

ANGELO OLIARO TOWN PLANNING

Ref: 180100-7

30 September 2020

Ms Helen Robertson
Manager Development Assessment
Gladstone Regional Council
PO Box 29
Gladstone Qld 4680

By email: info@gladstone.qld.gov.au

Dear Ms Robertson

Re: S 81 Minor change to Decision Notice number DA 33/2018 – Educational establishment Lot B SP 218087 in Lot 22 SP 178795 Surf Club Avenue Agnes Water

I refer to the above matter regarding DA 33/2018 seeking a minor change by amending Condition 2 – increasing student numbers to 70 students - which in turn requires an amendment to the plans of development.

Condition 2 states that "Upon commencement of the use, the Educational Establishment is limited to no more than the following members at any time:

- a. 7 Staff: and
- b. 50 Students."

An Advice Note, written in italics so distinguish it from the condition, is attached following the end of the condition with the following words: *"Advisory Note: Council will not support an increase of users associated with the Educational Establishment as it is to remain low scale."*

(I note that conditions 4, 5, 6 and 7 also have an Advisory Note/Note. These Advisory Notes do not form part of the conditions of approval but represent advices only. They do not form part of the conditions of approval and have limited, if any, legal authority in regulating a development approval).

In seeking to amend Condition 2, an updated plan of development will need to be lodged to reflect the internal building changes. No external changes to the building or increase in the building footprint will occur as a result of this minor change application.

Background

The Goora Gan Steiner School (the 'school') commenced in Agnes Water in 2017 within the Agnes Water Community Hall. It had a total of 22 students in three different classes having to operate out of one classroom which required the classroom to be packed up 2 to 3 times per week due to competing hall room bookings.

The relocation to the Surf Club Building (SCB) was necessitated due to the school outgrowing the use of its existing site, the cumbersome operational practices in using the existing site (daily placement and storage of furniture/equipment) and need to provide more modern and functional facilities for its students. The relocation to the SCB represented a bridging option to continue to allow the school to operate and provide services to the local community whilst providing time to explore options for more permanent establishment elsewhere.

As a consequence of the relocation to the SCB, the enrolment numbers at the school have significantly increased due to more modern and spacious facilities and improved course curriculum as a consequence of the use of the SCB. A number of families have moved to Agnes Water, approximately 50% specifically to enrol their children at the school as the nearest Steiner Schools are located at Noosa, Moreton Bay, Cairns hinterland and Samford. Goora Gan is also quite affordable compared to these other schools.

The planning application lodged to use the SCB stated the following with respect to student numbers, 3. The Proposal:

" Staffing and student levels are as follows:

Year 2018

1 x School Facilitator

2 full time teachers

17 students across 2 classes -

Prep/1 composite of 11 children and a Class 2/3 composite of 6 children.

*Year 2019 enrolments **expected** as follows:*

2 x full time teachers

1 x School Facilitator

1 x teacher Aide

1 x 0.6 admin staff

Prep/1/2 - 25 children

Class 3/4 - 8 children

*Year 2020 enrolments **expected** as follows:*

3 x full time teachers

1 School Facilitator

1 x Admin

1 x teacher Aide

Prep/1 - 15 children

Class 2/3 - 15 children

Class 4/5 - 10 children

Year 2021 enrolments **expected** as follows:

3 full time teachers

1 x School Facilitator

1.5 teacher aide

1 x admin

Prep/1 - 20 children

Class 2/3 - 18 children

Class 4/5/6 - 10 children

Based on the above, over the next 4 years the school is **expected** to grow from 3 staff and 17 students to 6.5 staff and 48 children with a new Year 6 class. This is a moderate increase in expected numbers attending the subject land." Extract from pages 4 and 5 of planning report. (Bold and underlining added to emphasis student numbers)

The important distinguishing issue is that the applicant could only estimate future student uptake based on only the first two previous years of operation in a building not suited for this land use. Since relocation to the SCB, it is clear that the local community has embraced the school as a sought after place of education which, in turn, resulted in an increase in enrolment enquires from the community and therefore requires a review of the **expected** student number during the lease period of the SCB.

Council, by way of email dated 13 August 2020, has advised that:

- *"The student numbers were submitted by the Applicant as part of the application;*
- *Council conditioned these numbers to align with the temporary operation of the school;*
- *Condition 2 clearly states no increase would be supported at this location.*

As such, Council would not support an increase in the student numbers onsite via a Change Application."

It is our planning opinion that this advice is quite misrepresented based on the planning report advising that student numbers were based on an expected enrolment from previous years, number of teachers required and therefore should have been treated in a more flexible manner rather than in a rigid manner, Condition 2 makes no reference to temporary operation of the school and the Advisory Note does not bear the same legislative force or effect as a written condition. Additionally, this Advisory Note is unlawful under the Planning Act (PA).

Finally, the applicant was not in a position to make S 75 change representations following the issuing of the approval in January 2019 as they needed to commence building work on the SCB for the start of the new school term which would have been delayed had this occurred. This was recognised in the Council report, as explained in greater detail following.

Proposal

The proposal involves amending Condition 2 to increase the student numbers to 70, provide a less formal application process in the event that student numbers exceed 70 students and delete the unlawful Advisory Note.

Condition 2 should be amended as follows:

“Upon commencement of the use, the Educational Establishment is limited to no more than the following members at any time, except as otherwise approved in writing by Council:

- a. 7 Staff: and
- b. 70 Students.”

The school **expects** that up to 70 students will enrol in the coming years of the six year lease in the SCB. This is an estimation of the student numbers given its popularity and enquiries for enrolments from parents within the local community. As the school is essentially in a growing stage, fourth year of operation, and is seeking alternative options to relocate elsewhere, it is prudent to allow it to grow to the capacity offered by the SCB so that it can better plan for future buildings and services on its future site of operation. To restrict the student numbers during this crucial development period of the school would negatively impact on its future growth aspirations and criteria of an appropriate site for the future. The available space within the SCB is a limiting factor with respect to the number of students and classrooms available to operate the land use. The minor change does not require any building footprint expansion but internal reorganisation to utilise spaces better and more functionally.

By adding the words, 'except as otherwise approved in writing by Council' is a standard term that most Council use when conditioning land uses. It allows for a less formal approach to changes to conditions and/or plans of development rather than using the formal S 81 application process. It still provides Council with the discretionary ability to not provide approval to any written request. It also provides the applicant with the flexibility in the event where 71 students are enrolled and the SCB has the gfa capacity to accommodate them to rectify this potential compliance matter expediently and in a cost effective manner.

It is abundantly important to reiterate that the development approval, DA 33/2018, is not the limiting factor for the school to operate within the SCB. It is the lease arrangements with the State Government that are restricted to 6 years which provides limitations for the ongoing use of the SCB which is beyond the control of the school and the Council.

The Agnes Water Branch of Surf Life Saving Queensland has offered to lease further building space to the school and it is therefore necessary to lodge amended plans for endorsement by Council. The fact that the Agnes Water Branch is of the opinion that it can lease further internal space to the school should immediately

overcome Council's concern that the public use of this site and facility is affected in any way. The amended plans of development simply convert underutilised spaces in the building to convert rooms to storage and free up additional rooms for classrooms. Please refer to attached plans and letter of support from Surf Lifesaving Queensland.

MINOR CHANGE APPLICATION

Minor change under Schedule 2 of the Planning Act is as follows:

“minor change means a change that—

(b) for a development approval—

(i) does not result in substantially different development; and

(ii) if the application, including the change, were made when the change is made—would not cause—

(A) the inclusion of prohibited development in the application; or

(B) referral to a referral agency if there were no referral agencies for the development application; or

(C) referral to extra referral agencies; or

(D) a referral agency, in assessing the application under section 55(2), to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application was made; or

(E) public notification if public notification was not required for the development application;”

Substantially different development is defined, in part, under Schedule 1 of the Development Assessment Rules (DAR) as follows:

'3. In determining whether the proposed change would result in substantially different development, the assessment manager or referral agency must consider the individual circumstances of the development, in the context of the change proposed.

4. A change may be considered to result in a substantially different development if any of the following apply to the proposed change:

(a) involves a new use; or

(b) results in the application applying to a new parcel of land; or

(c) dramatically changes the built form in terms of scale, bulk and appearance; or

(d) changes the ability of the proposed development to operate as intended;²⁹ or

(e) removes a component that is integral to the operation of the development; or

(f) significantly impacts on traffic flow and the transport network, such as increasing traffic to the site; or

(g) introduces new impacts or increase the severity of known impacts; or

(h) removes an incentive or offset component that would have balanced a negative impact of the development; or
(i) impacts on infrastructure provisions.'

Comment

With respect to 'substantially different development', the applicant clearly provided advice in the planning report for the original application that student numbers were based on **expected** enrolments rather than as fixed and firm student numbers in the coming years. School enrolments change from year to year and this is a fundamental characteristic of any school's cohort. Some students leave and others enrol during the course of the scholastic year consequently increasing and decreasing student numbers in any year.

This fundamental operational characteristic of a school seems to have not been taken into consideration by Council officers, been overlooked and/or misrepresented in the report presented to Council. In my planning opinion this is a fundamental flaw in the report presented to Council because it failed to recognise the nature of school operations concerning student numbers being flexible and not fixed over future years, especially when a school is developing as is the case with the applicant. This applies to not just this school's operation but to any school's operation.

The Council report tabled at the 22 January 2019 Council meeting, page 28 stated and provided "Expected school numbers". The report clearly advised Council with a view that school numbers were not fixed for the duration of the lease of the SCB but that they were regarded as likely to happen. Contrary to this view, the report, page 34 stated *"The Applicant has indicated to Council that they will commence use as soon as possible. The operational currency of the Educational Establishment will be commensurate with the number of students enrolled at the School."* (underlining added for emphasis to demonstrate contradictions)

The Macquarie Concise Dictionary defines "commensurate" as *"having the same measure: of equal extent or duration."*

This latter statement contradicts the earlier reporting on page 28 advising that student numbers were expected or likely to happen with a contrary view that student numbers would remain fixed with the duration of the lease. The applicant did not make the statement that student numbers would be fixed over the duration of the lease of the SCB in the planning report attached for the development application. Council has misinterpreted this fact, misused its statutory assessment power under the PA as well as misunderstood how a school cohort can change from year to year.

The requested increase in student numbers, from 50 students to 70 students, provides the basis for and the necessary flexibility for how a school actually operates as a land use rather than how it was reported to Council that student numbers would be commensurate, and necessarily fixed, during the lease of the SCB. When considering the individual circumstances of the development in the context of the changes sought, it is quite clear that Point 3 fully applies, should be

upheld and the misinterpretation of rigid student numbers applying to the lease of the SCB rectified as this does not represent substantially different development.

The applicant is simply seeking a change based on the actual operation of the school rather than the rigid wording of condition 2 which was imposed because Council misinterpreted that student numbers would be fixed in an attempt to "provide incentive to continue the search for suitable alternative site". (Extract of Council report page 33)

The justification for Council to impose Condition 2 is found on page 33, as stated above in the Council report, which in my planning opinion, is contrary to the proper framework of the assessment and conditioning provisions of the PA.

With respect to point 4:

- (a) Not applicable
- (b) Not Applicable
- (c) Not Applicable.
- (d) Not Applicable
- (e) Not Applicable
- (f) Not Applicable. The increase in student numbers will not significantly increase traffic generation of or significantly impact on the transport network;
- (g) Not applicable
- (h) Not applicable
- (i) Not applicable.'

The proposal therefore does not represent substantially different development.

Schedule 2 of the PA states minor change:

- (b) for a development approval—
 - (i) Not Applicable
 - (ii) Not Applicable
 - (A) Not Applicable
 - (B) Not Applicable
 - (C) Not Applicable
 - (D) Not Applicable
 - (E) Not Applicable

The proposal does not trigger the tests, therefore it is a minor change.

Assessing change application for minor changes

S 81 of the Planning Act calls up the matters that Council is to have regard to when deciding this application. Part (2)(b) applies, however, this was resolved with the report presented to Council. Part (2)(c) refers to Council email dated 13/8/2020 advising Council would not support a change application. This will be dealt with below. Part (2)(d) does not apply. Part (2)(da) calls up all matters the responsible entity would or may assess against or have regard to, if the change application were

a development application. In this regard the application was impact assessable against the planning scheme.

Part (2)(c)

Council email dated 13/8/2020 stated:

"I've reviewed the planning application and found the following:

- *The student numbers were submitted by the Applicant as part of the application;*
- *Council conditioned these numbers to align with the temporary operation of the school;*
- *Condition 2 clearly states no increase would be supported at this location.*

As such, Council would not support an increase in the student numbers onsite via a Change Application."

It is our planning opinion that this advice is quite misrepresented based on the common material of the planning application and planning report advising that student numbers were expected only, the Council report mistakenly linking the lease of the SCB with fixed student numbers (as explained above), Condition 2 makes no reference to temporary operation of the school and the Advisory Note not bearing the same legislative force or effect as a written condition. Additionally, this Advisory Note is unlawful under the PA.

S 78 of the PA allows any person to make a change application. A condition or advice note does not take away the rights of any person to make such an application – the Advice Note is therefore unlawful. Additionally, in making a change application, Council is legally obliged to assess it under the provision of S 81 of the PA and not by way of email – which did not provide any legitimate grounds for not supporting this application.

Those matters relevant to the assessment of the application, taken from the Council report, are generally addressed as follows to satisfy Part (2)(da):

Statutory Planning

State Interests remain compliant as per the "Assessment" in Council report.

Strategic Framework

Remains compliant as per Council report.

Bushfire Hazard Overlay

Remains compliant as per Council report. The additional student numbers do not change or increase risk to the endorsed Evacuation Plan and Bushfire Evacuation Plan - condition 7.

Conservation Zone Code

Overall Outcome B states that *“very low intensity development related to the conservation and environmental values of the area may be facilitated where a demonstrated community need exists.”*

I note that the Council report stated that *“there was no demonstrated community need submitted as part of this application.”* I also note that despite Council issuing an information request this matter was not raised in it.

The planning report submitted with the application and responding to the Overall Outcome B stated:

- *“It represents a low intensity development as it utilises an existing building and urban footprint whilst addressing a demonstrated community need for alternative non state educational facilities in this coastal community;”*

The planning report lodged with the application clearly stated that the application demonstrated a community need by providing for an alternative non state educational facility in this coastal community. Section 2 – Executive Summary stated *“The application has been necessitated due to the school outgrowing the use of its existing site, the cumbersome operational practices in using the existing site (daily placement and storage of furniture/equipment) and need to provide more modern and functional facilities for its students.”* This statement represents a clear demonstrated community need otherwise why was there a need for the school to relocate.

The fact that the applicant has received an increase in enrolment requests from the community is the basis for seeking a minor change application to increase the student numbers within the school and also represents a very clear and demonstrated community need to provide educational places to the local community, otherwise why is there a need to lodge this change application. Agnes Water does not have another Steiner School available for parents to send their children to be educated within this unique teaching philosophy. The fact that the applicant is making this request to fulfil a community need – additional student numbers based on expected growth and enquiries from the community - to provide educational services to the local community is a clear demonstration of community need.

Based on the Council report mistakenly not identifying that the applicant provided and demonstrated community need it went on to state that:

“The Purpose outlines that the conservation zone code is to provide for the protection, restoration and management of areas (such as National Parks) identified as supporting significant biological diversity and ecological integrity.

The proposal does not directly support the protection and management of the conservation area. The impacts from the proposed Educational Establishment will be minor as there are no significant works proposed as part of this development. To ensure the development operates at a low scale that does not detract from the conservation/recreation area, a condition has been recommended to include

maximum schooling numbers; calculated by the expected enrolment rates provided by the Applicant. The Applicant has suggested that the subject site is a temporary location for the school while appropriate land is being negotiated, therefore the proposed condition will provide incentive to continue the search for suitable alternative site. (Page 33. Underlining added to emphasis contradictions)

The above Council justification is somewhat perplexing as the purpose of the zone code is essentially to protect, restore, and manage the area. The SCB and surf club land use with associated restaurant exists on site presumably in harmony with the purpose of the code. It is our planning opinion that converting a portion of the building and outside area from a Surf Club to an Educational establishment without removing any flora or impacting on the biological diversity and ecological integrity of the site also logically fully complies with the purpose of the code. In fact, during a site inspection on 8/9/2020 a local goanna wandered into the play area and was known by teachers and students alike as other fauna – bush turkeys often do. This is evidentiary proof that the Educational establishment has not detrimentally affected the biological diversity and ecological integrity of the site.

Secondly, the council report acknowledges that the Educational establishment will be minor and in any sensible view that ought to be the end of meeting the purpose of the code. If the purpose of the code is met then the overall outcomes by definition are met as well.

Overall Outcome (b) states “*Very low intensity development related to the conservation and environmental values of the area may be facilitated where a demonstrated community need exists*”. This submission clearly provides examples where the demonstrated community need was established, but overlooked by Council in its report.

The Council report, Page 33, then advances the planning view that in order “*To ensure the development operates at a low scale that does not detract from the conservation/recreation area*” – this is despite the statement in the previous sentence that “*the proposed Educational Establishment will be minor as there are no significant works proposed as part of this development*” - “*a condition has been recommended to include maximum schooling numbers; calculated by the expected enrolment rates provided by the Applicant.*” Again, this statement is quite misleading and an unlawful condition as Council is illogically restricting the way in which any school operates, which is, with fluctuating student numbers despite the fact that these were presented to Council as “expected enrolment rates”.

To justify the imposition of condition 2, the Council report states further that “*therefore the proposed condition will provide incentive to continue the search for suitable alternative site.*”

In our planning opinion the Council report exceeds its statutory assessment provisions by including a condition that fails to meet the test of S 65 of the PA.

S 65 states:

“(1) A development condition imposed on a development approval must—
(a) be relevant to, but not be an unreasonable imposition on, the development or the use of premises as a consequence of the development; or

(b) be reasonably required in relation to the development or the use of premises as a consequence of the development."

Council was required to assess the impact of the land use in the Conservation Zone, **not** assess how long a land use could operate from the SCB. The clear intent of Condition 2 was imposed as a restriction to ensure that the applicant could not operate in the normal and same manner of other schools, ie fluctuating student enrolment numbers, and sought to impose a defacto time constraint on the land use by restricting student numbers to **incentivise** a search for an alternative site.

The lease with the Department of Natural Resources and Mines is the legal document which sets out the time period for the applicant to lease this building, this is not the legal responsibility of Council, nor does it form any relevant criteria requiring assessment under the Planning Scheme. However, in reviewing the Council report it seeks to unlawfully impose this restriction on the applicant. By any sensible view, Condition 2, in its current format and the basis for its imposition does not meet the tests of S 65 of the PA.

It is simply a condition imposed external to the assessment requirements of the Planning Scheme and the PA and therefore is an unlawful condition. On this planning view alone, it should be amended.

Community Need Explained

Community Need ought to be explained in greater detail to Council to assist them with this minor change application. A recent Planning and Environment Court Order will assist Council with better understanding Community Need to assist their assessment of this minor change application. Please refer to *Development Watch Inc & Anor v Sunshine Coast Regional Council & Anor* [2020] QPEC 25

The following extracts are presented:

"[444] The general principles that inform and guide an assessment of need are well settled. They are conveniently summarised by His Honour Judge Wilson SC (as he then was) in Isgro v Gold Coast City Council. As His Honour stated:

"Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community... Of course, a need cannot be a contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or not being adequately met."

[445] Other relevant principles referred to in the analysis of the authorities include:
(a) need in the town planning sense does not mean a pressing need or a critical need or even a widespread desire, but relates to the well-being of the community;
(b) a thing is needed if its provision, taking all things into account, improves the services and facilities available in a locality such that it will improve the ease, comfort, convenience and efficient lifestyle of the community;

(c) the question whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors;

(d) providing competition and choice can be a matter which also provides for a need, in the relevant sense, but of itself the addition of choice to the marketplace does not necessitate a finding of need;

(e) need is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority was to take into account;

(f) need is but one of a large number of issues that is required to be considered in an application of this kind and is not, on any view, paramount; and

(g) in some instances, public or community need for a service or facility may not be great, and other considerations may be of greater moment."

Planning opinion

The original application was necessitated because the applicant had outgrown the Community Hall, needed better facilities to properly operate its land use and was faced with increasing enrolment enquiries from the community and student numbers that could not be accommodated in the Community Hall. (Community Need based application).

The application to use the SCB provided a place that could improve the lifestyle of the community by offering a modern facility of sufficient size to provide a Steiner curriculum to the local community. This is the only Steiner facility in Agnes Water and the Gladstone region. Quite clearly there was a basic latent unsatisfied demand which was not being adequately met to provide modern facilities and room for an increasing number of students to undertake a Steiner school curriculum in Agnes Water. The original application provided a clear and evident Community Need which was not being adequately met which somehow the Council report failed to recognise.

The fact that the applicant is now seeking to increase student numbers due to increasing student enrolment enquiries and that this is the only Steiner School in Agnes Water should be clear evidence that a Community Need exists to support the minor change application. This planning view clearly meets the criteria under [444].

In approving an additional 20 student numbers to provide student places for parents making enquiries to enrol their children, there will be a direct benefit to members of the community who wish to place their children within a Steiner curriculum in accordance with [445] (a).

The expected increase in student numbers and ability to provide student placements represents an improvement to the facility and its services as well as lifestyle opportunities to the local community in accordance with [445](b).

The fact that there is an increase in the number of members of the community that are making requests to enrol their children at the school, which is the reason for the minor change application, is in compliance with [445](c).

The school provides an alternative choice for the community to educate their children as per [445](d).

It is our planning opinion that 'planning need' for the minor change, as was for the original application, has been established and this should be given greater weight to ensure that the community is provided with the services and facilities it requires for the betterment of the community, rather than giving weight to low intensity development based on restricting student numbers, to better satisfy [445](e).

It is our planning opinion that the use of the building is essentially compliant under the planning scheme which was the eventual outcome of council's assessment and the change sought to Condition 2 to adopt a flexible and realistic view of how any school operates with respect to student numbers should occur in accordance with [445](f).

Paragraph[445](g) does not apply in this case as planning need is the driving factor with this application.

In conclusion, there is a Community Need for the minor change because it will address a latent unsatisfied demand for additional student placements at the school, it is being driven by the community through enrolment requests to the school, it will provide additional important choice for the community with respect to the nature and number of educational courses offered in Agnes Water, the additional student numbers will improve the services available to the local community, it will improve the well being of the local community through the benefits of alternative educational services and remains a compliant land use under the planning scheme.

Quite clearly on any sensible view, the minor change application fulfils a demonstrated Community Need and Council should support this application.

Conclusion

The basis and justification to impose Condition 2, from reviewing the Council report was misinterpreted and unfounded, in fact, in our planning opinion it is not a lawful condition. It was imposed, as it seems to incentivise the applicant to hasten their search for an alternative site despite the fact that the land use satisfied the requirements of the planning scheme. This in itself, positions Council outside the realms of the requirements of the PA in assessing the original application and imposition of Condition 2.

The applicant demonstrated a Community Need to relocate to the SCB, however, Council failed to recognise this situation and include Condition 2 which does not recognise that the applicant's school, let alone any other school, could not properly operate and function with a limited number of students over a 6 year period. Council has regrettably failed to understand the nature and operation of an Educational Establishment.

The application meets the test of being a minor change as well as not being a substantially different development. The land use on site has operated without

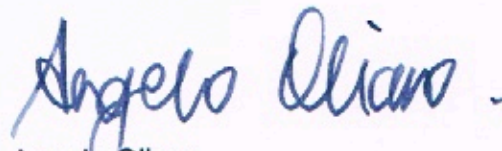
impact to the biodiversity and ecological integrity of the Conservation Zone. It remains a low intensity development otherwise it would not have been approved by Council and the same view logically applies to the minor change application.

The application has been lodged because of the Community Need from the local community in making student enrolment enquires to the school and this application is generated because of this fact. The application is based on Community Need rather than the applicant arbitrarily seeking to increase student numbers.

I trust that Council can properly correct the inconsistencies in the assessment reporting of the original application and provide support to the local community by increasing the student numbers to 70 in Condition 2 as requested by this application.

Would you kindly advise if further information or clarification is required in relation to this letter.

Yours faithfully,

A handwritten signature in blue ink that reads "Angelo Oliaro". The signature is written in a cursive, flowing style.

Angelo Oliaro
Principal