

19.4 S. & S. LAMBOURNE INVESTMENTS PTY LTD V REDLAND CITY COUNCIL - PLANNING & ENVIRONMENT COURT APPEAL NO. 3450 OF 2019

Objective Reference:

Authorising Officer: Louise Rusan, General Manager Community & Customer Services

Responsible Officer: Graham Simpson, Group Manager Environment & Regulation

Report Author: Paul Hoelscher, Team Leader Development Standards
Samantha Keenan, Technical Compliance Officer

Attachments: 1. Site Location and Details

The Council is satisfied that, pursuant to Section 275(1) of the *Local Government Regulation 2012*, the information to be received, discussed or considered in relation to this agenda item is:

(f) starting or defending legal proceedings involving the local government.

PURPOSE

The purpose of this report is to outline the grounds of appeal and set out relevant facts and circumstances to enable Council to provide instructions with respect to the progress of the appeal.

BACKGROUND

On 11 April 2019 Council issued a refusal in response to an application under *Subordinate Local Law 1.4 (Installation of Advertising Devices) 2017* for two Electronic Display Billboard signs, with third party advertising, on the former Rural Press premises at the corner of Finucane Road and Delancey Street, Cleveland, (56-68 Delancey Street), now owned and occupied by the appellant, trading as SS Signs and Vehicle Wraps. Attachment 1 depicts site location and proposed signage.

The first sign was to replace the existing 9.9m² faced traditional (non-electronic) billboard located on the sloped paddock to the west of the buildings on the site – for which an approval was granted to Rural Press in 1999 – with a larger, substantially framed, billboard sign having a total face area of 82.5m² and an LED display area of 40m².

The second sign, a smaller billboard – 6.5m wide by 7.25m in height, with 24m² LED display area – was proposed to be located immediately within the boundary at the Finucane Road and Delancey Street corner, facing the west and north bound traffic flows through the adjacent signalised intersection.

The application was refused on 11 April 2019, by notice given by the Team Leader, Development Standards, on the grounds that the style of signs (billboard signs) are not an approved sign in all zones; and the third party aspect proposed did not meet the relevant provisions or purpose of the Local Law for no more than one such sign per premises (restricted to particular uses), with a height of no more than 3m and a face area of no more than 2.4m².

On 18 April 2019 the applicant requested a review of the refusal partly on the basis of there being an existing example, at 39 Old Cleveland Road, Capalaba, where a third party sign had been established outside the 2.4m² area constraint of *Subordinate Local Law 1.4*.

That sign is now an existing substantial wall sign for which an appeal against the conditions attached to the Operational Works permit issued was settled in October 2018 by way of a consent order in the Planning & Environment Court, approving the sign – without conditions regarding third party

content and deleting a proposed 1-hour dwell time condition sought by the Department of Transport and Main Roads (DTMR).

During the review period for the subject application at 56-68 Delancey Street, Council officers discussed with the applicant possibly acceptable scenarios for new signage at the property.

These included removal of third party advertising as an aspect of the proposal, changing the second sign to a pylon sign, and using the existing billboard size as a guide for the dimensions of a new electronic display sign.

None of those aspects formed part of the original application, which is the subject of the refusal for which the review had been requested.

A letter was received from the applicant on 3 June 2019 purporting to change the application and re-enliven the application process, substituting an amended proposal.

That letter of 3 June 2019 from Bennett and Francis (Planning Consultants for Owner) stated as follows:

'Further to your email regarding the initial refusal and our subsequent request to review Councils (sic) decision, we respond as follows.

In relation to the existing Billboard Proposal 1, (Finucane Road), we confirm our client wishes to remove the third party component of this signage.

In relation to existing Billboard Proposal 2, (cnr of Delancey and Finucane), our client proposes to remove the third party component and change the sign type to a pylon sign, as per the attached plans of the proposed sign.'

It should be noted that the process under which the Council acts in relation to signs applications made under *Subordinate Local Law 1.4* is set out within the overarching *Local Law No. 1 (Administration) 2017*. The relevant provisions set a time for a Review Decision by the Council at 28 days from the review request, with a subsequent 5 days for the Review Notice to issue from the Council. If the times are not met the Council is taken to have made a Review Decision confirming the original decision.

In this case, despite the procedural provisions applicable, on 7 June 2019 Council officers issued a second Information Notice (decision notice) under the signature of the officer that administers the signage applications. This Information Notice purportedly 'approved' the substituted amended proposal subject to conditions, including a condition reflecting advice from the DTMR requiring a 'dwell time' of a minimum of 1 hour during peak traffic periods for both signs.

The Information Notice of 7 June 2019 was issued in error, as the applicant had requested a review, for which a Review Notice was the associated response under *Local Law 1*.

Further to this, the review application, under s.23 (2) of *Local Law 1*, was required to be dealt with by a different officer to the initial decision maker and not by 'a person in a less senior office', as appears was the case.

On 19 June 2019 the applicant requested a review of the DTMR conditions attached to the 7 June 2019 notice (the second review).

During this 'second review', examination of circumstances found that the process had been administratively flawed, and had proceeded *ultra vires* (outside the authority) of both parties to the application. There was no mechanism in the applicable Local Law provisions to amend an application

during a post-decision review process, and no provision to extend the time frames set out for the Council's review of the original decision.

Legal advice was received to that effect and, on 11 September 2019, Council issued a letter advising the applicant of the determination – that the initial refusal of the application was confirmed by virtue of the deeming provisions at s.23 (5) of *Local Law No. 1 (Administration) 2017* – and inviting a fresh application from the applicant, if desired.

Planning and Environment Court Appeal No. 3450/19 was subsequently lodged on 24 September 2019 – appealing the 11 April 2019 refusal or, in the alternative, the conditions of the Information Notice of 7 June 2019 (the purported approval) issued by Council with respect to the substituted amended proposal received from the application on 3 June 2019.

ISSUES

The preliminary issues of procedural efficacy and a determination of the effective decision in the matter will need to be dispensed with before the other matters concerning the merit of the proposed signs can be dealt with by the Planning and Environment Court.

These issues are the subject of a current legal services request to Minter Ellison Solicitors.

Original refusal

The issues leading to the refusal of the application on 11 April 2019 concerned the third party advertising display size of 64m² being over the prescribed size 2.4m²; the height of the signs being over the prescribed 3m; and a proposal of more than the maximum of one third-party sign per premises (for particular uses).

New billboard signs are classed as a “not approved sign” in the current Local Law.

In a merit-based hearing, added amenity issues would be raised to reinforce the general application of the signage local law provisions. These amenity issues are considered to relate to the impacts of the first (paddock) sign, in both its size and type, on the currently open grassed and open western slope on which it is proposed to be located.

The current open and grassed slope, albeit with an existing, low-key and static, billboard sign, presents as a non-commercial visual separation of surrounding residential and forested land with the existing Cleveland/Ormiston commercial precinct over the crest of the ridge formed by Delancey Street.

The scale and type of sign proposed would act to visually extend that commercial presence of the Cleveland/Ormiston commercial strip, and breach the natural ridgeline border to the residential areas extending westwards.

A smaller LED sign – immediately adjacent and directly related to the uses approved for the existing premises up the hill – would be entertained should it demonstrate consistency with relevant local law provisions.

Third party advertising is considered out-of-scope of such discussions in this circumstance, and not preferred.

Appeal of Conditions

Council's stated position currently is that the purported 'approval' issued 7 June 2019 is not valid for the reasons outlined above.

However, should the matters in dispute be reduced to the conditions attached to the purported approval of 7 June 2019, it is recommended the Council's position be to defend the application of conditions imposed subsequent to DTMR advice.

The conditions in dispute relate to safeguards against driver distraction. The appellant wishes, through the appeal, to have the dwell times of the LED signage reduced from 1 hour or greater to 25 seconds.

The DTMR Roadside Advertising Device Manual (the RAD manual) in fact looks to prohibit the second (corner) sign in its proposed location, given it is an illuminated sign within the intersection area prescribed for such signs in the RAD manual. However, the DTMR advised it has been trialling an alternative position whereby conditions are imposed on such signs so that they mimic a static sign during peak traffic movements. That is the basis of the 1-hour dwell time condition.

The DTMR has agreed to participate, informally, in the appeal, through making available a representative to give support to the department-led conditions relating to the dwell times, as applied to the second 'decision'.

Note that if the sign is deemed to be a hazard to traffic, the DTMR may remove or modify any sign under the separate provisions of the *Transport Operations (Road Use Management - Accreditation and Other Provisions) Regulation 2015*.

The existence of such a power has been used by the applicant's solicitors as part of its firm insistence that Council should have no recourse to the RAD Manual or the DTMR in its deliberations of signage applications under the local laws.

STRATEGIC IMPLICATIONS

Legislative Requirements

A local law decision can be appealed in the Planning and Environment Court under Schedule 1 of the *Planning Act 2016*.

However, as stated above and in the opinion of Legal Services, the preliminary procedural questions in the subject case require some further clarification before proceeding to a hearing of the merits of the applicable decision that would be the actual subject of the Planning and Environment Court proceedings.

Referral to the Supreme Court of Queensland may potentially be required to narrow the issues in that regard. Advice on that point will come through Legal Services.

The current strength of the local law provisions with regards the issues raised in appeal, as well Council's process under the administrative Local Law 1, is the subject of the separate approach through Legal Services to Minter Ellison Solicitors.

The wider implications for the Council are in having to review its local law signs provisions and processes in light of any such advice and any judgements made, should the issues be addressed in court.

Risk Management

There is risk that an appeal will highlight weaknesses in Council's administration of the local laws in terms of local law provisions to effectively regulate signage, administrative procedures and in the consistent application of policy measures across the current application and various past determinations.

The solicitor for the appellant was instrumental in the 2018 appeal of conditions the Council attached to the sign at 39 Old Cleveland Road, Capalaba. As mentioned, the existence of that sign was raised by the applicant in its request for a review of the 11 April 2019 refusal in the subject case.

That appeal concerned a large LED wall sign with third party capabilities as an outcome of the final consent order. That sign was, however, as distinct from the present case, applied for under the Redlands Planning Scheme as operational works.

It is anticipated that the appellant would be looking to rely on the approval at 39 Old Cleveland Road, Capalaba via the consent order for this sign, with a message dwell time of 10 seconds and no third party message prohibitions, which has a greater impact than the signs currently proposed.

As a separate example of the Planning and Environment Court's recent position on LED billboard signage, a recent appeal saw the Brisbane City Council fail to defend a refusal of a large billboard sign that resulted in a restriction of views to the heritage-listed Kedron Brook Hotel.

The source of the DTMR arrived-at position on driver distraction from the sign, and its amelioration by longer dwell times is, to an extent unknown. However, Council relies upon DTMR expert advice, and the RAD manual is called up in the local law as pertinent.

Opportunity

An opportunity may exist to settle the appeal for a more favourable outcome through either another application process or by judgement/consent order through the current court process.

This opportunity, which has been discussed during the course of the application and after the 11 April 2019 refusal, indicated Council officers would be prepared to allow the existing, more modest billboard to be changed to an LED sign.

It is not within Council's current policy to go against the DTMR advice on applying the RAD manual, and that would remain the position taken in any discussions.

The former Rural Press sign is currently being used under its 1999 conditional approval. The sign is 9.9m² in area and was below the threshold that attracted an annual licensing fee at the time.

The recent approval for the existing buildings on the site to be used for a medical centre, in conjunction with the new owner's sign and vehicle wrap business, did not at the same time appear to require any signage design as part of the consideration of the change of use.

However, it is considered that the signage might be assessed in the context of the recent approval and consider the overall design impact in relation to the newly approved uses, and overall locality considerations.

The advice given to the applicant to merely change the 1999 approved static sign to an LED screen (respecting the 1999 condition to relate only to the on-site use) remains the preferred outcome of officers. This would particularly be the case if the sign was located to more directly relate to the buildings the subject of the recent material-change-of-use approval.

The approach should have at its core the protection of the visual buffer and entrance way from Alexandra Hills to Cleveland. It is noted that potential expansion of industrial uses may eventually dominate this landscape.

Between the applicant and the DTMR there may exist room for negotiation around dwell times for that western facing billboard sign, however, it is recommended that Council hold the position with regard not having third party signage, and having the dwell time not changed for the corner 'pylon

sign' proposed at corner of Delancey Street and Finucane Road, unless that too is conceded by the DTMR.

Financial

There will be costs associated with the initial preliminary procedural matters, which might involve an application to the Supreme Court of Queensland, and also costs associated with any merits-based hearing regarding the signs in the Planning and Environment Court.

Given the application process disruption, through the fault of all parties, it might be prudent to offer that a new application would not attract application fees.

People

The recommended option involves human resources from the Legal Services Unit and Development Control Unit.

Environmental

Impacts on the environment are on the existing visual amenity. The grassed paddock acts as a visual buffer and significant break between residential areas of Alexandra Hills and the commercial strip views upon entry into Ormiston/Cleveland. A larger third party sign is considered to have the potential to materially detract from that existing visual entrance point.

Social

There is considered to be no social issues other than opinions around reduced amenity in respect the approach into Ormiston/Cleveland and maintaining the inter-urban break and sense of place.

Alignment with Council's Policy and Plans

Neither sign proposed, in either iteration of proposals, strictly meets the prescribed criteria of *Subordinate Local Law 1.4*.

Council has historically supported business advertising relating to the premises on which signage is located, and has assessment levels and set fees that encourages modest and discreet signage of a variety of types. Typically an assessment level not requiring application to Council or alternatively an annual licence exemption to annual registration has been applied to effect such a preference in behaviour.

The signs proposed exceed the dimensions expected in the respective sign types. While the Finucane Road frontage is very long, the total length is not considered to reflect an allowance for the size of the sign proposed facing west down the hill at traffic entering Ormiston/Cleveland.

The area of the site on which the sign is proposed is effectively an open paddock and not part of what would be described as the associated planning unit for the sign, having regard to the design of the developed portion of the site and to the recent approval granted.

CONSULTATION

Consulted	Consultation Date	Comments/Actions
Service Manager Legal Services	Ongoing	Provided legal advice and to facilitate advice from experts, and Counsel.
Service Manager Development Control	Ongoing	Provided technical and management advice in respect to the application and subject appeal.

Consulted	Consultation Date	Comments/Actions
DTMR	Ongoing	Provide advice with regard to Traffic Hazard and possible driver distraction of signage.

OPTIONS

Option One

The Council resolves as follows:

1. To instruct officers to contend for a refusal of the application and take appropriate action through the courts.
2. To identify the remaining issues in dispute in accordance with legal advice and experts from the Department of Transport and Main Roads and prepare the appeal for a hearing.
3. That this report remain and attachment confidential until after the final determination of the matter is made, subject to maintaining the confidentiality of legally privileged, private and commercial in confidence information.

Option Two

That Council resolves as follows:

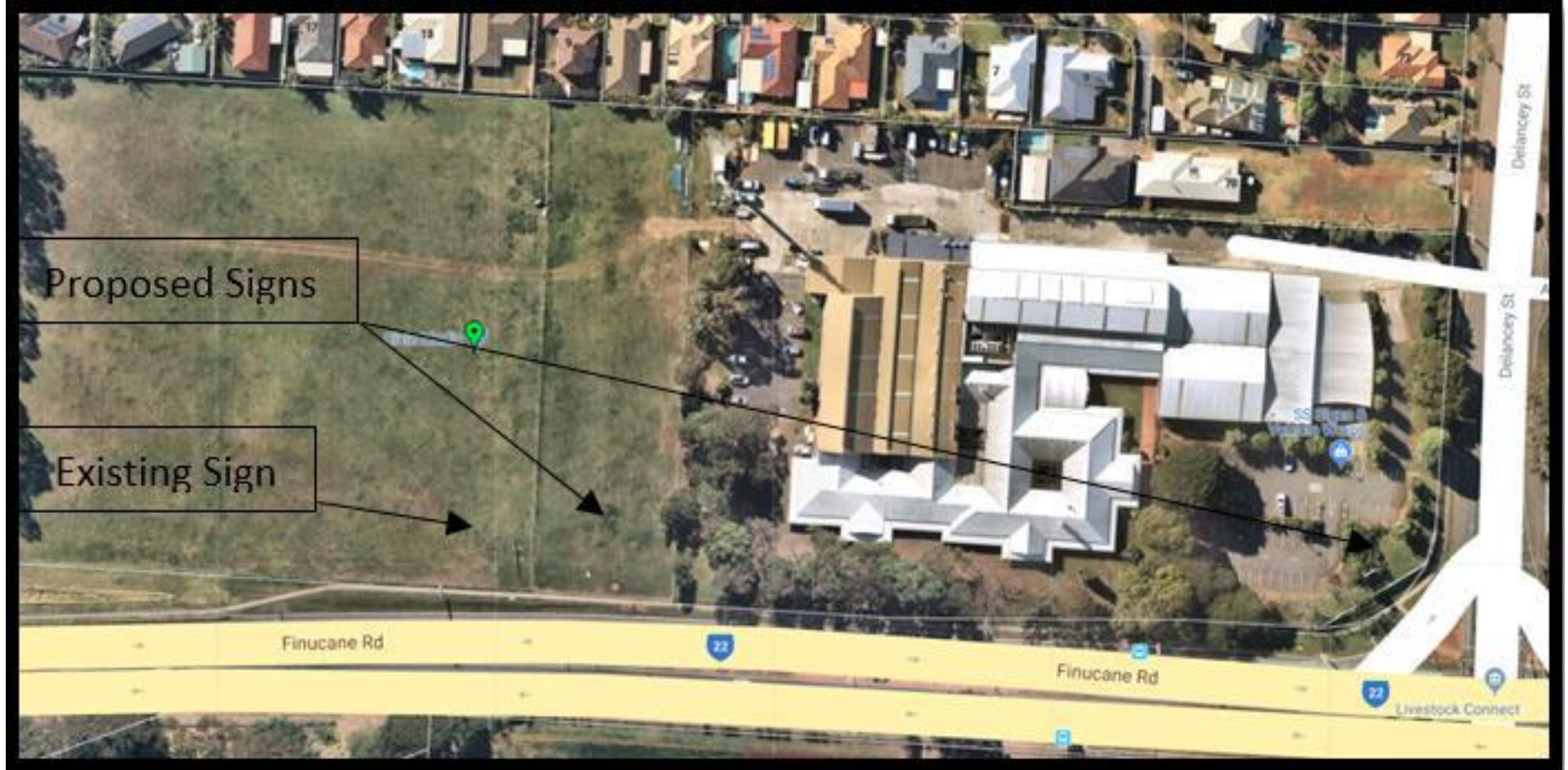
1. To instruct officers to negotiate a resolution based on an amended proposal.
2. That this report and attachment remain confidential until after the final determination of the matter is made, subject to maintaining the confidentiality of legally privileged, private and commercial in confidence information.

OFFICER'S RECOMMENDATION

The Council resolves as follows:

1. To instruct officers to contend for a refusal of the application and take appropriate action through the courts.
2. To identify the remaining issues in dispute in accordance with legal advice and experts from the Department of Transport and Main Roads and prepare the appeal for a hearing.
3. That this report and attachment remain confidential until after the final determination of the matter is made, subject to maintaining the confidentiality of legally privileged, private and commercial in confidence information.

Attachment 1 - Site Location and details

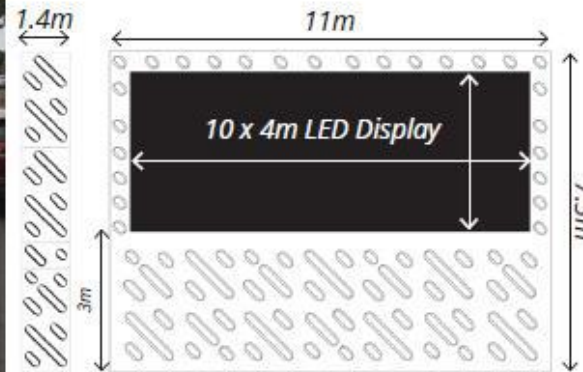




Finucane Rd, Cleveland

F/L:

Cleveland Rd, Cleveland



Client:
Cleveland Rural

Project:
LED Sign
Concepts

Version	Page
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Job No.:

Quote No.:
GC

Date:
08/03/2019

Designed by:
Marty

Approved by:

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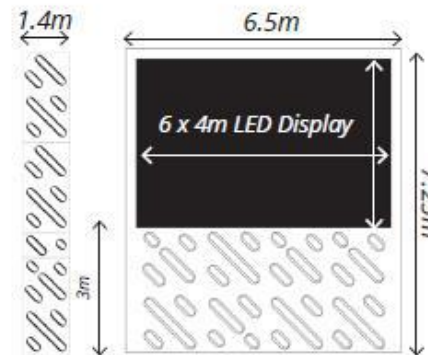




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Client:
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