

In the Planning and Environment Court
Held at: Brisbane

Appeal ⁸¹⁸ of 2020

Between: **Marakech Pty Ltd**
ACN 010 727 723

Appellant

And: **Toowoomba Regional Council**

Respondent

NOTICE OF APPEAL

Filed on: 19/3/2020

RECEIVED
2/4/2020
TOOWOOMBA
REGIONAL COUNCIL

Filed by: **Andrew Davis**
PLANNING LAWYERS

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Marakech Pty Ltd of 123 Margaret Street, Toowoomba in the State of Queensland appeals to the Planning and Environment Court at Brisbane against the decision of the respondent made on 12 February 2020 (and communicated by the respondent to the appellant by letter on 20 February 2020) to refuse a development application ("application") for material change of use – impact – service station and carwash in stages ("development") for land at the corner of Albert Street and the New England Highway, Crows Nest in the State of Queensland and more particularly described as Lot 2 on RP151087 ("land") bearing the respondent's application reference MCUI/2017/2940 (and SARA reference number SDA-0717-040688) and seeks the following orders or judgment:

- 1 the appeal be allowed
- 2 the application be approved subject to conditions
- 3 the appellant's costs be paid
- 4 such further or other order as this Honourable Court may require

ORDER

Filed on behalf of the Appellant

Andrew Davis
PLANNING LAWYERS

Form PEC-1

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The grounds of appeal are:

Land

- 1 The land:
- (a) has an area of 32,300m²
 - (b) is currently used for grazing
 - (c) falls generally from south to north. There is a local high point at the north-east adjacent to the corner of the New England Highway and Albert Street and a low point at the northern property boundary. The southern and western part of the site is a broad floodplain with channels.

Planning scheme

- 2 The land is in the:
- (a) is in the Limited Development (Constrained Land) zone of the Toowoomba Regional Planning Scheme 2012
 - (b) is subject to 2 overlays namely:
 - (i) Environmental Significance Overlay - Waterways and Wetlands Buffer
 - (ii) Water Resource Catchment - Water Resources Catchment Overlay

Application

- 3 The application:
- (a) was received by the respondent on or about 13 June 2017
 - (b) required impact assessment
 - (c) required referral

Referral agencies

- 4 According to the respondent Council, the application required referral for the following:

Referral agency (Technical agency)	Referral role	Aspect of development requiring referral
Department of State Development, Manufacturing, Infrastructure and Planning	Concurrence	Sustainable Planning Regulation 2009 Schedule 7, Table 3, Item 1- State-controlled road Schedule 7, Table 3, Item 2- State-controlled road

Referral agency response

- 5 On 22 November 2018 the referral agency gave a its final referral agency response.
- 6 The appellant does not take issue with the referral agency response

Public notification and submissions

- 7 Public notification of the application took place between 7 March 2018 and 30 March 2018.
- 8 According to the decision notice, 30 properly made submissions were made about the application by:

Heather Ehrlich
12 Aphra Avenue
CROWS NEST QLD 4355

Michael Forbes
191 Anduramba Road
CROWS NEST QLD 4355

John Dudley Hislop
53B South Street
CROWS NEST QLD 4355

Jacky Hislop
55 South Street
CROWS NEST QLD 4355

Gary and Laurel Carr
11 Perseverance Dam Road
CROWS NEST QLD 4355

Carol Pearce
Toowoomba Road
CROWS NEST QLD 4355

Barry Martin Miller
7 Eastside Road
CROWS NEST QLD 4355

Dave and Sue Geiszler
18 Pinnell Road
CROWS NEST QLD 4355

David Hiscock
6 William Street
CROWS NEST QLD 4355

Glenn and Rhyl Walker
C/- Crows Nest Fuel Supplies
37 Toowoomba Road
CROWS NEST QLD 4355

Lynn Maree Bartimote
19 Samuel Avenue
CROWS NEST QLD 4355

Deborah Blackman
12a Albert Street
CROWS NEST QLD 4355

Steven M Thomas
25 Esk Street
CROWS NEST QLD 4355

G D & J A Schmaling
178 Bergen Road
HADEN QLD 4353

Peter Ferris
6065 New England Highway
GLENAVEN QLD 4355

Robert Wicks
6 Samuel Avenue
CROWS NEST QLD 4355

Mrs Ivy and Mr Kevin Bridges
1A John Street
CROWS NEST QLD 4355

Graham Blackman
12A Albert Street
CROWS NEST QLD 4355

Ken and Sally Johnson
27 Albert Street
CROWS NEST QLD 4355

Brian and Margaret Berry
29 Albert Street
CROWS NEST QLD 4355

Mary and Paul Fleming
13 Naomi Drive
CROWS NEST QLD 4355

Myrtle Emily Kanowski
7825 New England Highway
PECHEY QLD 4352
Kirralea Dawn Johnson
21 Albert Street
CROWS NEST QLD 4355

Martin Rackham and Robin Johnson
14 Naomi Drive
CROWS NEST QLD 4355

Richard and Julie Kearns
50 Albert Street West
CROWS NEST QLD 4355

Brett Thorncroft
438 Douglas Plainby Road
CROWS NEST QLD 4355

Sarah Moccock
11 Lee Court
CROWS NEST QLD 4355

Lynette Ida Wetzig
PO Box 36
CROWS NEST QLD 4355

Lesley Fellows-Somerville
34 Woodlea Court
CROWS NEST QLD 4355

David John Asher
5 Parkland Drive
CROWS NEST QLD 4355

Officer recommendation

- 9 The respondent's officers recommended the application be approved subject to the imposition of 171 conditions.

Decision

- 10 On 12 February 2020 the respondent Council by resolution decided to refuse the application for the following reasons:

The Application is refused because it conflicts with the following assessment criteria from the Toowoomba Regional Planning Scheme 2012 and sufficient grounds do not exist to justify approval despite the conflict:

Strategic Framework

3.3.10(1): The proposed development does not comply because it does not enhance natural places, being areas of ecological significance, waterways and wetlands identified on the Strategic Frameworks Map - Natural Areas (Waterways and Wetlands).

3.3.11.1(1): The proposed development does not comply with (a) and (b) because it increases off-site flood impacts at nearby road and private land. Does not comply with (c) because it proposes to develop in an area known to be affected by flood. Does not fully comply with (d) because it does not account for potential changes to the flood regime that may be anticipated with climate change.

3.4.1(3): The proposed development does not maintain ecosystem function for the site's waterway and wetland

3.4.2(1): The proposed development does not protect water resources of local significance and does not meet the tolerable risk test as discussed in the Report.

3.4.5.1(1): The proposed development does not comply because it does not reduce or mitigate risk from natural hazards exacerbated through climate change by avoiding areas with high exposure to projected flooding.

3.4.5.1(8): The proposed development does not comply because it does not increase community resilience to the projected impacts of climate change.

Environmental Significance Overlay Code

Performance Outcome PO8: The proposed development does not comply because it does not retain the existing hydrological regime or re-establish the previous naturally occurring hydrological regime.

Limited Development (Constrained Land) Zone Code

Purpose (1)(a): The proposed development does not comply because it proposes urban development on flood constrained land which is unsuitable for development at the proposed scale and intensity and in the proposed form.

Overall Outcomes (2)(c): The proposed development does not comply because it proposes urban development on flood constrained land which is unsuitable for development at the proposed scale and intensity and in the proposed form.

Performance Outcome PO6: The proposed development is not compatible with the area's flood constraints.

Integrated Water Cycle Management Code

Purpose (1): The proposed development does not comply because water is not sustainably managed on a total water cycle basis to maintain the wellbeing of the community and the environment.

Overall Outcomes (2)(a): The proposed development does not comply because disturbance to natural landforms, wetlands, water courses and riparian zones is not avoided for the protection of aquatic ecosystems and natural hydrological functions.

Overall Outcomes (2)(b): The proposed development does not ensure the protection of surface and groundwater.

Works and Services Code

Overall Outcomes (2)(c): The proposed development does not provide safe and convenient access throughout the site.

Overall Outcomes (2)(d): The proposed development does not avoid risk to life and property throughout the site.

Overall Outcomes (2)(g): The proposed development does not comply because the proposal detracts from the environmental values of the site and the desired character and amenity of the locality.

Issues in dispute


- 11 The appellant takes issue with each of the reasons for refusal given.
- 12 The reasons for refusal ought to be the issues in dispute in this proceeding.

Approval ought to be given

- 13 In the exercise of the Court's discretion, the application ought to be approved subject to lawful conditions

Relief sought

- 14 The appellant seeks a final Order that:
- (a) the appeal be allowed
 - (b) the application be approved subject to lawful conditions
 - (c) the appellant's costs be paid



Andrew Davis
PLANNING LAWYERS

Solicitors for the Appellant
Dated 16 January 2020

If you are named as a respondent in this notice of appeal and wish to be heard in this appeal you must:

- (a) within 10 days after being served with a copy of this Notice of Appeal, file an Entry of Appearance in the Registry where this notice of appeal was filed or where the court file is kept; and**
- (b) serve a copy of the Entry of Appearance on each other party.**

The Entry of Appearance should be in Form PEC – 5 for the Planning and Environment Court.

If you are entitled to elect to be a party to this appeal and you wish to be heard in this appeal you must:

- (a) within 10 business days of receipt of this Notice of Appeal, file a Notice of Election in the Registry where this notice of appeal was filed or where the court file is kept; and**
- (b) serve a copy of the Notice of Election on each other party.**

The Notice of Election should be in Form PEC – 6 for the Planning and Environment Court.