

In the Planning and Environment Court

No. 57 of 2015

Held at Cairns

Between:	WARREN GEORGE SAVAGE	First Applicant
	SAVAGE RESORTS PTY LTD (ACN 150 197 256) AS TRUSTEE FOR THE ETERNITY TRUST UNDER INSTRUMENT NO. 714445096	Second Applicant
And:	CAIRNS REGIONAL COUNCIL	First Respondent
And:	JONATHON NOONAN PTY LTD (ACN 005 481 881)	Second Respondent
And:	CAMERON MILES DEMOY	Third Respondent
And:	KAREN ELIZABETH TOWNSHEND	Fourth Respondent
And:	JANICE PAMELA TILLER	Fifth Respondent
And:	MERILYN JOY WOMACK & JODIE LEIGH WYLIE AS TRUSTEES FOR THE WOMACK SUPERANNUATION FUND UNDER INSTRUMENT NO. 704978002	Sixth Respondent
And:	LYLE GEORGE DAVEY & SHEELAGH KAY DAVEY	Seventh Respondent
And:	MARK AUSTIN JONES & LORRAINE MAY JONES	Eighth Respondent
And:	KAREN BANKS-HORE	Ninth Respondent
And:	CASS PAUL MCMULLEN-BURN	Tenth Respondent
And:	KAYLENE JOY RICHARDS & BRADLEY STAN RICHARDS	Eleventh Respondents
And:	LINDSAY PETER ROBINSON & ELIZABETH ARMADA ROBINSON	Twelfth Respondent
And:	FRANCESCO MONACO & BRENDA JOAN MONACO	Thirteenth Respondent
And:	ME & BT CHARLESON NOMINEES PTY LTD (ACN 097 638 269) AS TRUSTEE FOR THE	Fourteenth Respondent

ORIGINATING APPLICATION

Filed on behalf of the First & Second Applicants
Form PEC-2

All About Law

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**ME & BT CHARLESON FAMILY
SUPERANNUATION FUND UNDER
INSTRUMENT NO. 705223572**

And: **ROBERT EDWARD USHER** Fifteenth Respondent

And: **GENEVIEVE CECILIA D'SILVA** Sixteenth Respondent

And: **KAMIRABA PTY LTD** Seventeenth
(ACN 001 666 762) Respondent

And: **KRK HOLDINGS PTY LTD (ACN 084 032 637)** Eighteenth Respondent
AS TRUSTEE FOR THE KRK
SUPERANNUATION FUND UNDER
INSTRUMENT NO. 703599510

And: **SHANE ROBERT HICKS** Nineteenth Respondent

And: **JUDITH YVONNE TANNOCK & GILBERT** Twentieth Respondent
JOHN VAN BEKKUM

And: **KRK HOLDINGS PTY LTD (ACN 084 032 637)** Twenty-First Respondent
AS TRUSTEE FOR THE KRK
SUPERANNUATION FUND UNDER
INSTRUMENT NO. 703442529

And: **CHARMAINE AMANDA DORWARD** Twenty-Second
Respondent

ORIGINATING APPLICATION

Filed on: 2 April 2015

Filed by: All About Law

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The First Applicant, **WARREN GEORGE SAVAGE** and the Second Applicant, **SAVAGE RESORTS PTY LTD (ACN 150 197 256) AS TRUSTEE FOR THE ETERNITY TRUST UNDER INSTRUMENT NO. 714445096** c/- All About Law, 83 McLeod Street, Cairns in the State of Queensland applies to the Planning and Environment Court pursuant to s 456(1)(a); s 456(1)(b) and 456(1)(e) of the *Sustainable Planning Act 2009* ("**SPA**") for declarations and, consequential orders pursuant to s 456(7) of the *SPA*:-

1. The decision by the Cairns Regional Council on 13 August 2014 to purportedly approve a Material Change of Use (Development Permit) from "Holiday Accommodation" to "Multiple Dwellings and Holiday Accommodation" in respect of **7 lots** (Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919) within the unit complex known as Il Centro Apartments situated at 26-32 Sheridan Street Cairns (**Il Centro**) was unlawful, invalid and is of no effect.
2. The decision by the delegate of the Cairns Regional Council on 26 February 2015 to purportedly approve a Material Change of Use (Development Permit) from "Holiday Accommodation" to "Holiday Accommodation and Multiple Dwellings" in respect of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 within Il Centro was unlawful, invalid and of no effect.
3. The proper construction of the term "Multiple Dwelling" which is a separately defined use in the "Residential Use" category of land uses in *CairnsPlan 2009*:
 - (a) is the use of premises comprising six or more dwelling units of self-contained accommodation - including flats, home units, apartments, townhouses or villa houses – for permanent residential accommodation; and
 - (b) does not include the use of premises for "Holiday Accommodation."
4. The proper construction of the term "Holiday Accommodation" which is a separately defined use in the "Tourist and Short Term Accommodation" category of land uses in *CairnsPlan 2009*:
 - (a) is the use of premises for short term accommodation by tourists and travellers; and
 - (b) does not include the use of premises for self contained permanent residential accommodation.
5. The proposed use of "Holiday Accommodation and Multiple Dwelling" applied for in the Development Application dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014 in respect of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 within Il Centro was not assessable development under *CairnsPlan 2009* that, in respect of each of the said lots:
 - (a) was making a Material Change of Use as defined under section 7(e) of the *SPA*;
 - (b) could be started as a new use of premises in accordance with the definition of Material Change of Use under section 10 of the *SPA*; and
 - (c) could be carried on as "lawful use" as defined under section 9 of the *SPA*, namely a natural and ordinary consequence of making a Material Change of Use of premises.
6. Further or in the alternative, the proposed use "Holiday Accommodation and Multiple Dwelling" applied for in the Development Application dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014 in respect of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 within Il Centro:

- (a) was not a separately defined use under the “CBD-North Cairns – District Assessment Table (Initial Level of Assessment – Material Change of Use)”;
 - (b) fell within the category of “All Other Material Change of Use” under the “CBD-North Cairns – District Assessment Table (Initial Level of Assessment – Material Change of Use)” which prescribes any such “other material change of use” as Impact Assessable development under *CairnsPlan 2009*;
 - (c) required public notification under Part 4 of Chapter 6 of the *SPA*; and
 - (d) required the Cairns Regional Council as “assessment manager” under the *SPA* to assess the application under section 314 of the *SPA*.
7. The proposed Material Change of Use to “Holiday Accommodation and Multiple Dwelling” applied for in the Development Application dated 31 December 2014 and received by the Cairns Regional Council on 7 January 2015 in respect of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 within Il Centro was not assessable development under *CairnsPlan 2009* that, in respect of each of the said lots:
- (a) was making a Material Change of Use as defined under section 7 of the *SPA*;
 - (b) could be started as a new use of premises in accordance with the definition in sub-paragraph “(a)” of Material Change of Use under section 10 of the *SPA*; and
 - (c) could be carried on as *lawful use* as defined in section 9 of the *SPA* namely a natural and ordinary consequence of making a Material Change of Use of premises.
8. Further or in the alternative, the proposed use “Holiday Accommodation and Multiple Dwelling” applied for in the Development Application dated 31 December 2014 and received by the Cairns Regional Council on 7 January 2015 in respect of each of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 within Il Centro:
- (a) was not a separately defined use under the “CBD-North Cairns – District Assessment Table (Initial Level of Assessment – Material Change of Use)”;
 - (b) fell within the category of “All Other Material Change of Use” under the “CBD-North Cairns – District Assessment Table (Initial Level of Assessment – Material Change of Use)” which prescribes any such “other material change of use” as Impact Assessable development under *CairnsPlan 2009*;
 - (c) required public notification under Part 4 of Chapter 6 of the *SPA*; and
 - (d) required the delegate of the Cairns Regional Council as “assessment manager” under the *SPA* to assess the application under section 314 of the *SPA*.

9. The Development Application dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014 in respect of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 was made unlawfully, in breach of sub-sections 260(1)(e) and 260(3) of the *SPA* and was thereby not a properly made application under section 261(1)(a) of the *SPA* and was void and of no effect.
10. For the purposes of the Development Application dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014 in respect of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919, under section 263(1(a) of the *SPA*:
 - (a) “...the land the subject of the application...” included the common property forming part of the Scheme Land in the Il Centro Community Title Scheme 17438;
 - (b) the Body Corporate for Il Centro Community Title Scheme 17438 is the “owner” of the common property as that term is defined under the *SPA* for the purposes of the Development Application; and
 - (c) the consent of the Body Corporate for Il Centro Community Title Scheme 17438 as owner of the common property was required to be obtained.
11. For the purposes of the Development Application dated 31 December 2014 and received by the Cairns Regional Council on 7 January 2015 in respect of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919, under section 263(1(a) of the *SPA*:
 - (a) “...the land the subject of the application...” included the common property forming part of the Scheme Land in the Il Centro Community Title Scheme 17438;
 - (b) the Body Corporate for Il Centro Community Title Scheme 17438 is the “owner” of the common property as that term is defined under the *SPA* for the purposes of the Development Application; and
 - (c) the consent of the Body Corporate for Il Centro Community Title Scheme 17438 as owner of the common property was required to be obtained.
12. The decision by the assessment manager, the Cairns Regional Council to accept and thereafter, assess, the Development Application dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014 in respect of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 as a Code Assessable application was unlawful, in breach subsections 266(1); 295(1)(a); 314(1); 314(2)(g) and 314(3)(a) and (b) of the *SPA*, invalid and of no effect.
13. The Development Application dated 31 December 2014 and received by the Cairns Regional Council on 7 January 2015 in respect of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 was made unlawfully, in breach of sub-sections 260(1)(e) and 260(3) of the *SPA* and was thereby not a properly made application under section 261(1)(a) of the *SPA* and was void and of no effect.

14. The decision by the assessment manager, a delegate of the Cairns Regional Council to accept and thereafter assess the Development Application dated 31 December 2014 and received by the Cairns Regional Council on 7 January 2015 in respect of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 as a Code Assessable application was unlawful, in breach of subsections 266(1); 295(1)(a); 314(1); 314(2)(g) and 314(3)(a) and (b) of the *SPA*, invalid and of no effect.
15. The use of each of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 within Il Centro that was approved under Town Planning Consent Permit 3902/93 issued by the Cairns City Council on 8 February 1994 pursuant to 4.13(12) of the *Local Government (Planning and Environment) Act 1990* for "accommodation units" was for short term accommodation by tourists and travellers.
16. The use of each of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 within Il Centro that was approved under Town Planning Consent Permit 3902/93 issued by the Cairns City Council on 8 February 1994 pursuant to 4.13(12) of the *Local Government (Planning and Environment) Act 1990* for "accommodation units" was for short term accommodation by tourists and travellers.
17. The use of each of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 within Il Centro for permanent residential accommodation is not a lawful use under *CairnsPlan 2009* and the *SPA*.
18. The use of each of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 within Il Centro for permanent residential accommodation is not a lawful use under *CairnsPlan 2009* and the *SPA*.

CONSEQUENTIAL ORDERS

19. The owners of each of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 be restrained from doing any act or thing in reliance on the development permit approved by the Cairns Regional Council on 13 August 2014.
20. The owners of each of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 be restrained from doing any act or thing in reliance on the development permit issued by the delegate of the Cairns Regional Council on 26 February 2015.

GROUNDINGS FOR APPLICATION

The grounds relied on are:

1. The First Applicant:
 - (a) is the registered owner of the estate in fee simple Lot 2 on BUP 101919, Parish of Cairns, County of Nares, Community Management Statement 17438, Title Reference 50050407 (**Lot 2**) in Il Centro;
 - (b) became the registered owner of Lot 2 on 5 July 2011;

- (c) is the sole director of Savage Resorts Pty Ltd ACN 150 197 256 (**Savage Resorts**); and
 - (d) is the Licensed Resident Letting Agent (No. 3469859), in his capacity as director of Savage Resorts as trustee for the Eternity Trust, for conducting the building management and letting agency business at Il Centro.
2. The Second Applicant:
- (a) is a corporation in its capacity as trustee of the Eternity Trust capable of suing;
 - (b) pursuant to a contract dated 20 April 2011, purchased from Il Centro Pty Ltd ACN 122 306 736 the building management and letting agency business carried on at Il Centro together with the business assets;
 - (c) pursuant to a deed of assignment dated 29 June 2011, as and from 1 July 2011 was assigned from Il Centro Pty Ltd, all right, title, estate and interest as manager in the management rights of Il Centro; (**management rights**); and
 - (d) the Licensed Resident Letting Agent (No. 3469858) for Il Centro.
3. The management rights assigned as from 1 July 2014 were those rights of a letting agent for a Community Title Scheme as defined in Schedule 6 of the *Body Corporate and Community Management Act 1997*.
4. The Body Corporate for Il Centro Community Titles Scheme 1748 (**CTS**) consented to the assignment of the management rights.
5. On 3 May 2012, Savage Resorts Pty Ltd ACN 1650 197 256 as Trustee for the Judith Savage Trust under Instrument No. 714445096 became the registered owner of the estate in fee simple of Lot 1 on BUP 101919, Title Reference 50050406 (**Lot 1**).
6. As from 7 April 2014, Lot 1, which comprises 58m,² has been used as office space.
7. Il Centro:
- (a) is situated at 26-32 Sheridan Street, Cairns;
 - (b) is located within the local government area of Cairns;
 - (c) is located within the planning scheme area of *CairnsPlan 2009* which, pursuant to s 778(1) of the *SPA*, continues to have effect and is taken to be the planning scheme for the local government's [the Cairns Regional Council] (**Council**) planning scheme area, made under the *SPA*;
 - (d) has an approximate land area of 1,523m²;
 - (e) were built in 1995;
 - (f) has a ground level and 3 upper levels (with internal access by lift and stairs);

- (g) contains 38 strata title one-bedroom units which range in floor area between 54m² and 59m² each having a small balcony, kitchenette, small dining/TV area, bathroom which includes the toilet and washing machine and dryer;
 - (h) contains one, two-bedroom unit (108m²) which is owned and occupied by the First Applicant;
 - (i) contains 38 carpark which are located on the ground level:- Level A, BUP 101919. Each lot has a car park attached to the title to each lot;
 - (j) contains one carpark attaching to Lot 2 which cannot be used as a carpark as it contains a large storm water drain and refuse bins; and
 - (k) has, as part of the common property, a swimming pool forming part of a 400m² outdoor recreation/pool area.
8. The registered owners of the estate in fee simple of Lots 8, 18, 23, 29, 32, 36 and 39 on BUP 101919 (**7 lots**) in Il Centro the subject of the development approval granted by the Cairns Regional Council on 13 August 2014 were as follows:

Resp No.	Real Property Description	Title Reference	Owner's Name	Location within Property	Area of Unit	Area of Carpark
2	Lot 8, BUP 101919	50050413	Jonathon Noonan Pty Ltd ACN 005 481 881	Level B [1]	56m ²	15m ²
3	Lot 18, BUP 101919 Lot 36, BUP 101919	50050423 50050441	Cameron Miles Demoy	Level C [2] Level D [3]	54m ² 54m ²	16m ² 14m ²
4	Lot 23, BUP 101919	50050428	Jonathon Noonan Pty Ltd ACN 005 481 881 ATF the Jonathon Noonan Superannuation Fund under Instrument No. 704450611	Level C [2]	54m ²	16m ²
5	Lot 29, BUP 101919	50050434	Janice Pamela Tiller	Level D [3]	53m ²	15m ²
6	Lot 32, BUP 101919	50050437	Merilyn Joy Womack & Jodie Leigh Wylie ATF Womack Superannuation Fund under Instrument No. 704978002	Level D [3]	53m ²	15m ²
7	Lot 39, BUP 101919	50050444	Lyle George Davey Sheelagh Kay Davey	Level D [3]	54m ²	14m ²

9. On 16 October 2014, Karen Elizabeth Townshend became the registered owner of the estate in fee simple of Lot 23, BUP 101919, Title Reference 50050428.
10. The registered owners of the estate in fee simple of Lots 3, 9, 10, 11, 14, 15, 17, 19, 21, 24, 25, 28, 31, 34, 37, 38 and 40 on BUP 101919 (**17 lots**) in Il Centro the subject of the development approval granted by a delegate of the Cairns Regional Council on 26 February 2015 were as follows:

Resp. No.	Real Property Description	Title Reference	Owner's Name	Location within Property	Area of Unit	Area of Carpark
8	Lot 3, BUP 101919	50050408	Mark Austin Jones Lorraine May Jones	Level B [1]	59m ²	15m ²
9	Lot 9, BUP 101919	50050414	Karen Banks-Hore	Level B [1]	56m ²	15m ²
10	Lot 10, BUP 101919	50050415	Cass Paul McMullen-Burn	Level B [1]	56m ²	15m ²
11	Lot 11, BUP 101919	50050416	Kaylene Joy Richards Bradley Stan Richards	Level B [1]	56m ²	15m ²
12	Lot 14, BUP 101919	50050419	Lindsay Peter Robinson Elizabeth Armada Robinson	Level C [2]	54m ²	15m ²
13	Lot 15, BUP 101919 Lot 25, BUP 101919	50050420 50050430	Francesco Monaco Brenda Joan Monaco	Level C [2] Level C [2]	54m ² 54m ²	15m ² 15m ²
14	Lot 17, BUP 101919	50050420	ME & BT Charleson Nominees Pty Ltd ACN 097 638 269 ATF the ME & BT Charleson Family Super Fund under Instrument No. 705223572	Level C [2]	54m ²	16m ²
15	Lot 19, BUP 101919	50050424	Robert Edward Usher	Level C [2]	53m ²	16m ²
16	Lot 21, BUP 101919 Lot 38, BUP 101919	50050426 50050443	Genevieve Cecilia D'Silva	Level C [2] Level D [3]	54m ² 54m ²	16m ² 14m ²
17	Lot 24, BUP 101919	50050429	Kamiraba Pty Ltd ACN 001 666 762	Level C [2]	54m ²	15m ²
18	Lot 28, BUP 101919	50050433	KRK Holdings Pty Ltd ACN 084 032 637 as Trustee under Instrument No. 703599510	Level D [3]	53m ²	15m ²
19	Lot 31, BUP 101919	50050436	Shane Robert Hicks	Level D [3]	53m ²	16m ²
20	Lot 34, BUP 101919	50050439	Judith Yvonne Tannock Gilbert John Van Bekkum	Level D [3]	53m ²	16m ²
21	Lot 37, BUP 101919	50050442	KRK Holdings Pty Ltd ACN 084 032 637 as Trustee under Instrument No. 703442529	Level D [3]	54m ²	14m ²
22	Lot 40, BUP 101919	50050445	Charmaine Amanda Dorward	Level D [3]	55m ²	15m ²

1994 TOWN PLANNING CONSENT

11. Prior to the development approvals purportedly being granted on 13 August 2014 (7 lots) and 26 February 2015 (17 lots), the use rights of each of the lots (24 in total) was governed by a town planning consent permit 3902/93 (**1994 Consent Permit**).
12. The 1994 Consent permit:
 - (a) was approved by resolution made by the Cairns City Council on 1 February 1994;

- (b) was issued by the Cairns City Council on 8 February 1994;
 - (c) was issued, subject to conditions, for the erection and use of a building for the purpose of 38 x 1 bedroom and 1 x 2 bedroom “accommodation units”;
 - (d) was issued pursuant to s 4.13(12) of the *Local Government (Planning and Environment) Act 1990 (P&E Act)*;
 - (e) pursuant to s 4.13(16) of the *P&E Act*, to the extent it conferred rights on each of the lot owners in Il Centro to use the lots as “accommodation units”, attached to the land and was binding on successors in title;
 - (f) was a *continuing approval* pursuant to s 6.1.23(1)(b) of the *Integrated Planning Act 1997 (IPA)* which, pursuant to ss 6.1.23(2) and (3) of the *IPA*, on the repeal of the *P&E Act* on 30 March 1998 had effect as if it was a development approval in the form of a development permit; and
 - (g) as at 18 December 2009, on the commencement of the *SPA* and the repeal of the *IPA*, pursuant to s 801(1), continued as a development approval under the *SPA*.
13. The 1971 Town Planning Scheme Planning for the City of Cairns (**1971 Scheme**) was the applicable planning scheme in force when the 1994 Consent Permit was granted.
 14. The resolution to grant the 1994 Consent Permit was passed on 1 February 1994 notwithstanding that the proposed development did not comply with the town planning by-laws for carparking. The proposed development was for 39 car spaces. The town planning by-laws required 48 car spaces.
 15. As part of the resolution on 1 February 1994, the Cairns City Council resolved to accept a contribution (\$16,000 per space for 9 spaces) in lieu of the carparking shortfall.
 16. The definition of “accommodation units” under the 1971 Scheme did not make a distinction between short term holiday accommodation or the permanent use of a particular unit.
 17. The Land Use definitions under the 1971 Scheme for “accommodation units” identified three definitions:
 - (a) Accommodation Units (High Density);
 - (b) Accommodation Units (Medium Density); and
 - (c) Accommodation Units (Low Density).¹
 18. The definitions of Accommodation Units (High Density) and Accommodation Units (Medium Density) both included the wording:

¹ The definition of Accommodation Units (Low Density) in the 1971 Scheme is not relevant. It refers to development comprising two flats or two home units only in accordance with the Council policy and not in excess of 7.5 metres in height.

“any land, building or other structure used or intended for use as flats and home units, serviced rooms, boarding houses, guest houses, hostels, unlicensed hotels, old people’s homes, motels or residential club”.

19. The difference between the two definitions was that ‘high density’ referred to a site population density exceeding 300 persons per hectare but not exceeding 800 persons per hectare while the ‘medium density’ referred to a site population density of not more than 300 persons per hectare and to a height not in excess of 10 metres.

20. Condition 1 of the 1994 Consent Permit provided:

“Provision shall be made on the site for carparking spaces and access thereto at the rate current at the time the Building Application is submitted as well as for the loading/unloading of vehicles. Such carparking, access and loading/unloading areas shall be constructed in accordance with the requirements of the City of Cairns Town Planning Scheme and By-laws and the approved plans and to the reasonable satisfaction of the City Engineer. On the present method of calculation 48 spaces would be required.

A minimum of 39 spaces shall be provided on the site.”

21. On 22 April 1994 Ainsley Bell + Murchison Architects for the proposed development (**Project Architects**) made application by letter to the Council to vary condition 1.

Particulars

“RE: CONSENT REFERENCE 3902/93 ‘IL CENTRO’

We refer you to the Consent Condition No. 1 for the above project, being required carparking calculations.

The ‘Il Centro’ project has been designed within the limitations of the existing town plan for a market that it not catered for in the existing Town Plan, but thankfully is now recognised in the new Town Plan viz. Holiday Apartments.

Clearly the ‘Il Centro’ design is for Holiday Apartments – re: Single bedroom apartments with a convenience kitchenette, ‘on-site’ management and a breakfast room – bigger than a motel room but too small for permanent living.

These apartments are designed to supplement the deficiency of hotel rooms in the city.

Your carpark calculations have been based on the old Town Plan with 1 car per unit plus one visitors car per four units. We ask that in keeping with the intent of the new Town Plan and in recognition of the Holiday Apartment needs for the city, the carpark calculations for this project be re-calculated at the New Holiday Apartment rate of 1 car per unit.

The new calculation would now be:-

1 per unit

= 39 x 1 = 39 cars

No. of cars actually provided = 39 cars

Therefore there is no shortfall in car spaces

We ask that you give urgent consideration to this request in the interests of supporting positive tourist development in Cairns.”

22. On 17 May 1994, the Cairns City Council at its ordinary meeting resolved, inter alia, to vary Condition 1 in accordance with the application made by the Project Architects.
23. By letter dated 18 May 1994, from E.A Taylor Acting Director- Planning and Development, Cairns City Council gave written notice to the Project Architects that the Council had on 17 May 1994 approved the variation applied for in respect of Condition 1.

Particulars

*"RE: REQUESTS FOR VARIATION TO CARPARKING REQUIREMENTS –
PROPOSED HOLIDAY APARTMENTS*

I refer to your letters concerning requests for variations to carparking requirements. Your requests were considered by Council at the recent Ordinary meeting [17 May 1994].

After considering your requests in detail, Council resolved to support an on site carparking rate of one space for each accommodation unit for developments at –

*26 – 30 Sheridan Street
20 – 24 Sheridan Street
62 – 66A Abbott Street
141 – 143 Grafton Street*

on the basis that:-

- The proposed developments will have on-site management and are intended to operate as holiday apartments;*
- Council's Policy currently requires one carspace for each strata titled self-contained motel unit which is considered to be a similar use to the proposed holiday apartments; and*
- The proposed holiday apartments are unlikely to generate the same level of on-site carparking as permanent accommodation due to the short term occupancy of residents and due to the location of the proposed developments in the Central Business District.*

Council Officers will calculate the on-site carparking requirement of any other applications for holiday apartments with on-site management in the Central Business District at the rate of one carspace for each apartment."

24. The application to vary condition 1 was an application to vary a condition of a town planning consent and thereby, a modification of an approval to which section 4.15 of the *Local Government (Planning and Environment) Act 1990* applied.²
25. As and from 17 May 1994, the Cairns City Council and subsequently, the First Respondent, has accepted that the approved use for Il Centro as "accommodation units" was for short term holiday accommodation.

Particulars

- (a) The Applicants repeat and rely on the facts and matters alleged at paragraphs 22 and 24 herein.

² Subsections 4.15(1)(b); 4.15(1A)(d); s 4.15(1C)(a); 4.15(3)(a) to (f); 4.15(5)(a)(i) and 4.15(13) of the P&E Act.

- (b) By letter dated 11 April 2012 from the First Respondent to the Body Corporate the First Respondent confirmed that the 1994 Consent Permit was an approval *"for Motel Units – Short Term Accommodation only"*; and
- (c) On 13 February 2014, a Show Cause Notice was issued by an officer of the First Respondent (Graham Boyd, Manager Development & Regulatory Services) to the owner of Lot 14 (Robinson) and confirmed that the 1994 Consent Permit was "...intended to operate as holiday apartments."

THE FIRST DEVELOPMENT APPLICATION

- 26. The Development Application in respect of the 7 lots was dated 27 June 2014 and received by the Cairns Regional Council on 30 June 2014 (**First Development Application**).
- 27. The "applicant" for the purposes of IDAS, Chapter 6 of the *SPA*, was Robert P Palethorpe, a solicitor from Port Douglas.
- 28. The IDAS form 1 [Application Details] Item 1 recorded that the "nature of the development proposed [applied for] was a "material change of use". Item 1(b) [the approval type] was not completed.
- 29. In respect of Table A, Item 1(c) of IDAS form 1 [A brief description of the proposal including use definition and number of buildings] the applicant stated:- "change use" from "Holiday Accommodation" to "Holiday Accommodation/Multiple dwelling" (**dual use**).
- 30. In respect of the question in Table 1(d):-

"What is the level of assessment? The applicant marked an "X" in the box next to Code Assessment".
- 31. Item 1 of the Mandatory Requirements of the IDAS form 5 [Material Change of Use Assessable Against a Planning Scheme] requires the applicant to provide a "General Explanation of the Proposed Use". The explanation provided was: "Holiday Accommodation/Multiple Dwelling".
- 32. Item 1 of IDAS form 5 also requires the "No. of Dwelling units (if applicable) or gross floor area (if applicable) to be stated. The applicant stated "one each".
- 33. Item 1 of IDAS form 5 also required the "days and hours of operation (if applicable)" to be stated. The applicant stated "year round".
- 34. On 4 July 2014, Graham Boyd (Manager Development & Regulatory Services, Cairns Regional Council sent a letter to the Applicant stating inter alia, "Council officers have commenced assessment of your Development Application and advise you that no further information is required".
- 35. The letter dated 4 July 2014 was not an Acknowledgement Notice as it did not comply with s 268 of the *SPA* which prescribes the content required for an acknowledgement notice.

36. On 31 July 2014, an officer of the First Respondent, one Gary Warner (Coordinator-Development Assessment Development and Regulatory Services) forwarded an email to the Applicant advising, inter alia:
- (a) that the Council had extended the decision-making period to enable the application to be placed before the next Council meeting on 13 August 2014; and
 - (b) that given the background to this proposal "...it is not a matter that we can deal with under delegation and, as noted in the letter, this extension is required to enable the proposal to be placed before the next available Council meeting".
37. On a date unknown after 4 July 2014, pursuant to section 256(1) of the *SPA*, the Council sought 'advice' about the application from Bruce Hedley, a Town Planning Consultant from "Planning Far North Pty Ltd".
38. The advice from Bruce Hedley was provided to the Council on or about 6 August 2014.

THE SECOND DEVELOPMENT APPLICATION

39. The Development Application in respect of the 17 lots was dated 31 December 2014 and received by the Council on 7 January 2015 (**Second Development Application**).
40. The "applicant" for the purposes of IDAS, Chapter 6 of the *SPA*, was Mark Austin Jones, one of the registered owners of Lot 3 BUP 101919.
41. The information contained in the First Development Application as recorded in the IDAS Form 1 and IDAS Form 5 as previously alleged herein at paragraphs 28 to 33 was the same information recorded in the Second Development Application.

THE 2014 DECISION NOTICE

42. The decision to approve the First Development Application for a material change of use was made by the Council on 13 August 2014.
43. Written notice of the decision in the approved form (**2014 Decision Notice**)³ was given to the applicant under cover of a letter dated "8 August 2014" (sic).
44. There were no conditions attaching to the approval.
45. The "assessable development" purportedly approved in the 2014 Decision Notice was a "material change of use" for "Multiple Dwellings and Holiday Accommodation."

³ Section 334(1)(a) of the *SPA* provides that the assessment manager must give written notice of the decision in the approved form (**decision notice**) to the applicant. The decision notice must be given within 5 business days after the decision was made: s 334(2) of the *SPA*.

46. Page 2 of the 2014 Decision Notice states, inter alia:

"DOES THE ASSESSMENT MANAGER CONSIDER THE APPLICATION TO BE IN CONFLICT WITH APPLICABLE CODES, PLANNING SCHEME, STATE PLANNING POLICIES OR PRIORITY INFRASTRUCTURE PLAN (IF YES, INCLUDE STATEMENT OF REASONS)

Not in conflict.

APPROVED DRAWING(S) AND/OR DOCUMENT(S)

The term 'approved drawing(s) and / or document(s)' or other similar expressions means:

Drawing or Document	Reference	Date
Plan of Survey for Units	BUP101919	25/01/1995

...

LAND USE DEFINITIONS

In accordance with the approved land uses of Multiple Dwellings & Holiday Accommodation defined as:

Multiple Dwelling:

Means; the use of premises comprising six or more dwelling units of self-contained accommodation on one lot for residential purposes. The use includes accommodation commonly described as flats, home units, apartments, townhouses or villa houses.

Holiday Accommodation:

Means; the use of premises for the accommodation of tourists or travellers.

The use may include restaurants, bars, meeting and function facilities, dining room, facilities for the provision of meals to guests and a manager's unit and office when these facilities are an integral part of the accommodation. The use includes facilities commonly described as holiday apartments or suites, international or resort hotel or motel."

47. The "approved drawings" are included as Appendix 1 of the 2014 Decision Notice showing as highlighted each of the 7 lots (subject units) being part of BUP 101919.

THE 2015 DECISION NOTICE

48. The decision to approve the Development Application for a material change of use was made by a delegate of the Council on 26 February 2015.
49. Written notice of the decision in the approved form (**2015 Decision Notice**) was given to the applicant under cover of a letter dated 26 February 2015.
50. There were no conditions attaching to the approval.
51. The "assessable development" purportedly approved in the 2015 Decision Notice was a "material change of use" for "Multiple Dwellings and Holiday Accommodation."
52. The content of the 2015 Decision Notice was the same as contained in the 2014 Decision Notice as hereinbefore alleged at paragraph 46.

53. The “approved drawings” are included as Appendix 1 of the 2015 Decision Notice showing as highlighted each of the 17 lots (subject units) being part of BUP 101919.
54. Appendix 2 of the 2015 Decision Notice is a form entitled “Notice of Intention to Commence Use”.

THE COUNCIL AS ASSESSMENT MANAGER: SUSTAINABLE PLANNING ACT 2009

55. Pursuant to subsection 13(c) and subsection 246(1) of the *SPA*; section 12 of the *Sustainable Planning Regulation 2009 (Regulation)* and Schedule 6, Table 1, Item 1 of the Regulation, the Council was the “assessment manager” for the First Development Application.
56. Section 14(1) of the *SPA* provides that “this Act binds all persons, including the State...”.
57. In the premises:
- (a) the Council, when the assessment manager, is bound by the *SPA* when exercising any statutory power under the *SPA*; and
 - (b) any delegate of the Council, when the assessment manager, is bound by the *SPA* when exercising any statutory power under the *SPA*.
58. Pursuant to section 247 of the *SPA* [Role of Assessment Manager], section 261 [When application is a properly made application], section 263 [When owner’s consent is required for application] section 266 [Notice about application that is not a properly made application] and section 267 [Notice about properly made application] of the *SPA*, the Council as the assessment manager of the First Development Application and the delegate of the Council as the assessment manager of the Second Development Application were bound to consider and decide, respectively, whether each application was:
- (a) a properly made application;
 - (b) an application for assessable development under *CairnsPlan 2009* whereby it was capable of being assessed under Chapter 6 [IDAS] of the *SPA*; and
 - (c) if it was an application for assessable development, whether it required code assessment under section 313 of the *SPA* or impact assessment under section 314 of the *SPA*.

NOT A PROPERLY MADE APPLICATION

59. The First Development Application was not a properly made application.

Particulars

- (a) The proposed dual use of Holiday Accommodation and Multiple Dwelling was not assessable development under *CairnsPlan 2009* – a material change of use - that could be approved under the *SPA*. The First and Second Applicants repeat and rely on paragraphs 63 to 71; 74 to 79; 81 to 97;
 - (b) Further or in the alternative, the application required impact assessment not code assessment as stated in Table A “(d)” of IDAS form 1 [Application Details]. The First and Second Applicants repeat and rely on the facts and matters alleged herein at paragraph 80;
 - (c) The consent of the body corporate (as “owner” of the common property for the purposes of the *SPA*⁴ – Body Corporate for Il Centro Community Title Scheme 17438) was not obtained under subsection 263(1)(a) of the *SPA*; and
 - (d) The mandatory information required in part 4 of IDAS form 5 [Material change of use assessable against a planning scheme] namely “...a statement about how the proposed development addresses the local government’s planning scheme and any other planning instruments or documents relevant to the application...” was not completed.
60. The Second Development Application was not a properly made application.

Particulars

- (a) The First and Second Applicants repeat and rely on the facts and matters alleged in the particulars to paragraph 59 herein.
61. As to the First Development Application, to the extent that the Council decided it was a properly made application:
- (a) the decision was unlawful, in breach of subsection 261(1)(a) of the *SPA*, void and of no effect;
 - (b) further or in the alternative, the Council failed to take into account relevant considerations it was bound to take into account. The First and Second Applicants repeat and rely on the facts and matters alleged in the particulars at paragraph 59 herein; and
 - (c) further or in the alternative, the decision was so unreasonable that no reasonable assessment manager could have exercised its power in that manner. The First and Second Applicants repeat and rely on the facts and matters alleged in the particulars at paragraph 59 herein.
62. As to the Second Development Application, to the extent that the delegate of the Council decided it was a properly made application:
- (a) the decision was unlawful, in breach of subsection 261(1)(a) of the *SPA*, void and of no effect.

⁴ The “owner” of land is defined in Schedule 3 of the *SPA* as “...the person entitled to receive rent for it if it were let to a tenant at rent.”

- (b) further or in the alternative, the delegate of the Council failed to take into account relevant considerations it was bound to take into account. The First and Second Applicants repeat and rely on the facts and matters alleged in the particulars at paragraph 59 herein; and
- (c) further or in the alternative, the decision was so unreasonable that no reasonable assessment manager could have exercised its power in that manner.

THE PROPOSED DUAL USE WAS NOT ASSESSABLE DEVELOPMENT UNDER CAIRNSPLAN 2009 THAT COULD BE ASSESSED AND APPROVED UNDER IDAS, CHAPTER 6 OF THE SPA

- 63. "Development" under section 7(e) of the SPA involves "making" a material change of use of premises.
- 64. "Material Change of Use" is defined under section 10 of the SPA as:
 - (a) the start of a new use of premises;
 - (b) the re-establishment on the premises of a use that has been abandoned; or
 - (c) a material increase in the intensity or scale of the use of the premises.⁵
- 65. The aspect of the definition of material change of use applicable to the proposed "development" in the First Development Application and the Second Development Application was sub-paragraph (a) of section 10 of the SPA.
- 66. Pursuant to s 12 of the SPA, if the meaning of a word[s] in a planning instrument - which includes a planning scheme - is inconsistent with the meaning of the same word[s] in the SPA, the meaning of the word[s] in the SPA prevails.
- 67. The definition of "material change of use" in section 10 of the SPA is the definition applicable to the provisions of *CairnsPlan 2009*.
- 68. Under Schedule 3 of the SPA, "assessable development" for a planning scheme area – includes other "development" not prescribed under a regulation to be assessable development but declared to be assessable development under the planning scheme for the area.
- 69. A "development approval" is defined in Schedule 3 of the SPA to mean a development approval for the application in the form of a decision notice or negotiated decision notice that approves wholly or partially, development applied for in the Development Application (whether or not the approval has conditions attached to it).
- 70. Pursuant to s 240(b), a development permit is a type of approval under the SPA.

⁵ This definition of "material change of use" was inserted into the SPA by s 64 of the *Environmental Protection Greentape Reduction and Other Legislation Amendment Act 2012 (EPGROLAA)*. Section 64 of the EPGROLAA commenced on **31 March 2013** (2013 SL No. 24).

71. A development permit is necessary for assessable development because it authorises assessable development to take place to the extent stated in the permit, subject to the conditions of the permit: s 243(a) and (b) of the *SPA*.
72. It is an offence to carry out assessable development without a development permit: sections 238 and 578 of the *SPA*.
73. Further to the facts and matters alleged at paragraph 59(b) herein, under the *SPA*:
 - (a) when the First Development Application was received by the Council, as the assessment manager under the *SPA*, the Council was bound to consider whether the proposed dual use applied for of “Holiday Accommodation and Multiple Dwelling” in respect of each of the 7 lots was assessable development under the *CairnsPlan 2009* which could be assessed under Chapter 6 [IDAS] of the *SPA*; and
 - (b) when the Second Development application was received by the delegate of the Council, as the assessment manager under the *SPA*, the delegate was bound to consider whether the proposed dual use applied for of “Holiday Accommodation and Multiple Dwelling” in respect of each of the 17 lots was assessable development under the *CairnsPlan 2009* which could be assessed under Chapter 6 [IDAS] of the *SPA*.
74. Under *CairnsPlan 2009*, Il Centro is located within the “CBD – North Cairns” district and the “City Centre” Planning Area.
75. Planning Areas identify areas of similar or compatible land use and identify the dominant land use preferred for each Planning Area.
76. Overall outcomes for each Planning Area are set out in the Planning Area codes and any specific outcomes for a Planning Area which are particular to a district are identified.
77. The Planning Areas identify the dominant land uses preferred in each District. There is a District Plan for each District.
78. There are Assessment Tables for each District.
79. The Assessment Tables:
 - (a) identify the level of assessment for components of development; and
 - (b) provide a guide to the codes applicable to the components of development.
80. The proposed development applied for in the First and Second Development Applications was Impact Assessable under the provisions of *CairnsPlan 2009*, including the “CBD – North Cairns – District Assessment Table [Initial Level of assessment- Material Change of Use]” (**Assessment Table**) because the dual use:
 - (a) was not a separately defined use under the “CBD-North Cairns – District Assessment Table (Initial Level of Assessment – Material Change of Use)”; and
 - (b) fell within the category of “All Other Material Change of Use” under the “CBD-North Cairns – District Assessment Table (Initial Level of Assessment –

Material Change of Use impact)" which prescribes any such "other material change of use" as Impact Assessable development under *CairnsPlan 2009*.

81. The proposed use applied for in the First Development Application (and subsequently approved by the Council) was for a material change of use for a dual use:
 - (a) "Holiday Accommodation and Multiple Dwelling" in respect of each of the 7 lots; and
 - (b) that was proposed to be commenced by each of the 7 lot owners when the approval took effect [the date when the decision notice was given] and carried on "year round".
82. The proposed use applied for in the Second Development Application (and subsequently approved by a delegate of the Council) was for a material change of use to a dual use:
 - (a) "Holiday Accommodation and Multiple Dwelling" in respect of each of the 17 lots; and
 - (b) that was proposed to be commenced by each of the 17 lot owners when the approval took effect [the date when the decision notice was given] and carried on "year round".
83. In the premises, in order for the category of "non-defined" use proposed in the First and Second Development Applications to be assessed and approved as assessable development under *CairnsPlan 2009* and, pursuant to the development permit [decision notice], authorised to commence as assessable development, the Council was required to decide whether the proposed dual use of "Holiday Accommodation and Multiple Dwelling" under *CairnsPlan 2009* was a "use" that also satisfied the definition of material change of use [development] – a start of a new use of premises - under the *SPA*.

ASSESSABLE DEVELOPMENT AND THE LAND USE DEFINITIONS UNDER CAIRNSPLAN 2009

84. Section 5.3 of Chapter 5 of *CairnsPlan 2009* contains the "Land Use Definitions" which have a specific meaning for the purpose of the Assessment Tables and assessment of the development.
85. The separately defined uses that are "Residential Uses" are defined in section 5.3.1 of *CairnsPlan 2009*.
86. The separately defined uses that are "Tourist and Short Term Accommodation Uses" are defined in section 5.3.2 of *CairnsPlan 2009*.
87. The uses contained in the "residential use" category include house; illuminated tennis court; caretaker's residence; dual occupancy; Multiple Dwelling (small scale development); Multiple Dwelling (includes accommodation commonly described as flats, home units, apartments, townhouses or villa houses); retirement village; special residential accommodation; home activity and home based business.

88. The uses contained in the "Tourist and Short Term Accommodation Uses" include Caravan and Relocatable Home Park; Holiday Accommodation (including holiday apartments or suites, international or resort hotel or motel) and Short Term Accommodation (including boarding house, guesthouse, backpackers hostel or serviced rooms).
89. The purpose of the "Multiple Dwelling" use under *CairnsPlan 2009* is that any use of premises was to be confined to permanent or long term residential accommodation.
90. The purpose of the "Holiday Accommodation" use under *CairnsPlan 2009* use is for short term accommodation for tourist and travellers.
91. The dual use proposed in the First Development Application was not a separately "defined use" under *CairnsPlan 2009*.
92. The dual use proposed in the Second Development Application was not a separately "defined use" under *CairnsPlan 2009*.
93. As previously alleged at paragraph 80 herein, under the Assessment Table, because the dual use is not separately defined, the prescribed level of assessment fell within the category "All other Material Change of Use (unless otherwise specified in Schedule 8 of IPA)"⁶ which in turn, prescribes any use within that category as Impact Assessable.
94. However, under *CairnsPlan 2009*, the defined uses of "Multiple Dwelling" and "Holiday Accommodation" are mutually exclusive uses that cannot be simultaneously commenced and carried on "year round".
95. The proposed use[s] applied for in the First and Second Development Applications are mutually exclusive because they could not be "started" or carried on at the same time in respect of each of the 7 lots and each of the 17 lots because:
 - (a) the "Multiple Dwelling" use is a use of premises for permanent residential accommodation; and
 - (b) the "Holiday Accommodation" use is a use for short term holiday accommodation by tourists and travellers.
96. Further, the dual use could not commence without each of the 7 lots owners and each of the 17 lot owners using the common property to access each of their units.
97. By reason of the facts and matters alleged at paragraph 96:
 - (a) "...the land the subject of the [First and Second Development] application[s]..." included the common property forming part of the Scheme Land in the Il Centro Community Title Scheme 17438;
 - (b) the Body Corporate for Il Centro Community Title Scheme 17438 is the "owner" of the common property as that term is defined under the SPA for the purposes of the Development Application; and

⁶ See now s 9(1)(a) of the *Sustainable Planning Regulation 2009 (Regulation)* and Schedule 3 Part 1 Column 2 [Assessable Development] Table 2 [Material change of use of premises] of the *Regulation*.

- (c) the consent of the Body Corporate for Il Centro Community Title Scheme 17438 as owner of the common property was required to be obtained.
98. By reason of the facts and matters alleged at paragraphs 63 to 97 herein, the proposed use applied for in the First Development Application was not assessable development under *CairnsPlan 2009* that could be assessed under Chapter 6 of the *SPA* and the decision of the Council to assess and approve the application was unlawful, invalid and of no effect.
99. Further or in the alternative:
- (a) the decision by the Council, in its capacity as assessment manager under the *SPA*, to accept the First Development Application as a properly made application for assessable development namely a material change of use as defined under s 10(a) of the *SPA* under *CairnsPlan 2009* was:
- i. unlawful, invalid and of no effect. The First and Second Applicants repeat and rely on the facts and matters alleged at paragraph 59, 96 and 97 herein;
 - ii. in the alternative, an invalid decision involving an improper exercise of power whereby the Council failed to take into account relevant considerations it was bound to take into account; and
 - iii. in the further alternative, an invalid decision that was so unreasonable that no reasonable assessment manager could have exercised its power in that manner.
100. By reason of the facts and matters alleged at paragraphs 63 to 97 herein, the proposed use applied for in the Second Development Application was not assessable development under *CairnsPlan 2009* that could be assessed under Chapter 6 of the *SPA* and the decision of the delegate of the Council to assess and approve the application was unlawful, invalid and of no effect.
101. Further or in the alternative:
- (a) the decision by a delegate of the Council, as assessment manager under the *SPA*, to accept the Second Development Application as a properly made application for assessable development namely a material change of use as defined under s 10(a) of the *SPA* under *CairnsPlan 2009* was:
- i. unlawful, invalid and of no effect. The First and Second Applicants repeat and rely on the facts and matters alleged at paragraph 60, 96 and 97 herein;
 - ii. in the alternative, a decision involving an improper exercise of power whereby the Council failed to take into account relevant considerations it was bound to take into account; and
 - iii. in the further alternative, a decision that was so unreasonable that no reasonable assessment manager could have exercised its power in that manner.

PROPOSED DUAL USE WAS IMPACT ASSESSABLE

102. Further or in the alternative, if the proposed dual use was assessable development under *CairnsPlan 2009* that could be assessed and approved under Chapter 6 of the SPA (which is expressly not admitted), it was development that required impact assessment. The First and Second Applicants repeat and rely on the facts and matters alleged at paragraphs 63 to 93 herein.
103. The decision to assess and the subsequent assessment of the First Development Application as code assessable by the Council was unlawful, in breach of subsections 266(1);⁷ 295(1)(a);⁸ 314 (2)(g)⁹ and 314(3)(a) and (b)¹⁰ of the SPA and invalid.
104. Further or in the alternative, the decision to approve the First Development Application is invalid because the Council improperly exercised its power as the assessment manager of the Development Application under the SPA.

Particulars

- (a) The Council assessed the Development Application as code assessable when it was Impact Assessable. The First and Second Applicants repeat and rely on the facts and matters alleged at paragraphs 63 to 93 herein;
- (b) The Council failed to apply the provisions of the SPA that related to an Impact Assessable Development Application that it was bound to apply; and
- (c) The decision was so unreasonable that no reasonable assessment manager could have exercised its power in that manner.
105. The decision to assess and the subsequent assessment of the Second Development Application as code assessable by the delegate of the Council was unlawful, in breach of subsections 266(1); 295(1)(a); 314(1); 314 (2)(g) and 314(3)(a) and (b) of the SPA and invalid.
106. Further or in the alternative, the decision to approve the Second Development Application was invalid because the delegate of the Council improperly exercised his power as the assessment manager of the Development Application under the SPA.

⁷ Subsection 266(1) of the SPA provides:- "If the application is not a properly made application the assessment manager **must** give the applicant a notice stating (a) that the application is not a properly made application; and (b) the reasons the assessment manager is satisfied the application is not a properly made application; and (c) the action the assessment manager is satisfied the applicant must take for the application to comply with section 261.

⁸ Subsection 295(1)(a) of the SPA provides:- "The notification stage applies to an application if either of the following applies- (a) any part the application requires impact assessment."

⁹ Subsection 314(1) – this section applies to any part of an application requiring impact assessment; s 314(2)(g) of the SPA states: "The assessment manager must assess the part of the application against each of the following matters or things to the extent that matter or thing is relevant to the development – (g) a planning scheme."

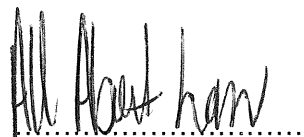
¹⁰ Section 314(3)(a) and (B) provides: "In addition to the matter or things against which the assessment manager must assess the application under subsection (2), the assessment manager must assess the part of the application having regard to the following – (a) the common material; (b) any development approval for, and any lawful use of, the premises the subject of the application or adjacent premises." The term "common material" for a development application is relevantly defined in Schedule 3 of the SPA as:- "all the material about the application the assessment manager has received in the first 3 stages of IDAS, including – (i) any... contents of submissions that have been accepted by the assessment manager; and (ii) any [third party] advice or comment about the application received under s 256; and (b) if a development approval for the development has not lapsed - the approval; and (c)..."

Particulars

- (a) The delegate of the Council assessed the Development Application as code assessable when it was Impact Assessable. The First and Second Applicants repeat and rely on the facts and matters alleged at paragraphs 63 to 93 herein;
 - (b) The delegate of the Council failed to apply the provisions of the *SPA* that related to an Impact Assessable Development Application that it was bound to apply; and
 - (c) The decision was so unreasonable that no reasonable assessment manager could have exercised its power in that manner.
107. Further or in the alternative, if the First and Second Development Applications were code assessable (which is expressly denied), to the extent that the Council and, the delegate of the Council, respectively decided that the proposed dual use was not in conflict with the applicable codes and the Planning Scheme, the Council and the delegate:
- (a) acted unlawfully in breach of the *SPA*. The proposed dual use of each of the lots was in conflict with the relevant provisions of the applicable codes including the Parking and Access Code;
 - (b) improperly exercised their power as the assessment manager of the Development Application[s] under the *SPA* whereby they failed to take into account, properly or at all, the nature of the approved use under the 1994 consent permit and the conditions attaching to the 1994 Consent Permit; and
 - (c) accordingly, the decisions made on 13 August 2014 and 26 February 2015 were invalid, void and of no effect.

THE NEED FOR CONSEQUENTIAL ORDERS

108. The commencement of the use of the 7 lots and the 17 lots for holiday accommodation and multiple dwelling without an effective development permit is a development offence under section 578(1) of the *SPA*.
109. The use of each of the 7 lots and each of the 17 lots is not a lawful use and is a development offence under section 582 of the *SPA*.
110. Unless restrained by orders of this Court, the named Respondents will commit or continue committing development offences under the *SPA*.



All About Law
Solicitors for the Applicant

Dated: 2 April 2015

This Originating Application was settled by Mr Allan of Counsel.

This application is to be heard by the Court at Cairns on the *1st* day of *may* 2015 at *9.30* am/pm.



NB: If you are named as a respondent in this proceeding and wish to be heard in this application you must:

- (a) within 10 business days after being served with a copy of this Originating Application, file an Entry of Appearance in the Registry where this application 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 application and you wish to be heard in this application you must:

- (a) within 10 business days of receipt of this Originating Application, file a Notice of Election in the Registry where this application was filed or where the court file is kept; and
- (c) 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.

To the First Respondent:	The Chief Executive Officer Cairns Regional Council 119-145 Spence Street CAIRNS QLD 4870
And to the Second Respondent: (Lot 8)	Jonathon Noonan Pty Ltd (ACN 005 481 881) Unit 3, 130 High Street ASHWOOD VIC 3147
And to the Third Respondent: (Lots 18 and 36)	Cameron Miles Demoy 72 Pridham Street EAST PRAHRAN VIC 3181
And to the Fourth Respondent: (Lot 23)	Karen Elizabeth Townshend 14/215 McLeod Street NORTH CAIRNS QLD 4870
And to the Fifth Respondent: (Lot 29)	Janice Pamela Tiller PO Box 5858 CAIRNS QLD 4870
And to the Sixth Respondent: (Lot 32)	Merilyn Joy Womack and Jodie Leigh Wylie as Trustees for the Womack Superannuation Fund under Instrument No. 704978002 1 Hamer Street MOORABBIN VIC 3189
And to the Seventh Respondent: (Lot 39)	Lyle George Davey and Sheelagh Kay Davey PO Box 334 PAMBULA NSW 2549
And to the Eighth Respondent: (Lot 3)	Mark Austin Jones and Lorraine May Jones PO Box 102 SILKWOOD QLD 4856
And to the Ninth Respondent: (Lot 9)	Karen Banks-Hore PO Box 853 OCEAN GROVE VIC 3226
And to the Tenth Respondent:	Cass Paul McMullen-Burn

(Lot 10)	130 Winery Drive KARNUP WA 6176
And to the Eleventh Respondent: (Lot 11)	Kaylene Joy Richards and Bradley Stan Richards 50 Paradise Palm Drive TULLY HEADS QLD 4854
And to the Twelfth Respondent: (Lot 14)	Lindsay Peter Robinson and Elizabeth Armada Robinson 26 Lofthouse Drive LESCHENAULT WA 6233
And to the Thirteenth Respondent: (Lots 15 and 25)	Francesco Monaco and Brenda Joan Monaco Unit 11, 1 Malouf Court PAKENHAM VIC 3810 and 61 Wallace Street BEACONSFIELD VIC 3807
And to the Fourteenth Respondent: (Lot 17)	ME & BT Charleson Nominees Pty Ltd (ACN 097 638 269) as Trustee for the ME & BT Charleson Family Super Fund under Instrument No. 705223572 73 Lannercost Street INGHAM QLD 4850
And to the Fifteenth Respondent: (Lot 19)	Robert Edward Usher Phu Bia Mining Ltd PO Box 5559 VIENTIANE LAO PDR
And to the Sixteenth Respondent: (Lots 21 and 38)	Genevieve Cecilia D'Silva 29 Sunbeam Avenue BURWOOD NSW 2134
And to the Seventeenth Respondent: (Lot 24)	Kamiraba Pty Ltd (ACN 001 666 762) Irish & Saunders Suite 3, 7 Parraween Street CREMORNE NSW 2090
And to the Eighteenth Respondent: (Lot 28)	KRK Holdings Pty Ltd (ACN 084 032 637) as Trustee for the KRK Superannuation Fund under Instrument

	No. 703599510 91-93 Aberdeen Street ALBANY WA 6330
And to the Nineteenth Respondent: (Lot 31)	Shane Robert Hicks 11 Kenneth Street BAYVIEW HEIGHTS QLD 4868
And to the Twentieth Respondent: (Lot 34)	Judith Yvonne Tannock and Gilbert John Van Bekkum PO Box 1492 INNISFAIL QLD 4860
And to the Twenty-First Respondent: (Lot 37)	KRK Holdings Pty Ltd (ACN 084 032 637) as Trustee for the KRK Superannuation Fund under Instrument No. 703442529 91-93 Aberdeen Street ALBANY WA 6330
And to the Twenty-Second Respondent: (Lot 40)	Charmaine Amanda Dorward 12/16 Byron Street ELWOOD VIC 3184
And to:	The Chief Executive Department of Infrastructure, Local Government and Planning pecappeals@dsdip.qld.gov.au