

In the Planning and Environment Court
Held at: Brisbane

Appeal No. 2001 of 2021

Between:	SDA PROPERTY NOMINEES PTY LTD ACN 634 072 030 ATF SDA HOLDINGS TRUST	Appellant
And:	SCENIC RIM REGIONAL COUNCIL	Respondent
And:	AMANDA HAY	Eighth Co-Respondent By Election
And:	TAMBORINE MOUNTAIN PROGRESS ASSOCIATION	Twentieth Co-Respondent By Election

COPY

RESPONSE TO APPELLANT'S APPLICATION IN PENDING PROCEEDING – COSTS

1. The Eighth Co-Respondent by Election submits the following material in satisfaction of paragraph 1 of His Honour's Order made on 11 November 2022.
2. Firstly, it is not possible to respond to the Appellant's eight (8) page Application and seventy-six (76) page Affidavit filed on 24 October 2022, and the content of its four (4) page outline of submissions filed on 04 November 2022 in the four (4) pages limited in His Honour's Order of 11 November 2022. This would be an unrealistic expectation.
3. I did not engage any expert witnesses up to and including 23 August 2022 as, up until that date, the Respondent and I were aligned in seeking a refusal of the Development Application and Appeal.
4. Given that the Respondent had engaged five (5) experts in the Appeal, I did not consider the engagement of any other experts separately on my behalf was warranted.
5. In hindsight, and given that the Respondent's Town Planning Expert, Mr Ovenden, eventually conceded to the Appellant's Town Planning Expert's opinions (and every other Expert's for that matter), this was a poor decision on my part.
6. It was not possible to engage separate experts at that late stage in the Appeal.
7. On 12 August 2022 at a Review of the appeal His Honour stated that "you only need to win one issue" or words to that effect. I took this as encouragement to continue.
8. I relied on the Separate Report of Mr Ovenden, SRRC's Town Planning Expert, dated 19 August 2022¹ in considering my continued participation in the Appeal. That document was provided to me on 23 August 2022 (week 53 of the Appeal) by way of email from King and Company Solicitors² and which included the wording "Given the views expressed in the separate reports of Mr Ovenden and Dr McGowan, we are instructed that Council no longer

¹ Court Exhibit 35 pp.2-3.

² Court document 133. Exhibit ELK-10 page 19 para 3 of the Affidavit of Erin Kay of 12 September 2022



maintains its refusal of the development application in the appeal and will instead seek the imposition of reasonable and relevant conditions.” Note the wording “no longer maintains its refusal of the development application...”.

9. Whilst the Respondent’s position altered based on the separate reports of Mr Ovenden and Dr McGowan, Mr Ovenden’s report did not in fact fully capitulate on the position he put forward in the Joint Experts Report dated 20 April 2022.³ Mr Ovenden stated at 2.2 “I maintain my opinion that the key issues are the scale of the use and its impact on the character and amenity of the site and surrounding areas.....”. Further, at 4.3 he states “I maintain, at least on face value, the proposal is discordant with some key provisions of the planning scheme.....”. He makes further relevant statements at 5.2, 6.4 and 6.6.
10. The Respondent did not serve its final Separate Report of Bryce Tolliday until 25 August 2022.
11. The Appellant did not serve its final Separate Report of Dan Clowes until 26 August 2022.
12. It is difficult to understand how the Appellant justifies making an application for a costs order from 21 July 2022 when both the Appellant and Respondent had not served all Separate Reports as at that date and the Respondent had not at that time changed its position.
13. It is difficult to understand how the Appellant justified sending a without prejudice save as to costs letter to the parties on 21 July 2022. I took this to be an indication the Appellant was unsure of its case, as the Respondent did not advise its change of position until one month later, on 23 August 2022. Given this fact, the assertion that I acted in a frivolous and vexatious manner from 21 July 2022 is not supported.
14. I did not have the benefit of Mr Ovenden’s two (2) Further Separate Reports dated 13 September 2022 and 14 September 2022 prior to the commencement of the hearing on 13 September 2022. The documents were only provided following an instruction by His Honour on that date and a subsequent instruction.
15. The Respondent’s Expert failed to act in accordance with 35B (1), (2) and (3) of Part 3 of the *Planning and Environment Court Rules 2018* – Evidence - in that the expert changed his opinion on 19 August 2022 but did not satisfy Part 3 until 15 September 2022, the final day of the hearing. The Respondent made an oral application seeking the court’s discretion in excusing non-compliance with rule 35B(3)(c) of the *Planning and Environment Court Rules 2018* on, I believe, the first day of the hearing. I do not recall if such an application was made in respect of the Further Separate Report dated 14 September 2022⁴ but handed up on 15 September 2022.
16. I was disadvantaged by not being in receipt of Mr Ovenden’s two (2) Further Separate Reports until after the commencement of the hearing.

³ Court Exhibit 3 – Town Planning Joint Experts Report

⁴ Court Exhibit 35 – Mr Ovenden’s second Further Separate Report of 14 September 2022

17. His Honour cited wording from that Report in his Reasons for Judgement⁵.
18. The appeal was filed on 02 August 2021 and up to the time when the Court ordered that the Appeal be heard on the basis of the Changed Development Application on 14 July 2022 (a period of 48 weeks), the Appeal was based on the Development Application as it was made to the Respondent. Council would not entertain re-advertising of the Changed Development Application as the change was deemed a “minor change” and there is no requirement to re-advertise. This disadvantages submitters when they make their submissions on Development Application A but the Application then morphs into B. The vast number of submissions made to Council during the public notification period were thus rendered all but useless, and consequently afforded very little weight.
19. It is not possible for submitters to take into consideration the technical evidence of the expert witnesses⁶ when that evidence was some months in the future following the closing date for submissions. No doubt with the benefit of such evidence, the submissions would have been significantly more aligned with the Planning Scheme in force at that time.
20. His Honour’s Reasons for Judgement⁷ state that “Whilst Council notified in the initial stages of the appeal that it would contend for refusal, it is now supportive of the application”....and cited Exhibit 34, para 8a and Exhibit 37, para 3(e). These documents were entered as exhibits on 15 September 2022, and were the first indication that the Respondent was in fact *supportive* of the application rather than simply maintaining a neutral position.
21. As a lay person, I took the statement⁸ that Council “no longer maintains its refusal of the development application...” at face value – that Council was no longer maintaining its position of refusal. This is not indicative that Council was in fact supportive of the development application, rather it was now taking a passive role in the appeal, subject to the imposition of conditions.
22. As a lay person, I struggle to understand why the Respondent did not make application for a Costs Order against the Appellant in respect of the Appellant’s Application in Pending Proceeding⁹ in which it sought an Order to have the 20th and 40th Co-Respondents by Election permanently removed from the appeal. That application resulted in several court appearances and wasted eight weeks, and was a waste of both public and private resources, including the resources of the Court.
23. The Appellant’s protracted stance in that Application was not in compliance with 10(2) of the *Planning and Environment Court Act 2016* in that it did not proceed in an expeditious way, yet there were no consequences for that failing.
24. It was certainly open to the Respondent to seek such a costs Order as the precedent was, I believe, set in the matter of *Sincere International Group Pty Ltd v Gold Coast City Council [2019] QPEC 9 (22 March 2019)*.

⁵ Court document 136 – Reasons for Judgement 06 October 2022 at paragraph 234 page 41

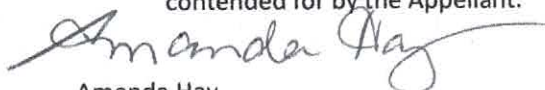
⁶ Court document 136 – Reasons for Judgement 06 October 2022 at paragraph 308 page 53

⁷ Court document 136 – Reasons for Judgement 06 October 2022 at paragraph 4 page 3

⁸ Court document 133. Exhibit ELK-10 page 19 para 3 of the Affidavit of Erin Kay of 12 September 2022

⁹ Court document 50 – Appellant’s Application in Pending Proceeding – 06 October 2021

25. That application was doomed to fail, was 'without reasonable prospects of success' given relief available by exercising the power conferred by section 37 of the *Planning and Environment Court Act 2016 (Qld)*. His Honour Judge Rackemann DCJ when handing down his decision¹⁰ was particularly scathing in his oral summation (the transcript would be a good starting point) and made the following comment in his Reasons for Judgement¹¹ "*Wetting the saliva of lawyers with one hand on the guillotine can only frustrate rather than meet the ends of justice*".
26. Yet, there were no repercussions for this significant waste of time and resources, other than a dressing-down by His Honour.
27. Whilst the Appellant provided a list of proposed conditions on 14 July 2022, this was somewhat premature.
28. I personally derived no financial or personal gain from maintaining my position in the appeal. My actions were self-funded and were motivated and purely undertaken for the good of the community in which I have had the privilege of residing for more than ten (10) years.
29. As a lay Co-Respondent by Election, I did not have the benefit of the expertise of teams of legal representatives as I lacked the resources to engage such representation. Indeed, I was quoted a cost of between \$20,000 and \$30,000 to secure legal representation in this costs application. Again, not an option as my funds to satisfy any costs order made would be depleted by that amount.
30. I did not cross-examine any witnesses for no other reason than that there was considerable pressure to reduce the number of hearing days. In hindsight, in attempting to satisfy the Court in that regard, I disadvantaged myself, which I now regret.
31. The legal system appears geared towards those who have significant financial resources; in the case of the Appellant, Government funding via the NDIS for his existing developments and future financial gain from that source in relation to the now approved development, and, in the case of the Respondent, the rates collected from Scenic Rim residents and ratepayers, including myself.
32. There has been no mention of whether the Respondent is covered by an insurance policy in respect of this court appeal and the resultant Costs Application.
33. While ultimately a matter of discretion, the Court may be satisfied that it is appropriate to award costs, however I do not concur with such an award being made in the manner contended for by the Appellant.



Amanda Hay
Eighth Co-Respondent by Election
25 November 2022

¹⁰ Court document 65 – Order – Judge Rackemann DCJ 02 December 2021

¹¹ Court document 66 – Reasons for Judgement – Judge Rackemann DCJ 02 December 2021