

19.2 APPEAL 1506 OF 2018- BARRO QUARRY APPEAL UPDATE (MCU17/0149)**Objective Reference:****Authorising Officer:** Louise Rusan, General Manager Community & Customer Services**Responsible Officer:** Chris Vize, Acting Group Manager City Planning & Assessment**Report Author:** Emma Martin, Senior Appeals Planner**Attachments:**

1. Officer's report to the General Meeting of Council on 21 March 2018
2. Amended grounds for refusal

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

This matter is referred to the General Meeting of Council to provide an update on the abovementioned appeal and to seek formal direction on how to proceed with the matter.

BACKGROUND

On 20 December 2013 the Planning Minister issued a Development Permit for a Material Change of Use for Extractive Industry and Environmentally Relevant Activities 8 (Chemical Storage), 16 (Extractive and Screening) and 21 (Motor Vehicle Workshop Operation) at 1513 and 1515-1521 Mount Cotton Road and 163-177 and 195 Gramzow Road, Mount Cotton. The Development Permit approved an extension to the existing operations of the quarry, for further background to the development see attached the officer's report tabled at the General Meeting of Council on 21 March 2018. (**Attachment 1**)

On 12 December 2017 Council received an application to extend the currency period of the abovementioned development permit. On 21 March 2018 Council decided to refuse the extension request for the following reasons:

1. The proposed extension is actually a new quarry, extracting new material from a different location on the site, with a significantly greater scale than the existing quarry.
2. The proposed development is not consistent with the reasonable expectations of the local community, because the proposal is for a completely separate quarry which is of a significant scale and will operate in close proximity to adjoining rural residential properties.
3. The applicant has failed to demonstrate that the new quarry can be constructed and operated in such a manner as to protect the amenity of the surrounding sensitive receptors.
4. The applicant has failed to adequately define and apply suitable noise criteria to assess protection of amenity for the surrounding sensitive receptors.
5. The proposal will not maintain or enhance the rural residential amenity of the surrounding area through the minimisation of environmental nuisance occurring through the operation and construction of the quarry.
6. The proposal adversely impacts on and limits the future enhancement of the surrounding economic tourism opportunities.

7. A large number of submissions have been received objecting to the proposal, which raise valid planning grounds.
8. The proposed development is in conflict with the following provisions of the Redlands Planning Scheme:
 - a. Part 3.1.4, Desired Environmental Outcome No. 3 – Community Health and Wellbeing;
 - b. Part 3.1.7, Desired Environmental Outcome No. 6 – Economic Development;
 - c. Overall Outcomes 2(a)(i) and 2(c) for the Rural Non-Urban Zone;
 - d. Overall Outcome 2(a)(iv) for the Extractive Industry Code; and
 - e. Specific Outcomes S2.1 to S2.4 of the Extractive Industry Code.
9. There are not sufficient grounds to warrant approval of the proposed development having regard to the nature and extent of the conflict with the Redlands Planning Scheme.
10. That the development proposal be immediately referred to the relevant State Minister to assess the proposal, in particular the decision of the State agencies, under the Planning Act 2016.
11. The development will have a significant impact on Mount Cotton Road that may affect pedestrian and vehicular safety on this road. This impact is not suitably mitigated by conditions on the original approval.
12. That the population of Mount Cotton, its surrounds and Redland City itself has grown significantly since the original application was subject to public notification in 2012. A number of new dwellings and change of ownership in Mount Cotton and surrounds has occurred during this time. Therefore there is fair degree of non-awareness of the development approval within the surrounding community.

EXPERT ADVICE

Noise and Air Quality

Officers have sought the assistance of a noise and air quality expert at Air Noise Environment Pty Ltd, to review the original application material and the material relevant to the extension request the subject of this appeal. The consultant's professional advice is included below:

Air Quality

The air quality experts for both parties engaged for the 2007 appeal agreed that the air quality goals stated in the National Environmental Protection (Ambient Air Quality) Measure (NEPM) are relevant to the development. The NEPM Ambient Air Quality was updated in 2016 and a new air quality goal for PM10 as an annual average was introduced. The NEPM 2016 also removed reference to permissible exceedances of air quality goals. The MWA air quality assessment, which was lodged by the applicant in support of the proposal, did not present the maximum predicted air quality impacts and appears to rely on permissible exceedances to demonstrate predicted compliance. This is not in accordance with the current NEPM (and, in fact, did not comply with the previous NEPM either as permissible exceedances only applied to regional events such as bushfires). Therefore, the original predictions relied on in determining the application may not in fact comply with the current air quality goals as defined in the NEPM. Whilst the NEPM AQ is not referenced in the Redland City Council Planning Scheme Policy Environmental Emissions, the NEPM was relied on by the experts on both side in terms of defining relevant criteria and determining predicted compliance with appropriate air quality goals for the 2007 appeal.

Noise

The former Environmental Protection Agency document *Planning for Noise Control* was the basis for determining the criteria in the 2010 MWA noise assessment, and for developing the conditions of approval. *Planning for Noise Control* was withdrawn from use some years ago, and is still currently under review. The appropriate noise criteria would now be determined in accordance with the *Environmental Protection (Noise) Policy* (EPP) (as referenced in the Redland City Council Planning Scheme Policy), and would result in lower noise limits for receptors to the south and south-east than adopted in the existing approval. Based on the modelling presented in the MWA report dated December 2010, the EPP Noise criteria would be exceeded for receptors to the south and south-east of the development, during daytime operations with a rock drill.

The consultant has advised that in their view there have been changes to relevant policies and guidelines relied upon in determining the original application that are relevant for consideration of the application to extend the currency period of the approval. Initial review of the predictions presented in the 2010 MWA air and noise reports indicates that there are predicted exceedances of the current noise goals and potentially the NEPM air quality goals for particulates. This warrants further investigation prior to extending the currency period. However, it should be noted that the consultant has advised that if the applicant provides more refined modelling and/or improved mitigation, then compliance may be achieved with the current goals for noise and air quality.

Planning

Officers sought the opinion of three planning experts, all of whom could not support Council's refusal of the extension application. The key points in their advice is summarised below:

All experts agreed that the reasons for refusal, which replicated Council's reasons for refusing the original application, are not consistent with Council's jurisdiction for this application. Whilst section 87 the *Planning Act 2016* provides for a relatively broad assessment being "*any matter the assessment manager considers relevant*" it is the view of the planning experts that this does not include the ability to reassess the merits of the original application. It is considered that this criteria most likely means that Council should consider whether there are relevant considerations, which may not have applied to the original assessment but would if the application was remade or provisions or contextual matters that did apply/were relevant at the time the application was decided and have changed.

The experts highlighted two additional matters that were not considered by planning officers in their assessment of this application that could be considered "relevant" for the purposes of the appeal; the draft City Plan and the age of the approval. The experts undertook an assessment of the development against the draft City Plan and all agreed that the proposed development is consistent with the draft City Plan. Likewise they all agreed that given the Development Permit was issued in December 2013 the approval is a recent approval and is unlikely to give rise to any relevant planning matters.

It is important to note that in seeking expert planning advice Council officers contacted four reputable consultants, one had a conflict of interest and as outlined above the other three advised they could not support Council's decision.

Traffic

At the time of writing officers had not received expert advice from a traffic engineer. An update will be provided at the General Meeting.

OTHER RELEVANT MATTERS

Officers have reviewed the Decision Notice issued by the Minister of State Development, Infrastructure and Planning on 20 December 2013 and have noted a number of anomalies that will be relevant to highlight during these proceedings. For example, and most importantly, condition 2.3 of the conditions prepared by the Department of Transport and Main Roads (Schedule 4) identifies that additional financial contributions for road maintenance may be payable if the quantity of material hauled from the site exceeds 15 million tonnes in the first 15 years from the date the development permit takes effect. Ordinarily this type of condition would be tied to the commencement of use to ensure the actual impact on the roads is captured, however as drafted there is a risk that delayed commencement will affect the Department's ability to levy relevant charges in the future. There are other less significant anomalies, for example there is some

uncertainty over the timing of some conditions by the Department of Natural Resources and Mines (DNRM – schedule 2) and the Department of Environment and Heritage Protection (DEHP - schedule 3).

It should be noted that these are not considered reasons for refusal, however the proceedings are considered an opportunity to have these matters reviewed by the relevant Departments and appropriately addressed.

AMENDED REASONS FOR REFUSAL

Having regard to the advice of Council’s legal team and consulted experts, officers have prepared an amended set of reasons for refusal for Council to consider. The main change is the deletion of the reasons that relate solely to planning grounds, these are conditions 1, 7 and 10. Without expert witnesses to defend these reasons it is recommended that they be deleted.

A complete set of the proposed changed reasons for refusal are contained in **Attachment 2**.

Further alterations may be necessary to refine the reasons further, however these will only entail administrative amendments that help explain or organise the reasons.

STRATEGIC IMPLICATIONS

Legislative Requirements

The Planning and Environment Court issued a Directions Order on 1 June 2018 that requires Council to provide any amended grounds, upon which it seeks to rely, to the appellant by 22 June 2018.

Risk Management

The recommendation seeks to reduce the risk of an adverse costs order being made against Council.

Financial

The recommendation seeks to reduce the risk of an adverse costs order being made against Council.

People

There are no direct implications to people from the recommendation.

Environmental

There are no direct environmental implications of the recommendation.

Social

There are no social implications of the recommendation

Alignment with Council's Policy and Plans

The recommendation is consistent with the Corporate Plan governance outcomes.

CONSULTATION

Consultation has occurred with Council’s Senior Solicitor, Council’s external solicitors and court experts in planning, noise, air quality and traffic.

OPTIONS

Option One

That Council resolves to instruct its solicitors to:

1. amend the reasons for refusal of the application to those identified in attachment 2;
2. make any other minor adjustments necessary to further particularise the reasons identified in 1) above;
3. negotiate with the appellant seeking to resolve concerns relating to air quality, noise, traffic and the timing of conditions in the Minister's Decision;
4. report back to Council as soon as practicable to advise whether the outcomes sought in 3) above have been achieved; and
5. maintain this report as confidential until the conclusion of the appeal.

Option Two

That Council resolves to instruct its solicitors to:

1. not amend the reasons for refusal;
2. continue to defend Council's decision dated 21 March 2018; and
3. maintain this report and recommendation as confidential until the conclusion of the appeal.

OFFICER'S RECOMMENDATION

That Council resolves to instruct its solicitors to:

1. amend the reasons for refusal of the application to those identified in attachment 2;
2. make any other minor adjustments necessary to further particularise the reasons identified in 1) above;
3. negotiate with the appellant seeking to resolve concerns relating to air quality, noise, traffic and the timing of conditions in the Minister's Decision;
4. report back to Council as soon as practicable to advise whether the outcomes sought in 3) above have been achieved; and
5. maintain this report as confidential until the conclusion of the appeal.