

In the Planning and Environment Court
Held at: Brisbane

Appeal No. 3084 of 2014

Between: **BORAL RESOURCES (QLD) PTY LIMITED (ACN 009 671 809)**

Appellant

and: **GOLD COAST CITY COUNCIL**

Respondent

NOTICE OF APPEAL

Filed on 11/10/2014

Filed by: HopgoodGanim
Service address: Level 8, Waterfront Place, 1 Eagle Street, Brisbane, Qld 4000
Phone: 07 3024 0377
Fax: 07 3024 0077
Email: g.chadwick@hopgoodganim.com.au

Boral Resources (Qld) Pty Limited (ACN 009 671 809) (Boral) of c/- HopgoodGanim, Level 8, Waterfront Place, 1 Eagle Street, Brisbane appeals to the Planning and Environment Court at Brisbane against the decision of the Respondent (**Council**), made on 11 July 2014 and set out in its decision notice dated 18 July 2014, to refuse Boral's development application (**Development Application**) for a development permit for a material change of use to establish an extractive industry and environmentally relevant activity 16(2)(c) on land located at Old Coach Road, Reedy Creek and Tallebudgera Creek Road, Tallebudgera Creek, Tallebudgera Valley more particularly described as Lot 105 on SP144215 (**Land**) and seeks the following orders or other relief:

1. that the Appeal be allowed;
2. that the Development Application be approved subject only to reasonable and relevant conditions that are not inconsistent with conditions stated in the Coordinator-General's report dated 20 December 2013 that must attach to the development approval;
3. that Boral be paid its costs of the appeal; and
4. such further or other orders as the Court considers appropriate.

The grounds of appeal are:

Land

1. The Land:
 - (a) is situated at Old Coach Road, Reedy Creek and Tallebudgera Creek Road, Tallebudgera Creek, Tallebudgera Valley, more particularly described as Lot 105 on SP144215;
 - (b) has a total site area of 216.7 hectares;

NOTICE OF APPEAL
Filed on behalf of the Appellant
Form PEC-1

HopgoodGanim
Level 8, Waterfront Place
1 Eagle Street
Brisbane Qld 4000

Phone: 07 3024 0377 Facsimile: 07 3024
0077
Email: g.chadwick@hopgoodganim.com.au

Ref: 1484039 - 9282762_1.DOC

- (c) is currently vacant (with some parts affected by trespassers who have used the Land for illegal dumping, illegal four wheel drive access and illegal dirt bike access);
- (d) has a varying topography, with levels ranging from between RL10 AHD in the eastern portion of the Land to approximately RL150 AHD in the north-western portion of the Land;
- (e) is located near:
 - (i) residential areas;
 - (ii) Boral's existing West Burleigh Quarry;
 - (iii) an industrial area; and
 - (iv) open space areas;
- (f) contains the last known and largest undeveloped hard rock extractive resource on the southern Gold Coast; and
- (g) is within the local government area of the Council.

Planning Instruments

2. The Land was initially identified as a possible hard rock resource in 1979.
3. After further investigation, the State Government recommended that in 2001 the Council include the Land as a resource of regional significance in its planning scheme.
4. In 2007, the Land was declared a Key Resource Area (KRA96) under State Planning Policy 2/07: *Protection of Extractive Resources (SPP 2/07)*.
5. In 2013, the single State Planning Policy (**SPP**) commenced and the previous State Planning Policies (including SPP 2/07) were repealed.
6. Under the SPP in effect when the Development Application was made (SPP December 2013), and under the SPP currently in effect (SPP July 2014), the Land was again identified as a Key Resource Area (KRA96).
7. The Land is the only undeveloped Key Resource Area identified on the southern Gold Coast.
8. Under the *South East Queensland Regional Plan 2009-2031 (SEQRP)*, the Land is:
 - (a) designated within the "Urban Footprint"; and
 - (b) identified as an Extractive Resource Areaand has been so designated since the 2004 draft SEQRP.
9. Under the 2003 Gold Coast Planning Scheme (Version 1.2 amended November 2011) (**Planning Scheme**), the Land has the following designations:
 - (a) Planning Strategy: part Urban Residential Land Use Theme, part Park Living Land Use Theme and Part Open Space/Nature Conservation Land Use Theme;
 - (b) Domain: the Emerging Communities Domain and, more particularly, the Reedy Creek Structure Plan Area; and
 - (c) Precincts of the Reedy Creek Structure Plan: part Urban Residential Precinct, part Park Living Precinct and part Open Space and Nature Conservation Precinct.

10. Under the Council's Draft City Plan 2015 (which was publicly notified between 17 June 2014 and 29 July 2014), the Land has the following designations:
 - (a) Strategic Framework – Designated Urban Area: Non-urban Area;
 - (b) Strategic Framework – Settlement Pattern: Natural Landscape;
 - (c) Strategic Framework – Focus Areas for Economic Activity: Non-committed Resource Area;
 - (d) Zone: Rural Zone - Landscape and Environment Precinct; and
 - (e) Extractive Resources Overlay Map: KRA 96.

The Proposed Development

11. The proposed development is an extractive industry, involving the establishment and operation of a hard rock quarry on the Land. The extractive industry is expected to have a resource life of at least 40 years (depending on market conditions).
12. The material sought to be won is meta-greywacke, a hard rock which is to be used to manufacture concrete, asphalt, drainage material, road base, bricks, pavers, pipes, landscape supplies and other necessary products for use in the building and construction industry.
13. Of the total site area of 216.7 hectares:
 - (a) the disturbance footprint is approximately 65 hectares (30% of the gross site area).
 - (b) the vegetated buffer is approximately 152 hectares (70% of the gross site area); and
 - (c) the office, amenities, weighbridge, QA laboratory and workshop components (which are located within the disturbance footprint) are approximately 2,600m² (0.1% of gross site area).
14. Vehicular access is proposed from the Old Coach Road frontage of the site. Old Coach Road serves an arterial traffic function within the road network. The connection between the Land and the Pacific Motorway via Old Coach Road is a designated KRA Transport Route.
15. The proposed development will not be connected to Council's trunk water, sewer or stormwater infrastructure.
16. In the construction phase, the proposed development is estimated to generate a total of 246 full-time equivalent persons (FTE). Once operational, the proposed development is expected to directly generate 24 FTE positions. There will be flow on employment effects in both the construction and operational phases of development.

State and Commonwealth Assessment Processes

17. On 8 December 2009, Boral lodged an Initial Advice Statement with the Coordinator-General's office seeking a significant project declaration under the *State Development and Public Works Organisation Act 1971* (**State Development Act**).
18. On 27 August 2010, the Coordinator-General determined the project was a "Significant Project" (now a Coordinated Project) for which an Environmental Impact Statement (**EIS**) was required. A declaration was published in the Queensland Government Gazette on 19 November 2010.
19. On 1 December 2010, Boral voluntarily referred the project to the Commonwealth Minister for the Environment for a "controlled action" decision under *the Environment Protection and Biodiversity Conservation Act 1999* (Cth).

20. On 21 December 2010, the Commonwealth Minister for the Environment determined that the project was a "controlled action".
21. On 19 February 2011 the Coordinator-General released draft terms of reference for the EIS for public consultation. The consultation period extended to 1 April 2011.
22. On 26 July 2011, the Coordinator-General released the final terms of reference for the EIS.
23. On 23 April 2013, Boral submitted the EIS to the Coordinator-General.
24. The EIS was publically notified between 27 April 2013 and 11 June 2013.
25. On 6 August 2013, the Coordinator-General requested additional information to address specific queries in relation to the EIS.
26. On 22 October 2013, Boral submitted the requested additional information to the Coordinator-General.
27. The Coordinator-General provided the additional information to government agencies for consultation between 25 October 2013 and 22 November 2013.
28. On 20 December 2013, the Coordinator-General issued his evaluation report on the EIS recommending that the project proceed subject to conditions.
29. On 23 January 2014, the Commonwealth Minister for the Environment issued his approval of the 'controlled action', subject to conditions.

Environmental Authority

30. On 9 May 2014, Boral submitted a single site specific application seeking an environmental authority for prescribed ERAs 16(2)(c), 16(3)(c) and 63(1)(a) (**EA Application**) to the Department of Environment and Heritage Protection (**DEHP**).
31. On 16 July 2014, the DEHP approved the EA Application and issued an environmental authority subject to conditions (**Environmental Authority**).

IDAS Process

32. On 9 May 2014, the Development Application was submitted to the Council.
33. On 22 May 2014, the Council issued its Acknowledgment Notice.
34. The Information and Referral Stages of IDAS did not apply to the Development Application, by operation of section 37 of the State Development Act.
35. On 18 June 2014, the Council issued a letter extending its decision making period.
36. As is set out in the minutes for the Council's City Planning Committee Meeting of 8 July 2014 the Council engaged independent experts in a number of fields of expertise "to undertake an independent review and detailed assessment" of the Development Application.
37. The experts engaged by the Council addressed matters including:
 - (a) town planning;
 - (b) economic assessment;
 - (c) geological and quarry operation;
 - (d) traffic and transport;
 - (e) noise and air quality;

- (f) development engineering;
 - (g) natural environment (flora and fauna);
 - (h) visual amenity; and
 - (i) social planning.
38. The experts engaged by the Council generally recommended approval of the Development Application, subject to conditions, as did the Council officer who prepared the report to the Council on the Development Application.
39. On 8 July 2014, the Council's City Planning Committee met and recommended that the Development Application be refused, contrary to the Council officer's recommendation (and to the opinions of the independent experts) that the Development Application be approved subject to conditions.
40. On 11 July 2014, at a full Council Meeting, the Council resolved to refuse the Development Application, contrary to the Council officer's recommendation (and to the opinions of the independent experts) that the Development Application be approved subject to conditions.
41. On 18 July 2014, the Council issued an incomplete electronic copy of its decision notice. Boral received a complete copy of the decision notice on 21 July 2014 (**Decision Notice**).

Reasons for Refusal

42. The Decision Notice lists the following reasons for refusal:

1. *The proposed development conflicts with the following provisions of the Emerging Communities Domain of the Gold Coast Planning Scheme 2003:*
 - a. *Intent;*
 - b. *Purpose of the Emerging Communities Domain Code;*
 - c. *Performance Criteria PC1, PC3, PC6, PC7, PC8, PC10, PC19, PC20 and PC21.*
2. *The proposed development conflicts with the outcomes sought by the Reedy Creek Structure Plan of the Gold Coast Planning Scheme 2003 and in particular:*
 - a. *the purpose statement, key objectives (a) and (b);*
 - b. *the Open Space and Nature Conservation Intent and implementation items (b), (c), (d), (g), (j) and (m);*
 - c. *the Urban Residential Intent and implementation items (a), (b), building implementation items (b), (c) and (d); and*
 - d. *the Park Living Intent and implementation items (a) – (e) and (j).*
3. *The proposed development does not maintain, and presents a net loss, in koala habitat and therefore cannot comply with:*
 - a. *the SPP state interests for Biodiversity and in particular items (3) and (5) of Part D and items (1) and (3) of Part E;*
 - b. *Policy 2.2.2 and 2.2.5 of the South East Queensland Regional Plan 2009-2031;*
 - c. *DEO Ecol.1 and planning objectives Ecol1.1, 1.3 and 1.6 of the Gold Coast Planning Scheme 2003;*
 - d. *Performance criteria PC1, 3, 5, 6 and 13 of the Nature Conservation Constraint Code in the Gold Coast Planning Scheme 2003;*

4. *The proposed site access presents a significant barrier to wildlife movement and cannot comply with:*
 - a. *Policy 2.2.5 of the South East Queensland Regional Plan 2009-2031;*
 - b. *DEO Ecol.1 and planning objectives Ecol1.1, 1.3 and 1.6 of the Gold Coast Planning Scheme 2003;*
 - c. *Performance criteria PC1, PC3, PC5, PC6, PC13 of the Nature Conservation Constraint Code in the Gold Coast Planning Scheme 2003.*
5. *The proposed development will create a significant visual impact from visible quarry faces and therefore cannot comply with:*
 - a. *Policy 3.5.1 and 3.5.2 of the South East Queensland Regional Plan 2009-2031;*
 - b. *DEO Ecol.1 and planning objectives Ecol.1.5 of the Gold Coast Planning Scheme 2003;*
 - c. *DEO Econ.4 and planning objectives Econ.4.4 of the Gold Coast Planning Scheme 2003;*
 - d. *Performance Criteria PC3 and PC5 of the Steep Slopes or Unstable Soils Constraint Code in the Gold Coast Planning Scheme 2003;*
 - e. *Performance Criteria PC16(c) of the Nature Conservation Constraint Code in the Gold Coast Planning Scheme 2003;*
 - f. *Performance Criteria PC1 and PC3 of the Vegetation Management Specific Code in the Gold Coast Planning Scheme 2003; and*
 - g. *Performance Criteria PC1, PC2 and PC3 of the Landscape Work Specific Code in the Gold Coast Planning Scheme 2003.*
6. *Due to the lack of suitable alternative access via Bermuda Street, the use of Old Coach Road as the proposed haul route will result in unsafe traffic conditions and it is uncertain whether the route can be upgraded to an acceptable and appropriate standard. The proposed development therefore cannot comply with:*
 - a. *DEO Econ.6 of the Gold Coast Planning Scheme 2003;*
 - b. *DEO Soc.6 and planning objectives Soc.6.3 of the Gold Coast Planning Scheme 2003;*
 - c. *Key Strategy TR Policy 9 of the Gold Coast Planning Scheme 2003; and*
 - d. *Performance criteria PC11 and PC18 of the Car Parking, Access and Transport Integration Constraint Code of the Gold Coast Planning Scheme 2003.*
7. *The use of Old Coach Road for 250-300 heavy vehicles per day will create significant residential amenity impacts and therefore cannot comply with:*
 - a. *DEO Soc.5 of the Gold Coast Planning Scheme 2003;*
 - b. *Key Strategy TR Policy 9 of the Gold Coast Planning Scheme 2003; and*
 - c. *Performance criterion PC1 of the Road Traffic Noise Management Constraint Code of the Gold Coast Planning Scheme 2003.*
8. *Council is not in a financial position to reimburse the applicant for, or partially fund, the costs associated with the upgrading of Old Coach Road to the required standard of service in line with the trunk infrastructure funding arrangements implemented by the State Planning Regulatory Provisions (adopted charges) dated 1 July 2014.*

9. *The proposed development does not adequately address impacts of noise and Council does not have certainty that the development will manage and mitigate audible and unacceptable levels of noise in surrounding residential areas in accordance with Performance Criteria PC19 and PC20 of the Emerging Communities Domain Code.*
10. *The proposed development does not adequately address impacts of air quality and Council does not have certainty that the development will manage and mitigate unacceptable levels of air quality (especially dust) in surrounding residential areas in accordance with Performance Criteria PC19 and PC20 of the Emerging Communities Domain Code.*
11. *The proposed development provides unacceptable buffer separation distances from adjacent residential areas, such that Council cannot be satisfied that the amenity of those areas will be protected.*
12. *The applicant has failed to demonstrate the proposed development provides an overall positive community benefit."*

Boral's Response to the Council's Grounds for Refusal

43. The grounds for refusal advanced by the Council are erroneous and cannot be sustained in that:
 - (a) Boral disputes the assertions of fact in the grounds for refusal, in particular, Boral asserts that:
 - (1) the proposal commits to a net benefit for koalas;
 - (2) the proposed site access does not present a significant barrier to wildlife movement;
 - (3) the proposal will not create a significant visual impact in relation to visible quarry faces;
 - (4) in relation to traffic:
 - (A) the proposal does not result in unsafe traffic conditions;
 - (B) Old Coach Road can be upgraded to an acceptable and appropriate standard; and
 - (C) the use of Old Coach Road is acceptable pending the provision of alternative access via Bermuda Street; and
 - (D) the use of Old Coach Road for heavy vehicles (being a designated KRA Transport Route) will not create significant residential amenity impacts;
 - (5) the proposal does adequately address impacts of noise;
 - (6) the proposal does adequately address impacts of air quality;
 - (7) the proposal provides acceptable buffer separation distances to adjacent residential areas; and
 - (8) the proposal demonstrates an overall positive community benefit;
 - (b) in the circumstances, upon a proper understanding of the proposal and the proper construction of the planning documents referred to in the Council's grounds for refusal, a decision to approve the Development Application would not conflict with the provisions of:

- (1) the SPP;
 - (2) the SEQRP; and
 - (3) the Planning Scheme;
- (c) alternatively, any conflict that does arise must be viewed in light of the following:
- (1) Section 25 of the SPA states that if there is an inconsistency between a State planning policy and a local planning instrument, the State planning policy prevails to the extent of the inconsistency;
 - (2) Section 36 of the SPA states that if there is an inconsistency between a regional plan and a local planning instrument, the regional plan prevails to the extent of the inconsistency;
 - (3) the Planning Scheme is inconsistent with the SPP and the SEQRP as it does not reflect the designation of the Land as a Key Resource Area under the SPP and an Extractive Resource Area under the SEQRP and accordingly has been overtaken by events;
 - (4) any apparent conflict between the proposed development and the Planning Scheme is a direct result of the fact that the Planning Scheme has not been amended to reflect the SPP and SEQRP;
 - (5) the conflict is textual only, is resolved by the operation of the decision rules in the SPA, should only be viewed as at the lower end of the spectrum and should be given little or no weight;
 - (6) Part D of the SPP (referred to in paragraph 3(a) of the Reasons for Refusal) only applies to making or amending a local planning scheme and designating land for community infrastructure, not to development assessment; and
 - (7) neither the Planning Scheme nor the Council's Draft City Plan 2015 gives rise to any reasonable expectation that the Land would remain in an undeveloped state.

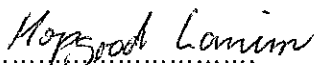
44. For the reasons pleaded herein, Boral says that:

- (a) a decision to approve the Development Application would not conflict with the provisions identified in the Council's Decision Notice;
- (b) alternatively, any conflict arises and is overcome for the reasons set out in paragraph 43(c) and the sufficient grounds relied upon by Boral; and
- (c) otherwise the proposed development either complies with the provisions identified in the Council's Decision Notice or is capable of achieving compliance by way of:
 - (1) the conditions stated in the Coordinator-General's report dated 20 December 2013 that must attach to the development approval; and
 - (2) the imposition of reasonable and relevant conditions that are not inconsistent with the conditions stated in the Coordinator-General's report dated 20 December 2013.

Grounds for Approval of the Application

45. In the event that the Court determines that a decision to approve the Development Application would conflict with the provisions of the Planning Scheme identified by the Council in its Decision Notice, Boral says that the Development Application should be approved on the following grounds:

- (a) the proposal reflects a project of State significance that will contribute to the economy of the region;
- (b) there is strong need for the project;
- (c) the proposed development is consistent with State interests;
- (d) the proposal gives effect to State planning instruments;
- (e) the Planning Scheme has been overtaken by events and is inconsistent with the SPP and the SEQRP;
- (f) the proposed development will generate important employment opportunities;
- (g) the EA associated with the Development Application has been approved by DEHP and the proposal complies with all regulatory limits, particularly with respect to air quality, acoustics and blasting;
- (h) the proposal efficiently and effectively balances the extent of development with the need to retain and enhance existing environmental values;
- (i) the proposal commits to a net benefit for koalas;
- (j) the proposal will maintain environmental values through:
 - (1) the retention and management of the buffer area;
 - (2) maintenance of connectivity; and
 - (3) the implementation of effective and best practice on-site water management;
- (k) the topography and location of the Land are such that the proposal represents a relatively unique opportunity to win a highly valuable resource without any unacceptable amenity impacts with respect to visual matters, noise, dust, vibration, traffic or otherwise; and
- (l) approval will lead to enforceable obligations upon Boral to:
 - (1) carry out rehabilitation to achieve sufficient improvements from an ecological perspective; and
 - (2) implement a stormwater management plan which will improve stormwater management on the subject site, achieve appropriate objectives and obviate risks of detrimental impact associated with leaving the site in its current state.


HopgoodGanim, Solicitors for Boral
// August 2014

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

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

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

Environment Court.

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

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

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