing a development approval before the applicant's appeal period for the approval ends.
- (2) This subdivision also applies to an approval of a change application, other than a change application for a minor change to a development approval.
- (3) For subsection (2), sections 75 and 76 apply—
 - (a) as if a reference in section 75 to a development approval were a reference to an approval of a change application; and
 - (b) as if a reference in the sections to the assessment manager were a reference to the responsible entity; and
 - (c) as if a reference in section 76 to a development application were a reference to a change application; and
 - (d) as if the reference in section 76(3)(b) to section 63(2) and (3) were a reference to section 83(4); and
 - (e) with any other necessary changes.

75 Making change representations

- (1) The applicant may make representations (*change representations*) to the assessment manager, during the applicant's appeal period for the development approval, about changing—
 - (a) a matter in the development approval, other than—
 - (i) a matter stated because of a referral agency's response; or

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- (ii) a development condition imposed under a direction made by the Minister under chapter 3, part 6, division 2; or
 - (b) if the development approval is a deemed approval—the standard conditions taken to be included in the deemed approval under section 64(8)(c).
- (2) If the applicant needs more time to make the change representations, the applicant may, during the applicant's appeal period for the approval, suspend the appeal period by a notice given to the assessment manager.
- (3) Only 1 notice may be given.
- (4) If a notice is given, the appeal period is suspended—
- (a) if the change representations are not made within a period of 20 business days after the notice is given to the assessment manager—until the end of that period; or
 - (b) if the change representations are made within 20 business days after the notice is given to the assessment manager, until—
 - (i) the applicant withdraws the notice, by giving another notice to the assessment manager; or
 - (ii) the applicant receives notice that the assessment manager does not agree with the change representations; or
 - (iii) the end of 20 business days after the change representations are made, or a longer period agreed in writing between the applicant and the assessment manager.
- (5) However, if the assessment manager gives the applicant a negotiated decision notice, the appeal period starts again on the day after the negotiated decision notice is given.

76 Deciding change representations

- (1) The assessment manager must assess the change representations against and having regard to the matters that

- must be considered when assessing a development application, to the extent those matters are relevant.
- (2) The assessment manager must, within 5 business days after deciding the change representations, give a decision notice to—
 - (a) the applicant; and
 - (b) if the assessment manager agrees with any of the change representations—
 - (i) each principal submitter; and
 - (ii) each referral agency; and
 - (iii) if the assessment manager is not a local government and the development is in a local government area—the relevant local government; and
 - (iv) if the assessment manager is a chosen assessment manager—the prescribed assessment manager; and
 - (v) another person prescribed by regulation.
 - (3) A decision notice (a *negotiated decision notice*) that states the assessment manager agrees with a change representation must—
 - (a) state the nature of the change agreed to; and
 - (b) comply with section 63(2) and (3).
 - (4) A negotiated decision notice replaces the decision notice for the development application.
 - (5) Only 1 negotiated decision notice may be given.
 - (6) If a negotiated decision notice is given to an applicant, a local government may give a replacement infrastructure charges notice to the applicant.

Chapter 6 Dispute resolution

Part 1 Appeal rights

229 Appeals to tribunal or P&E Court

- (1) Schedule 1 states—
 - (a) matters that may be appealed to—
 - (i) either a tribunal or the P&E Court; or
 - (ii) only a tribunal; or
 - (iii) only the P&E Court; and
 - (b) the person—
 - (i) who may appeal a matter (the *appellant*); and
 - (ii) who is a respondent in an appeal of the matter; and
 - (iii) who is a co-respondent in an appeal of the matter; and
 - (iv) who may elect to be a co-respondent in an appeal of the matter.
- (2) An appellant may start an appeal within the appeal period.
- (3) The *appeal period* is—
 - (a) for an appeal by a building advisory agency—10 business days after a decision notice for the decision is given to the agency; or
 - (b) for an appeal against a deemed refusal—at any time after the deemed refusal happens; or
 - (c) for an appeal against a decision of the Minister, under chapter 7, part 4, to register premises or to renew the registration of premises—20 business days after a notice is published under section 269(3)(a) or (4); or

- (d) for an appeal against an infrastructure charges notice—20 business days after the infrastructure charges notice is given to the person; or
- (e) for an appeal about a deemed approval of a development application for which a decision notice has not been given—30 business days after the applicant gives the deemed approval notice to the assessment manager; or
- (f) for an appeal relating to the *Plumbing and Drainage Act 2018*—
 - (i) for an appeal against an enforcement notice given because of a belief mentioned in the *Plumbing and Drainage Act 2018*, section 143(2)(a)(i), (b) or (c)—5 business days after the day the notice is given; or
 - (ii) for an appeal against a decision of a local government or an inspector to give an action notice under the *Plumbing and Drainage Act 2018*—5 business days after the notice is given; or
 - (iii) for an appeal against a failure to make a decision about an application or other matter under the *Plumbing and Drainage Act 2018*—at anytime after the period within which the application or matter was required to be decided ends; or
 - (iv) otherwise—20 business days after the day the notice is given; or
- (g) for any other appeal—20 business days after a notice of the decision for the matter, including an enforcement notice, is given to the person.

Note—

See the P&E Court Act for the court's power to extend the appeal period.

- (4) Each respondent and co-respondent for an appeal may be heard in the appeal.

- (5) If an appeal is only about a referral agency's response, the assessment manager may apply to the tribunal or P&E Court to withdraw from the appeal.
- (6) To remove any doubt, it is declared that an appeal against an infrastructure charges notice must not be about—
 - (a) the adopted charge itself; or
 - (b) for a decision about an offset or refund—
 - (i) the establishment cost of trunk infrastructure identified in a LGIP; or
 - (ii) the cost of infrastructure decided using the method included in the local government's charges resolution.

230 Notice of appeal

- (1) An appellant starts an appeal by lodging, with the registrar of the tribunal or P&E Court, a notice of appeal that—
 - (a) is in the approved form; and
 - (b) succinctly states the grounds of the appeal.
- (2) The notice of appeal must be accompanied by the required fee.
- (3) The appellant or, for an appeal to a tribunal, the registrar, must, within the service period, give a copy of the notice of appeal to—
 - (a) the respondent for the appeal; and
 - (b) each co-respondent for the appeal; and
 - (c) for an appeal about a development application under schedule 1, section 1, table 1, item 1—each principal submitter for the application whose submission has not been withdrawn; and
 - (d) for an appeal about a change application under schedule 1, section 1, table 1, item 2—each principal submitter for the application whose submission has not been withdrawn; and

- (e) each person who may elect to be a co-respondent for the appeal other than an eligible submitter for a development application or change application the subject of the appeal; and
 - (f) for an appeal to the P&E Court—the chief executive; and
 - (g) for an appeal to a tribunal under another Act—any other person who the registrar considers appropriate.
- (4) The *service period* is—
- (a) if a submitter or advice agency started the appeal in the P&E Court—2 business days after the appeal is started; or
 - (b) otherwise—10 business days after the appeal is started.
- (5) A notice of appeal given to a person who may elect to be a co-respondent must state the effect of subsection (6).
- (6) A person elects to be a co-respondent to an appeal by filing a notice of election in the approved form—
- (a) if a copy of the notice of appeal is given to the person—within 10 business days after the copy is given to the person; or
 - (b) otherwise—within 15 business days after the notice of appeal is lodged with the registrar of the tribunal or the P&E Court.
- (7) Despite any other Act or rules of court to the contrary, a copy of a notice of appeal may be given to the chief executive by emailing the copy to the chief executive at the email address stated on the department’s website for this purpose.

231 Non-appealable decisions and matters

- (1) Subject to this chapter, section 316(2), schedule 1 and the P&E Court Act, unless the Supreme Court decides a decision or other matter under this Act is affected by jurisdictional error, the decision or matter is non-appealable.

- (2) The *Judicial Review Act 1991*, part 5 applies to the decision or matter to the extent it is affected by jurisdictional error.
- (3) A person who, but for subsection (1) could have made an application under the *Judicial Review Act 1991* in relation to the decision or matter, may apply under part 4 of that Act for a statement of reasons in relation to the decision or matter.
- (4) In this section—
decision includes—
 - (a) conduct engaged in for the purpose of making a decision; and
 - (b) other conduct that relates to the making of a decision; and
 - (c) the making of a decision or the failure to make a decision; and
 - (d) a purported decision; and
 - (e) a deemed refusal.**non-appealable**, for a decision or matter, means the decision or matter—
 - (a) is final and conclusive; and
 - (b) may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way under the *Judicial Review Act 1991* or otherwise, whether by the Supreme Court, another court, any tribunal or another entity; and
 - (c) is not subject to any declaratory, injunctive or other order of the Supreme Court, another court, any tribunal or another entity on any ground.

232 Rules of the P&E Court

- (1) A person who is appealing to the P&E Court must comply with the rules of the court that apply to the appeal.
- (2) However, the P&E Court may hear and decide an appeal even if the person has not complied with rules of the P&E Court.