COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

Trusted Partners, Strategic Thinkers, Legal and Policy Designers and Tacticians

COLIN BIGGERS & PAISLEY LAWYERS

Our Planning Government Infrastructure and Environment group

Colin Biggers & Paisley's Planning Government Infrastructure and Environment group is the trusted partner of public and private sector entities, for whom we are the legal and policy designers of strategic and tactical solutions to exceptionally challenging problems, in our chosen fields of planning, government, infrastructure and environment.

Our group has developed a longstanding reputation for continual and exceptional performance in the planning, designing and execution of legal and policy solutions for large development and infrastructure projects in Australia, including new cities, towns and communities.

We are passionate about planning, government, infrastructure and environment issues, and we pride ourselves on acting for both the private and public sectors, including private development corporations, listed development corporations, other non-public sector entities and a wide range of State and local government entities.

The solutions we design extend beyond legal and policy advice, and represent sensible, commercially focused outcomes which accommodate private interests in the context of established public interests.

Our specialist expertise and experience

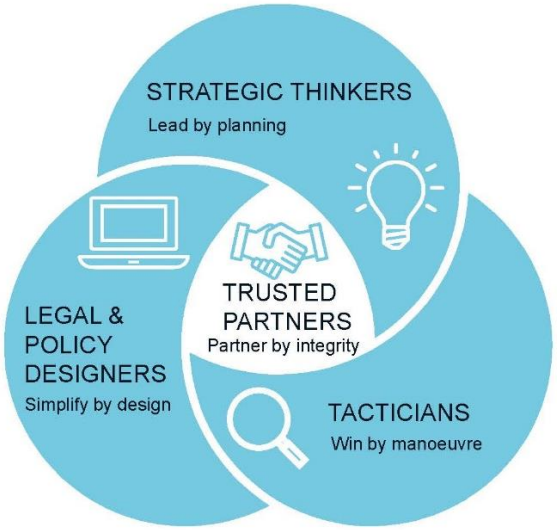
Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

Planning – Strategic and tactical planning of development issues and processes for projects, in particular major residential communities, retail, commercial and industrial developments.

Government – In-depth understanding of government legislation, policy and processes.

Infrastructure – Specialist expertise and experience in infrastructure planning, funding and delivery.

Environment – Legal excellence in all areas of environmental law and policy.



Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

Our group practices collectively as an *East Coast Team of Teams*, which is known for its *Trusted Partners*, *Strategic Thinkers*, *Legal and Policy Designers* and *Tacticians*.

Our Credo is to *Lead, Simplify and Win with Integrity*, and we practice personally so as to *partner by integrity*, *lead by planning*, *simplify by design* and *win by manoeuvre*.

We believe that continual and exceptional performance is the foundation of success, and we apply our integrity and character, critical reasoning and technical process of strategy to ensure an unparalleled level of planning, design and manoeuvre to achieve that success.

COLIN BIGGERS & PAISLEY LAWYERS

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Regional Planning Interests Bill introduced into Queensland Parliament

Ian Wright | Harry Ashton

This article discusses the introduction of the *Regional Planning Interests Bill 2013* by the Queensland government into Parliament

February 2014

In brief – Bill could empower local councils to veto resource projects

The Queensland government has recently introduced the *Regional Planning Interests Bill 2013* (Qld) (**Bill**) into parliament. If enacted it will impact on existing and future resource operations by expanding the assessment and approval process and potentially empower local councils to veto resource projects.

Important concepts introduced by Regional Planning Interests Bill

The Bill introduces the following concepts:

Area of Regional Interest – The priority land use for a particular area designated by a regional plan or regulation as a priority agricultural area, priority living area, strategic cropping area or strategic environmental area.

Regulated Activity – An activity that is likely to have an impact on an Area of Regional Interest prescribed by regulation.

Resource Activity – An activity authorised by a resources authority under the *Geothermal Energy Act 2010*, *Greenhouse Gas Storage Act 2009*, *Mineral Resources Act 1989*, *Petroleum Act 1923* or *Petroleum and Gas (Production and Safety) Act 2004*.

Regional Interest Authority – An authority to conduct either a Resource Activity or a Regulated Activity within an Area of Regional Interest.

Regional Interest Decision – A decision made by the Chief Executive in respect of an application to obtain a Regional Interest Authority.

Regional Interest Conditions – The conditions imposed as a result of a Regional Interest Decision.

Some resource operations will require Regional Interest Authority as soon as legislation commences

A Resource Activity and a Regulated Activity are prohibited from occurring within an Area of Regional Interest unless the person conducting the activity holds a Regional Interest Authority or the activity is exempt.

The failure to obtain a Regional Interest Authority may result in a maximum fine of $687,500 or five years' imprisonment.

Significantly, existing operations within an Area of Regional Interest are not exempt, so some resource operations will require a Regional Interest Authority immediately upon the commencement of the legislation.

Therefore a person conducting a Regulated Activity or Resource Activity will have to apply for a Regional Interest Authority unless the activity is exempt.

Chief Executive to comply with local council response to applications for Regional Interest Authority

An application for a Regional Interest Authority can only be made if the applicant holds, has applied for or is able to apply for an environmental authority or resource authority or intends to carry out a Regulated Activity.

The application is to be in the approved form, contain a report assessing the impact of the proposed activity on the Area of Regional Interest and identify any constraint in the configuration or operation of the activity.

The application is subject to a public notice requirement which is to include notice to the owners of land within the Area of Regional Interest within which the proposed activity is to be conducted.

The Chief Executive is to decide the application after considering the recommendations of any Assessing Agency. Significantly, if the Assessing Agency is a local council, the Chief Executive is required to comply with, rather than just consider, the Assessing Agency's response.

Having considered the application, the Chief Executive may approve all or part of the application, with or without Regional Interest Conditions, or refuse the application.

A Regional Interest Condition may, amongst other things, limit or restrict the carrying out of a Resource Activity or Regulated Activity or require the installation or operation of stated plant or equipment in a stated way within a stated period.

A Regional Interest Condition will prevail over an environmental authority and resource authority to the extent of any inconsistency.

Some Resource Activities will not require a Regional Interest Authority

An application for a Regional Interest Authority is not required in the case of certain Resource Activities in particular Areas of Regional Interest. Importantly, a specific exemption for all pre-existing resource authorities does not exist.

Where an activity is carried out in accordance with a resource activity work plan that took effect prior to the inclusion of the land in a priority agricultural area, the activity will be exempt unless it is likely to have a negative impact on a water source which is necessary for the ongoing use of a priority agricultural land uses area in a priority agricultural area (for example the Condamine Alluvium).

Other exemptions may apply where the Resource Activity is carried out in a priority agricultural area and the authority holder is not the owner of the land and there is a written agreement with the landholder, or the Resource Activity is not likely to have a significant impact on the priority agricultural area or on land owned by a person other than the land owner.

There are also exemptions for small scale mining activities as defined under the *Environmental Protection Act 1994*.

Appeals to the Queensland Planning and Environment Court from Resource Interest Decisions

An applicant for a Regional Interest Authority or by a landholder within the area that a Resource Activity or Regulated Activity is being conducted, may appeal a Resource Interest Decision to the Queensland Planning and Environment Court.

Overall impact of proposed legislation remains unclear at this stage

Given the form of the future regulation provided for under the Bill is unknown at this time, it is difficult to assess the overall impact of the proposed legislation.

However, it is clear that if the Bill is enacted in its current form it will result in another layer of assessment for resource projects, provide a new right of appeal to impacted landowners and potentially provide a veto to local governments over resource projects.

Charity begins in Herston: Performance-based interpretation of criteria leads to approval

Ronald Yuen | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cox & Ors v Brisbane City Council* [2013] QPEC 44 heard before Rackemann DCJ

February 2014

In brief

In the matter *Cox & Ors v Brisbane City Council* [2013] QPEC 44, his Honour Judge Rackemann dismissed the submitter appeal and allowed the co-respondent, a charity providing family-style accommodation for people dealing with childhood cancer, to proceed with its proposal for a multi-unit dwelling in the Brisbane Character Residential Area.

Case

This case involved a submitter appeal against a development which comprised a multi-unit dwelling in Herston, in the Character Residential Area of Brisbane, proposed by a charity which provided family-style accommodation for people dealing with childhood cancer.

Facts

Brisbane City Council approved development for 10 year period

Childhood Cancer Support Inc sought a development approval to relocate and refurbish an existing house, convert it into a unit and construct three new additional units behind the existing house, which would provide residential accommodation for people with special needs.

Brisbane City Council approved the development application subject to conditions, including conditions relating to the design and use of the premises to mitigate its impacts and requiring restriction of the proposed development to those with special needs for a period of 10 years. This afforded the proposed development a development bonus referred to in the *Brisbane City Plan 2000* (**City Plan**).

Residents argued that development would compromise local amenity

There were four appellants, residents who were submitters against the proposed development, contending that the proposal was an over-development and conflicted with the relevant provisions of the City Plan. Further, they argued that the proposed development should be characterised as "generally inappropriate impact assessable" development and would compromise the local amenity.

The council and Childhood Cancer Support denied that the proposed development was an over-development and denied conflict with the City Plan. They argued that to the extent there was any conflict, there were sufficient grounds to justify an approval of the proposed development despite any conflict.

Decision

Court acknowledged pressing need for special needs residential accommodation

The court was satisfied there was a need for the proposed development, given that there was a recognised demand and pressing need for the type of accommodation and facility proposed by Childhood Cancer Support. The court noted that the proposed development would offer an opportunity to address this pressing need in part.

Court found that development generally consistent with Brisbane City Plan

The City Plan included the subject site in the Character Residential Area, and therefore in a Demolition Control Precinct. A multi-unit dwelling was characterised as "impact assessable - generally appropriate" where complying with the Residential Design – Low Density, Character and Low-medium Density Code (**LMR Code**) and where pre-1946 houses were retained.

Subject to effective management of the impacts of new development, the court noted that the LMR Code envisaged new multi-unit dwellings, incorporating the pre-1946 dwelling in the development.

The court was satisfied that the proposed development was generally consistent with the Demolition Code and the Residential Design - Character Code, given that the traditional character of the streetscape and the pre-1946 character of the existing house would be retained and enhanced.

The court acknowledged that the design of the proposed new units was responsive to issues of bulk and scale and that the proposed development was located and treated in a way which minimised its impact on the low density nature of the locality. In this regard, the court observed that the proposed development, overall, would present as a single house when viewed from the front and as three building components when viewed from the side neighbours.

City Plan allowed for possibility of departure from "acceptable solutions"

The principal argument of the residents who opposed the development was that the determination on whether there was compliance with the LMR Code should be based upon compliance with the relevant acceptable solutions.

The court observed that a departure from an acceptable solution itself would not establish conflict with the applicable code. This was supported by the City Plan itself, which included that:

- performance criteria "provide a statement of the outcome that the acceptable solution must achieve";
- "a proposal not complying with an acceptable solution must provide sufficient information to demonstrate how the corresponding performance criterion has been met";
- "there may be other ways of complying with the performance criteria while still meeting the code's purpose".

Accordingly, as observed by the court, the City Plan itself contemplated departure from the acceptable solutions whilst meeting the performance criteria, which was a familiar performance-based approach.

Performance-based approach to establishing compliance with City Plan

By taking a performance-based approach, insofar as it related to issues associated with building size, bulk and height, gross floor area and setbacks, the court was satisfied that, with the proposed development deserving of a development bonus, which was offered to encourage low cost and special needs housing, the proposed development overall was not in conflict with the LMR Code.

After having considered the residents' individual concerns about the impact of the proposed development on their properties and the amenity of the locality, and having regard to the intent of the relevant provisions of the City Plan, the court was satisfied that the proposed development would not be "unduly overbearing" and would not compromise local amenity.

Sufficient grounds to approve development proposal - appeal dismissed

The court found that, despite its departure from the acceptable solutions, the proposed development did not conflict with the City Plan, including, in particular, the LMR Code. The court was therefore satisfied that the proposed development was properly characterised as "impact assessable - generally appropriate development".

The court further noted that, in the event that a conflict was found with performance criteria of the LMR Code, conditions of approval would have been able to mitigate potential impacts adequately.

Further, if a conflict with the LMR Code and the criteria for generally appropriate impact assessable development (for reasons other than unacceptable impacts on amenity) was found, there would have been sufficient grounds to approve the proposed development notwithstanding the conflict.

Accordingly, the court dismissed the appeal, with the parties being given an opportunity to be heard on conditions of approval.

Held

The appeal was dismissed.

Costs application dismissed following withdrawal of an application in pending proceeding

Ronald Yuen | Edith Graveson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rintoul & Ors v Brisbane City Council* [2013] QPEC 45 heard before Rackemann DCJ

February 2014

In brief

The case *Rintoul & Ors v Brisbane City Council* [2013] QPEC 45 involved an application for costs by a developer, Greengate Property Group, against a group of submitters, Matthew Rintoul, Debra Venables, Jantine Boers, Christine Clift, Wayne Clift, Vincent Crowley, Joanne Greenhill, Paul Hargreaves, Anthony Newman, Gary Van-Ooy, Leonie Van-Ooy, Rodney Ward and Eugene Zakrjevsky (**submitters**).

The submitters commenced a submitter appeal in the Queensland Planning and Environment Court against the Brisbane City Council's approval of a development application for an integrated care-based village.

The appeal was set down for hearing in the June 2013 sittings, but was removed from the sittings as a result of the submitters bringing an application in pending proceeding seeking, amongst other things, a declaration that the development approval was invalid and of no legal effect and an order that it be set aside.

The submitters subsequently discontinued their application during the course of the hearing of the submitters' application. Greengate made a costs application against the submitters in respect of their application, which was dismissed by his Honour Judge Rackemann.

Case

This case involved an application for costs by a developer Greengate Property Group against the submitters in respect of their application, filed during the course of a submitter appeal, which was subsequently discontinued.

Facts

Submitters sought declaration that development approval was invalid, but subsequently discontinued during argument at the hearing

The submitters commenced an appeal against the development approval granted by the council to Greengate. The appeal was set down for hearing in the June 2013 sittings, but was removed from the sittings as a result of the submitters' application.

Prior to the hearing of the submitters' application, the council and Greengate wrote to the submitters on a number of occasions inviting the submitters to desist from pursuing their application. Greengate also put the submitters on notice of its difficulties with the submitters' application and the effect of their application.

The submitters' application was heard on 21 May 2013. During argument at the hearing of the submitters' application, the submitters decided to discontinue their application.

Developer advanced arguments for award of costs

Greengate made a costs application against the submitters in respect of the submitters' application under the now superseded costs provisions pursuant to which the court only had jurisdiction to award costs in limited circumstances. Greengate submitted that the jurisdiction to award costs arose on two bases:

- The submitters, in filing and partly prosecuting their application, failed to properly discharge their responsibilities in the proceeding (Section 457(2)(i) of the *Sustainable Planning Act 2009*) (**the first argument**).
- The submitters' application was frivolous or vexatious (Section 457(2)(a) of the *Sustainable Planning Act 2009*) (**the second argument**).

Developer argued that submitters failed to discharge their responsibilities in the proceeding

In support of the first argument, Greengate relied upon the implied undertaking in rule 4(3) of the *Planning and Environment Court Rules 2010*, for a party to act expeditiously, having regard to the purpose of the rules by reference to rule 4(1). Greengate submitted that the implied undertaking was breached for the following reasons:

- The submitters' application would not have advanced the matter in such a way which resulted in the determination of the issues expeditiously.
- The submitters' application lacked utility.
- There was a delay of five weeks between when the submitters' application was foreshadowed and when it was brought.
- The submitters' application was brought in the face of correspondence pointing out the difficulties which were subsequently raised at the hearing and resulted in the discontinuance of the submitters' application.
- Greengate was put to the expense of preparing to meet the submitters' application, which was ultimately discontinued.

Developer argued that submitters' application was frivolous or vexatious

In support of the second argument, Greengate relied upon the following:

- The public notification argument was completely without merit.
- The submitters could not have established any error which would render the council's decision invalid.
- The relief would have been refused, on discretionary grounds, given the lack of utility in the submitters' application.

Decision

Was there a breach of implied undertaking by the submitters?

His Honour Judge Rackemann was not persuaded that there was a breach of the implied undertaking by the submitters as contended by Greengate in that:

- The submitters were entitled to agitate available and arguable points of law/jurisdiction.
- There was no lack of expedition, notwithstanding the five week delay.
- The discontinuance of the submitters' application, the fact that their application had its difficulties and was brought on notice of such difficulties, and the apparent absence of practical utility of the relief sought under the submitters' application, did not constitute a breach of the implied undertaking.

Was the submitters' application frivolous or vexatious?

His Honour also was not persuaded that the submitters' application was frivolous or vexatious for the following reasons:

- Despite the apparent absence of practical utility of the relief sought under the submitters' application, in his Honour's view, their application was not unarguable or doomed for that reason.
- The submitters' challenge on the validity of the council's decision turned on a question of construction of the statute, as to whether a decision which was subject to an undetermined merits review was susceptible to a finding that it was void and of no effect. In his Honour's view, that part of the submitters' application was not so unarguable as to render their application doomed for that reason.
- Whilst the public notification argument did not appear to have much merit (if any), even if it were so bad as to be unarguable, given that it was only one argument to be relied on by the submitters, in his Honour's view, it would not render the submitters' application as a whole frivolous or vexatious.

Held

The application for costs was dismissed.

Is lack of negative impact an independent ground to justify conflict?

Ronald Yuen | Luke Grayson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Viridian Noosa Pty Ltd (Receivers and Managers Appointed) v Sunshine Coast Regional Council* [2013] QPEC 54 heard before Robin QC DCJ

February 2014

In brief

The case *Viridian Noosa Pty Ltd (Receivers and Managers Appointed) v Sunshine Coast Regional Council* [2013] QPEC 54 involved an appeal against the decision of the Sunshine Coast Regional Council to refuse a development application made by Viridian Noosa Pty Ltd (Receivers and Managers Appointed) for a material change of use of 38 apartments in an approved, fully constructed resort development on Noosa Hill. The development application sought to provide for permanent residence as a lawful use of the existing resort. His Honour Judge Robin QC dismissed the appeal on the basis that there was a conflict with the *Noosa Plan 2009*, and there were not sufficient grounds to justify an approval despite the conflict.

Case

This case involved an assessment under section 326(1)(b) (Other decision rules) of the *Sustainable Planning Act 2009* of the conflict of the development application with the *Noosa Plan 2009* and whether there were sufficient grounds to justify an approval of the development application despite the conflict.

Facts

Sunshine Coast Regional Council refused development application

The development application was lodged with the council by Viridian Noosa under the *Sustainable Planning Act 2009* and was subsequently refused by the council on the basis of a conflict with the *Noosa Plan 2009*.

The conflict related to the council's planned use of the existing resort for temporary tourist accommodation, rather than the permanent residential use proposed under the development application. The appeal was an appeal to the Queensland Planning and Environment Court against the council's refusal of the development application.

Decision

Permanent residential accommodation would conflict with planning scheme

His Honour Judge Robin QC found an inconsistency between the development application and the assessment table for the attached housing zone under the *Noosa Plan 2009*. The assessment table for the attached housing zone listed consistent and inconsistent uses. As his Honour noted, consistent uses:

> *...include detached house or community residence 'if not on lot 889 SP203086, being the Viridian Noosa Resort at Viewland Drive ...' or multiple housing 'if not on lot 889, (etcetera)', or, as further consistent use 'visitor accommodation, ... type 4 conventional'* [at 23].

His Honour noted that inconsistent uses were those residential uses listed in section 9.20, being specific outcome O40.

His Honour concluded that a "finding of conflict becomes inescapable" [at 27] when one looked to the specific outcomes for the Noosa Heads locality, in particular specific outcomes O39 and O40. Specific outcome O39 set out consistent uses for the Noosa Heads locality, which provided:

> ***O39**: The following defined uses and use classes are consistent uses ... Commercial business Type 1 if an estate sales office; home-based business type 1; detached house; or community residence if not on lot 889 (etcetera); multiple housing if not on lot 889 (etcetera), and (e) visitor accommodation, types 1, 2, or 4* [at 27].

O40 set out inconsistent uses for the Noosa Heads locality which provided that:

> ***O40**: The following defined uses and use classes are inconsistent uses and are not located in the Attached Housing zone -*
>
> *...*

> ***Detached House**; or **Community** residence if on lot 889 (etcetera),*
>
> *...*
>
> ***Multiple housing** if not on lot 889 (etcetera)...* [at 27].

This led his Honour to conclude that the *Noosa Plan 2009* "could hardly be clearer or more specific that visitor accommodation is wanted on the site; accommodation for permanent residence is not" [at 31].

Lack of negative impacts only relevant as a supporting element in justifying approval of the development application

With conflict having been established, his Honour then assessed whether there were sufficient grounds to justify an approval of the development application despite the conflict. His Honour was satisfied that there were no negative impacts of the proposal. However, his Honour noted that such a consideration "has traditionally not been regarded as a ground for the purposes of a provision like section 326" [at 32].

His Honour noted that the Court of Appeal might be changing its approach in this regard and in support of this statement his Honour favourably referred to the recent decision of the Court of Appeal in *Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QCA 370, (2012) 191 LGERA 452, where it was held that the absence of a negative impact might be a relevant consideration.

Ultimately, his Honour concluded that in this case there were not sufficient grounds to justify an approval of the development application. His Honour also found that, in general, a lack of negative impacts was not sufficient as a ground in its own right to justify an approval but rather, it was only relevant as a supporting element to an independent ground.

Held

His Honour held that:

- the appeal be dismissed; and
- the development application be refused.

Unfairness as between developers in contributing to road upgrades

Ronald Yuen | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mackay Resource Developments Pty Ltd v Mackay Regional Council & Ors* [2013] QPEC 57 heard before Robin QC DCJ

February 2014

In brief

The case *Mackay Resource Developments Pty Ltd v Mackay Regional Council & Ors* [2013] QPEC 57 involved an appeal by a quarrying company against the respondent council's refusal of a development application in respect of a material change of use of land for a hard rock quarry. The main issues in dispute were whether the proposed development conflicted with the Extractive Industry Code and the Good Quality Agricultural Land Overlay Code and, if so, whether there were sufficient grounds to justify its approval despite any conflicts.

His Honour Judge Robin QC found that there was sufficient need to overcome any difficulties associated with good quality agricultural land, but the need was not sufficient to resolve a non-compliance with the Extractive Industry Code. Nonetheless, his Honour was prepared to approve the development application on the basis that product extracted and removed from the subject site should be hauled only along sealed roads. The appeal was therefore allowed, but adjourned to enable suitable development conditions to be worked out.

Case

This case involved an appeal by a developer against the respondent council's refusal of a development application in respect of a material change of use of land for a hard rock quarry.

Facts

Council argued that proposed development conflicted with local planning scheme

The applicant, quarrying company Mackay Resource Developments Pty Ltd made a development application for a material change of use for a hard rock quarry known as the Porters Hill Quarry over part of Lot 643 on SP22481. The land consisted of 68.21 hectares on the southern side of Barrie Lane, Homebush, about 20 kilometres south of the Mackay CBD. The current use of the land was for growing sugar cane on the southern part and for pasture. The development would remove part of the knoll in the centre of the land where cane never had been or could be cultivated due to the steepness and soil quality.

Council conceded that impacts of amended proposal were within acceptable standards

The Mackay Regional Council, with the support of some of the local residents, argued that the development conflicted with the Planning Scheme for the City of Mackay and that in light of this, there were not "sufficient grounds" to justify an approval of the development.

Mackay Resource Developments made a number of changes to the development in order to meet some of the objections. As those changes met the test of "minor change" under section 350 of the *Sustainable Planning Act 2009*, the appeal proceeded on the amended development proposal. Significantly, the changes overcame concerns regarding the unacceptable impacts on groundwater quality and the deleterious effects of surface run-off on the cane lands and the creek. The council effectively conceded that the impacts of the proposal, appropriately managed, would be acceptable. Further, based on expert evidence, it was accepted that noise and dust impacts from operations on the land were well within acceptable standards.

Both possible haul routes for extracted rock to require upgrading

One of the main issues was conflict with the Extractive Industry Code, particularly the identification and impacts of the proposed haul route. There were two possible haul routes for the development proposal, the first being to use Barrie Lane east to connect to Homebush Road, a State-controlled road, and the second being to use the western section of Barrie Lane to access the Peak Downs Highway, another State-controlled road.

The residents who supported the council's position lived along the eastern part of Barrie Lane and apparently, use of the connection to Peak Downs Highway would not create the same community concerns as using the connection to Homebush Road. However, the western part of Barrie Lane was more problematic for traffic safety than the eastern part, as there were a couple of pronounced dips accommodating low, extremely narrow bridges across watercourses. Both routes would require upgrading of the intersections with the respective State-controlled roads.

Haul routes already in use by larger existing quarry with greater impacts

On the other side of Barrie Lane, nearly a kilometre east of the land, was the long established Kings Quarry, which had pre-existing use rights without being subject to any council control at all. Kings Quarry used Barrie Lane as its haul route to connect with Homebush Road, but there was evidence which suggested that at times trucks used the western section of Barrie Lane to access Peak Downs Highway as well. Relevantly, Kings Quarry was considerably larger than the development proposal and its impacts, including those related to truck movements along Barrie Lane, were far greater than what the proposal would cause.

Development on Good Quality Agricultural Land

Another difficulty the applicant had to confront was the requirement under the Good Quality Agricultural Land Overlay Code, being that, amongst others, development on land shown as Good Quality Agricultural Land (**GQAL**) did not result in land being taken out of agricultural use unless an overriding community need for the development was demonstrated and no alternative sites were available. The land was indicated, in part, on the overlay map as GQAL.

Need for the development

A further issue was whether there was sufficient need to overcome any conflict with the local planning scheme. In this regard, according to the applicant's expert, the land contained marketable resources of rock of the quality the company or its associates would require for their own use and for sale of surplus and that there was a market for the production. The council, however, argued that need was not shown, nor an ability of the proposal to meet the asserted need. It was suggested there were other quarries which could supply at going rates to meet the demand.

Decision

New development proposals must comply with current planning regime

In relation to the traffic impacts associated with the proposed haul route, his Honour Judge Robin QC observed that the development proposal would simply add, arguably modestly, to impacts already inflicted on the community by Kings Quarry. His Honour noted, however, that such an observation would not assist Mackay Resource Developments as, by applying for an approval for a new development, "it must face up to a new, more demanding planning regime that has been put in place".

Accordingly, the court would be required to impose reasonable and relevant conditions which would appropriately address the impacts of the development proposal.

Unfairness between quarry operators in contributing to road upgrades

In this instance, use of Barrie Lane as contemplated would worsen an already unsafe situation unless it was upgraded (which included road sealing). Whilst his Honour recognised the unfairness of Mackay Resource Developments having to pay to ameliorate the impacts of Kings Quarry's operations, his Honour went on to state that:

> *... it is established that unfairness as between "developers", which may arise according to whether they come into the field sooner or later, is not a factor in determining the appropriateness of conditions, even though fairness may be a factor in determining whether a condition fairly and reasonably "relates" to a proposed development and is reasonably required by it (Ajana Park Pty Ltd v Mackay City Council [2009] QCA 404 at [30]).*

Court's finding in relation to Good Quality Agricultural Land

In relation to the issue of GQAL, his Honour agreed with Mackay Resource Developments that if there was any conflict with the Good Quality Agricultural Land Overlay Code, it was purely technical. In dealing with the question of "overriding need", his Honour stated:

> *...my approach is that "overriding need", that is not overwhelming or unquestionable need, but simply enough to outweigh the consideration that the relevant acres or hectares will be lost, temporarily or even permanently, should be shown in context of GQAL being protected. That is the only requirement for the appellant to show need - as opposed to opportunity to help its case by demonstrating need.*

Was the development proposal in the public interest?

In considering whether the need for development constituted a "sufficient ground" to justify approval, his Honour recognised that a "ground" must be a matter of public interest and would not include the personal circumstances of an applicant, owner or interested party.

His Honour found that there were grounds of public interest served by the development proposal in that, apart from the undeniable benefit of another supplier of quarry products adding to competition and theoretically keeping prices lower, the proposal would help maintain the cane tramways which not only have historical and cultural significance, but were used by hundreds of growers behind Mackay Sugar. Further, the cane tramways represented a point of interest for local people and visitors and by and large, the community.

Court determined that haul route must be provided along sealed roads

Overall, his Honour found that need demonstrated by the development proposal outweighed the GQAL-related issues, but was not sufficient to overcome the conflict with the local planning scheme arising out of the traffic impacts. The relevant question for determination by his Honour was whether other grounds put forward by Mackay Resource Developments outweighed the traffic concerns arising from the intended use of Barrie Lane.

His Honour was not persuaded that the need for the proposal nor the "absence of adverse impacts" grounds collected by the company's town planning expert were sufficient to overcome non-compliance with P2(i) of the Extractive Industry Code, which required that the haul route be provided along sealed roads.

His Honour was of the view that it should be a condition of the approval that product extracted and removed from the land should be hauled only along sealed roads.

Court left council to determine which haul route should be used

His Honour again noted his unhappiness about imposing such a condition as a matter of fairness vis-à-vis the other users of the road i.e. by Kings Quarry. His Honour accepted Mackay Resource Developments' willingness to contribute to roadworks in proportion to the impact the development proposal would have as being entirely reasonable, but observed that there was no way the court could make an outcome along those lines come true in reality.

His Honour was not prepared to make an order as to which haul route was to be used, given that both routes had their own problems, but left that to the council to determine taking into account both amenity and safety issues.

His Honour therefore allowed the appeal and adjourned it to enable Mackay Resource Developments and the council to work out a suitable conditions package, including the requirements of the Department of Transport and Main Roads, with an opportunity being given to the concerned residents to submit their views on the conditions package.

Held

The appeal was allowed but adjourned generally to enable suitable development conditions to be worked out.

Infrastructure charges, offsets and refunds – Missing the woods for the trees

Ian Wright

This article discusses the current challenges surrounding infrastructure charges, offsets and refunds in Queensland and guideposts for the future

March 2014

Queensland's economic model

In our professional capacities as politicians, public servants, developers and advisors and in our personal capacities as citizens of Queensland and our regions and as rate payers in our various local government areas, we instinctively understand that the planning and funding of infrastructure is critical to the construction and development of the places where we live, work and play.

This is particularly the case in South East Queensland and Brisbane which are responsible for some 65% and 48% respectively of Queensland's economic activity (QCOA 2013:2-379).

However despite our collective understanding of its importance, it is clear that the current state of infrastructure planning and funding proves that the German Philosopher, Georg Hegel, was right when he said:

> *Peoples and governments have never learned anything from history or acted on principles deducible from it*.

I therefore start from the premise that you have to understand the past to know the present and to plan for the future.

I would like to provide some broad policy guideposts for the future of infrastructure planning and funding in the context of the development of South East Queensland and Brisbane over the next 20 years.

In doing so I will digress into the past to discuss Queensland's economic model and how it has been broken by those who were ignorant of the lessons of the past and gambled with our collective futures for their own ideological and political gain.

Queensland's economic model

Queensland's current economic model was established by the Bjelke-Peterson Coalition government of the 1970's. The economic model was based on the simple principle of lower taxes and charges being funded by mining royalties (Knox 2012).

The economic model involved five elements (Eadie 2014:19):

- First – mining royalties were distributed to the regions and cities and towns as State government grants for development infrastructure.
- Second – local governments used State government grants together with rates revenue to build development infrastructure for future development.
- Third – local governments levied future development with infrastructure charges to recover the rates revenue but not the State government grants expended by local governments in building development infrastructure.
- Fourth – the resulting cheap residential land and lower taxes attracted population growth resulting in Queensland experiencing an 88% increase in population over 20 years compared to the 50% Australian average.
- Finally – many of the new Queenslanders brought retirement savings and set up small business which drove growth in South East Queensland and Brisbane in particular.

Therefore Queensland's economic model at its core involved mining in rural and regional Queensland subsidising urban development and population growth in Brisbane and South East Queensland.

The Beattie and Bligh Labour governments subsequently utilised the economic model to fund increased expenditure on education and health services:

- Firstly to address Queensland's lower productivity in the 1990's.
- Secondly in the case of the Bligh government to reflect the ideological position of the Left Faction of the Labour party.

This increased expenditure on education and health services (as opposed to economic infrastructure) was predicated on rising mining royalties in particular from coal mining in Queensland's regions.

Challenges to the economic model

However by 2009 the Queensland economic model was coming under significant challenges from 2 areas:

- First – the Global Financial Crisis significantly reduced coal prices and exports.
- Second – a Labour Federal government introduced taxes in particular the mining tax and the carbon tax which created significant uncertainty in mining investment particularly in coal in Queensland.

The resulting damage to the Queensland budget in terms of reduced revenue from mining royalties was in the order of $400 million by 2011 (see Table 1).

Table 1 Queensland's mining royalty gap – 2008 to 2012

Year	Budget coal royalties ($ million)	Actual coal royalties ($ million)	Gap ($ million)
2008	1,020	1,035	15
2009	3,213	3,103	**-110**
2010	1,433	1,786	353
2011	2,766	2,357	**-409**
2012	2,755	2,386	**-369**

Source: Eadie 2014:35

Bligh government's policy response

The Bligh government was therefore confronted with increasing spending on education and health services (as opposed to productive economic infrastructure) with increasing deficits.

The Bligh government's policy response to the impending fiscal crisis was 4 fold:

- First, the privatisation of State government assets.
- Second, the cutting of State government grants to local governments to fund development infrastructure. For example, the average annual subsidy was reduced from $480 million in the period from 2002 to 2010 to $225 million in the period from 2011 to 2013 (LGAQ 2013a:iii).
- Third, local governments were empowered to levy infrastructure charges under priority infrastructure plans from developers to recover the abolished capital subsidy program of the State government. In effect the State government's subsidy of up to 50% for development infrastructure was passed on to developers.
- Fourth, the resulting significant increases in infrastructure charges when combined with suppressed housing demand and reduced financing in the context of the Global Financial Crisis adversely impacted on development feasibility and housing affordability, resulting in the introduction of capped infrastructure charges and capped water charges for SEQ water businesses.

Queensland's economic model broken

Bligh's policy responses had the effect of breaking the Queensland economic model in 5 respects:

- First, State government per capita investment in development infrastructure dropped significantly below that of other Australian states. This is shown in Table 2.

Table 2 Per capita investment in development infrastructure

State	Investment per capita ($)
New South Wales	76.35
Victoria	9.25
Queensland	3.95

Source: LGAQ 2013a:iii

- Second, the abolition of the capital subsidy program, capping of infrastructure charges and reduced income from SEQ water businesses is estimated to have reduced local government revenues by $800 million a year (LGAQ 2013a:iii).
- Third, the capping of infrastructure charges itself created a funding gap particularly for high growth local governments which is estimated by the Local Government Association of Queensland to be some $480 million annually. This has caused local governments to:
  - increase rates to fund the gap – the $480 million annual funding gap is equivalent to $359 per rateable property (LGAQ 2013a:10);
  - increase borrowings – local government borrowings have increased 50% from 2008 to 2012 to $6.3 billion (LGAQ 2013a:4);
  - reduce the construction of development infrastructure to support property development.
- Fourth, capped charges were also utilised unwisely by some local governments particularly in rural and regional areas to increase their infrastructure charges beyond the short term marginal cost of the provision of that infrastructure, such that capped charges functioned as a tax on development.
- Fifth, the political fallout of privatisation killed the Bligh government in March 2012 whilst the combination of local taxation increases and reduced economic activity in the construction and property development sector killed 44 Mayors in the April 2012 elections – the largest turnover in local political leaders since World War 2 (LGAQ 2013a:2).

Newman government's challenges

The Newman government, which replaced the Bligh government at the March 2012 election, confronted 5 significant challenges:

- First, Queensland did not have an integrated State and local government infrastructure planning model.
- Second, Queensland did not have an infrastructure funding model which was financially sustainable for local governments or financially feasible for property developers.
- Third, the residential property industry was dead as a result of poor public policy.
- Fourth, the Queensland economic model was consequently broken.
- Fifth, the Queensland fiscal position was unsustainable and urgent budget consolidation was required.

The Newman government's Queensland Commission of Audit made three fundamental recommendations (QCOA 2013):

- First, fiscal consolidation – to be achieved by reducing expenditure (some $5.5 billion in the 2012/2013 budget) and secondly reducing debt (by some $25 - $30 billion) to regain the State's AAA credit rating.
- Second, reducing the role of government – to be achieved by privatising government assets and providing for greater private sector delivery of public services.
- Third, long term financial planning – to be achieved by improved budget, cash and asset management practices underpinned by an InterGenerational Report for the State with a 40 year perspective and 10 year State Infrastructure Plan.

Newman government's policy responses

The Newman government is currently finalising its policy position in relation to the review of Queensland's infrastructure planning and charging system following the release of its discussion paper in June 2013.

It is critical that the ultimate policy responses are not at the odds with the lessons of history and the recommendations of the Commission of Audit.

- Firstly, the infrastructure planning framework should not be divorced from the cost of the development infrastructure and the available financial capacity of local governments to fund that infrastructure.

  As the Queensland Commission of Audit stated in the context of its recommendation for a 10 year State Infrastructure Plan while there have been previous attempts at longer term strategic plans and infrastructure plans, their usefulness has been significantly diminished by the lack of any serious assessment of available financial capacity (QCOA 2013:1-17).
- Secondly, infrastructure charges should not be reduced by an arbitrary amount or by reducing the essential development infrastructure to be funded by infrastructure charges.

  If this occurs it has been estimated that it will cause an annualised funding gap of between $760 million to $1 billion (LGAQ 2013a:10).

The funding of this gap will either increase local government borrowings and as a result State government borrowings thereby making it more difficult to regain the State's AAA credit rating or it will increase local government rates by between $571 to $768 per rateable property (LGAQ 2013a:10).

These outcomes are neither financially or politically sustainable.

Table 3 Financial impacts of Discussion Paper reform options

Infrastructure charges	Funding gap (NPV total)	Annualised funding gap (NPV total)	Annualised cost per property
Maximum capped charge	$10 billion	$481 million	$359
Reduced capped charge (25%)	$16.4 billion	$759 million	$571
Planned charge for reduced development infrastructure	$22 billion	$1 billion	$768

Source: LGAQ 2013a:10

Guideposts for the future

If we are to learn anything from history it is that good policy is good politics and that bad policy is death to politicians. But we continue to repeat the mistakes of the past over and over and over again.

If our policy goal is the rebooting of the Queensland economic model through a revived construction and property development sector which I believe it should be, then the following are considered as critical preconditions for the achievement of that goal.

- First, an integrated infrastructure planning model – As recommended by the Queensland Commission of Audit a 10 year State Infrastructure Plan linked to the financial capacity of the State to fund that infrastructure should be complemented by a 10 year Local Infrastructure Plan which is also linked to the financial capacity of local governments to fund local development infrastructure.
- Second, an integrated infrastructure funding model which is based on 4 principles:
  - First, infrastructure charges should be linked to the funding of essential development infrastructure being water supply, sewerage, transport and local parks with social infrastructure such as district and regional sport, recreational and community facilities being funded through local government rates.
  - Second, infrastructure charges should be calculated on the short run marginal cost that is the incremental cost of the provision of additional development infrastructure to fund future development (PCA 2014:123).
  - Third, infrastructure charges can be capped by the State government to achieve State economic objectives such as the promotion of the construction and property development sector or State social objectives such as housing affordability.
  - Fourth, State government subsidies through capped infrastructure charges should be funded by the State government through compensatory grants to local governments or as in the case of New South Wales, through a Priority Infrastructure Fund which is used to fund local development infrastructure (PCA 2014:149).
- Thirdly, property development should be increasingly used to fund development infrastructure (PCA 2014:147). Examples include:
  - the development of airport lands to fund airport and transport infrastructure as has occurred with the Brisbane and other Australian airports;
  - the development of land and airspace around railway stations to fund railway infrastructure such as has occurred at the Toowong and Central railway stations in Brisbane, the Chatswood railway station in Sydney and the Melbourne Central railway station;
  - the development of land around road transport infrastructure to fund associated road transport infrastructure.

Conclusions

In conclusion, whilst the State government, local governments and the construction and property development sector remain focused on endless detailed disputes about infrastructure charges, offsets and refunds, the critical issues of the development of an integrated infrastructure planning and funding model and the rebooting of the Queensland economic model are not being addressed.

It is difficult to avoid the conclusion sometimes that our endless battles over infrastructure charges, offsets and refunds are nothing more than a fight over the spoils of defeat that distract us from confronting and debating the policy prescriptions necessary for our collective prosperity.

Therefore I end where I started.

If we remain focused on fighting over infrastructure charges, offsets and refunds; we will be truly missing the woods for the trees.

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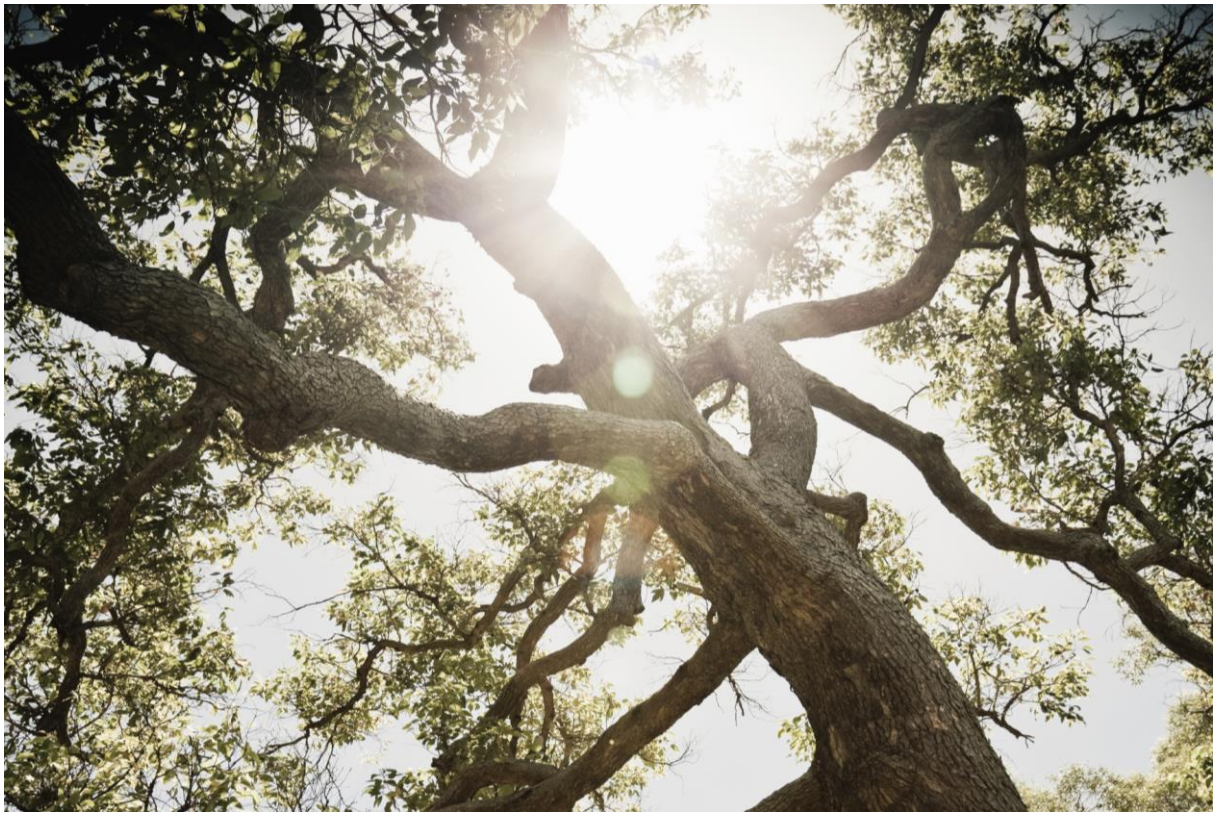


Council liable in negligence for harm caused to cyclist by failure to warn of repairs to road

Mathew Deighton

This article discusses the decision of the Queensland District Court in the matter of *O'Connor v Brisbane City Council* [2013] QDC 137 heard before Samios DCJ

March 2014

In brief

The Queensland District Court has found in the case of *O'Connor v Brisbane City Council* [2013] QDC 137 that Brisbane City Council (**BCC**) failed to ensure that signs remained in place warning road users of hazards created by road repairs. The court determined that the council had created a risk of injury and that the injuries suffered by a cyclist falling from his bike were a result of the council's negligence.

Poor condition of road under repair not signposted

On 3 November 2007, the cyclist, Mr O'Connor, was riding his bicycle over a patch of road that was under repair by the council and which caused him to fall from his bicycle and sustain injuries. While the injuries were not catastrophic, Mr O'Connor sued the council for negligence.

The section of road under repair was 25.2 metres in length and the repairs did not extend to the adjoining bicycle lane. Mr O'Connor claimed that the repairs caused grooves and unevenness in the bitumen surface and that the condition of the road and the existence of the repairs were not known to him.

He also claimed that the condition of the road was not apparent to him and was obscured from his view because of a curve in the road and the lack of signage indicating an uneven surface or roadworks in progress.

Council defends signage at roadworks as adequate for a person keeping a proper lookout

The council defended Mr O'Connor's claim on the basis that the condition of the road was a necessary consequence of the repair works in progress and that the repair works did not impact on the bicycle lane, which Mr O'Connor admitted he elected not to ride in.

The council argued that the repair works were obvious to persons travelling on the road and were visible from a distance and regardless of the bend in the road. The council argued further that signage had been erected which read "rough surface" 30 metres away from and on the approach to the repair works. The council contended that Mr O'Connor was not keeping a proper lookout and that his vision was obscured by the presence of cyclists in front of him.

Did council owe duty of care to cyclist riding outside bike lane in breach of regulations?

The key issues to be considered by the court centred on whether the council owed a duty of care to Mr O'Connor and, if so, whether it had fulfilled its duty. Important factors included whether the state of the repairs was safe at the time Mr O'Connor rode onto the repairs and whether Mr O'Connor was in breach of regulations 151(1) and 247 of the *Transport Operations (Road Use Management – Road Rules) Regulation 1999* which regulated cyclists riding alongside others and the requirement to ride in bike lanes.

Given Mr O'Connor's breach, the court was asked to consider whether the council was consequently absolved from its responsibility under the dangerous recreational activities provisions in the *Civil Liability Act 2003*, or indeed, if it was absolved from responsibility under the public authority exemptions in this Act.

Council exposed cyclist to hazard it had created despite road repairs according with accepted practice

The court determined that the road, in its state of being repaired, was a hazard to bicycle riders, despite the repairs being carried out in accordance with accepted engineering practice.

The court further determined that the hazard had been created by the council and that having created the hazard, it exposed Mr O'Connor to a risk of injury. The court found that the injury suffered by Mr O'Connor falling from his bike was as a result of the negligence of the council.

Council told it must ensure warning signs remain in place throughout repair work

It had been Mr O'Connor's claim that there were no signs warning motorists or cyclists of the repair work. The council adduced evidence that signs had been installed at the time the work was carried out, but could not be certain that they were there when the accident occurred.

The court held that the council was aware that signage went missing from time to time and that BCC ought to have done more to ensure that the signs remained in place at all times. The court considered that the cost of the council checking and maintaining warning signs would have been minimal.

The court determined that the hazard caused by the repairs to the road was not obvious to Mr O'Connor due to the bend in the road and the absence of signage (at the time) to alert road users to the repairs.

Liability not excluded by cyclist's non-compliance with road use regulations

The court held that the council ought to have reasonably expected that cyclists would use the road as well as travel in groups, rejecting the council's attempt to rely on Mr O'Connor's non-compliance with regulations 151(1) and 247 of the *Transport Operations (Road Use Management – Road Rules) Regulation 1999* prohibiting motorbike or bicycle users from riding alongside each other on single lane roads unless overtaking and prescribing the use of bike lanes unless impracticable.

The court found that the width of the bicycle lane and frequent presence of broken glass and other debris in it made it impracticable for Mr O'Connor to ride in the bicycle lane. The court went on to say that if Mr O'Connor was found to be in breach of these provisions, the *Transport Operations (Road Use Management – Road Rules) Regulation 1999* would not operate to exclude the council of its liability for Mr O'Connor's injuries.

Cycling not a "dangerous recreational activity"

The council attempted to rely upon section 19 of the *Civil Liability Act 2003*, which excludes liability for persons who suffer injuries as a result of a dangerous recreational activity with obvious risks. The court determined that cycling, as a recreational activity, did not involve a significant degree of risk of physical harm.

Council's act of misfeasance placed it outside the scope of the public authority protections of the Civil Liability Act 2003

The council also attempted to rely on section 35 to 37 of the *Civil Liability Act 2003*, which excludes public authorities such as councils from liability for their nonfeasance with respect to the repair and inspection of roads. The court considered that the options open to the council for either bringing the repairs to the attention of road users or diverting traffic around the repairs would have been reasonable and of minimal cost.

Further, the court held that the operation of sections 35 to 37 of the *Civil Liability Act 2003* would only absolve the council of liability in the event of nonfeasance as opposed to malfeasance. In this instance, the court judged the council's action in carrying out the repairs and creating the hazard were acts of misfeasance and outside the scope of the protection afforded by the Act.

The court held that sections 35-37 only assisted local authorities where they failed to remedy a hazard caused by another source such as weather or normal wear and tear and unknown to the local authority.

Councils beware - statutory protections limited if public not warned of known road hazards

There are a number of lessons for local government to be taken from this case:

- If a hazard such as an unsealed road is created by a council, the council is responsible for either rectifying the hazard, making the hazard very clear and obvious to all persons or preventing persons from coming into contact with the hazard.
- If a council is made aware of a hazard caused by third parties, the council is arguably under an obligation to make sure no person comes into contact with the hazard until it is rectified; whether by bringing it to the attention of all persons so that the hazard becomes obvious (signage) or completely denying access to the hazard. Accordingly, the council needs to ensure that it has systems which result in complaints from the public being investigated and acted on in a timely manner.
- Bicycle lanes should be maintained in a condition that would not make their use impracticable, deter their use or encourage cyclists to ride on the road.

- If roads must be used whilst under repair, appropriate signage must be erected which indicates such potential hazard. The road under repair must be in a condition that is not a hazard to any road user, including vehicles and bicycles. The council must establish a monitoring system to ensure that the signage remains in place at all times.
- Councils should be aware of the limitations of the statutory protections in the *Civil Liability Act 2003*.

Suspended sentence and conviction recorded for violation of enforcement order

Ronald Yuen | Luke Grayson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v John Alexander Bowman and Ors* [2013] QPEC 62 heard before Robin QC DCJ

March 2014

In brief

Brisbane City Council has successfully applied to the Queensland Planning and Environment Court seeking punishment for contempt against an individual and two companies. The court found in *Brisbane City Council v John Alexander Bowman and Ors* [2013] QPEC 62 that Mr Bowman and the two companies had failed to comply with an enforcement order made by the court in an earlier enforcement proceeding.

Court was satisfied that a development offence had been committed or would be committed unless restrained

On 19 March 2012 the council commenced an enforcement proceeding in the court against Mr Bowman and the two companies seeking declarations and enforcement orders for unlawful use of the premises (warehouse, industry, office and display and sale activities) and for carrying out assessable development (operational works - filling) without an effective development permit for that use and that assessable development.

The court was satisfied a development offence had been committed or would be committed unless restrained.

The court further made various enforcement orders which required Mr Bowman and the two companies to do the following:

- submit to the council a properly made development application for a material change of use and environmentally relevant activities (industry - green waste transfer/holding station) and do everything necessary to advance that development application by 1 February 2013;
- cease using the premises for any activity or use that would require a development permit, excluding any industrial use or a green waste transfer/holding station only, by 1 February 2013;
- remove all earthmoving and heavy vehicles, equipment, plant and machinery for the purposes of a warehouse industry as defined in the *Brisbane City Plan 2000*, not associated with the rural use of the premises as defined in the *Brisbane City Plan 2000*, by 1 February 2013;
- submit to the council a rehabilitation plan prepared by a duly qualified expert for assessment and approval by the council for the removal of introduced fill back to natural ground level or other satisfactory level based on relevant and qualified experts' reports, and the rehabilitation of the premises following the removal of the fill material, by 1 February 2013.

Court acknowledged that the orders made by the court were serious but would not otherwise have made them unless it was satisfied that they represented an appropriate outcome

On 15 May 2013, the council filed an originating application in the court seeking the punishment of Mr Bowman and the two companies for contempt following their failure to comply with the earlier enforcement order made by the court.

Subsequently, the parties negotiated a resolution in which Mr Bowman and the two companies effectively pleaded guilty to non-compliance with the earlier enforcement order, which resulted in a conviction being recorded against all of them. Mr Bowman and the two companies agreed to the orders proposed by the council by way of punishment.

The parties also agreed to variations to the earlier enforcement order made by the court. These variations included, amongst others, a significant provision in respect of costs and the release from an obligation to lodge a development application to the council for the purposes of regularising the use of the premises at Bald Hills in Brisbane.

The court, however, observed that "the court ought to insist that its orders be respected and visit consequences that may need to be harsh on those who fail to comply".

Mr Bowman provided to the court explanations for his failure to comply with the earlier enforcement order and submitted steps he had since taken in complying with the order. Further, an assurance was given to the court by Mr Bowman that he was:

> *...going to do everything he can now to comply with the full orders... You will not be seeing this man back here in another 12 months for contempt of order, unless he has some sort of desire to go to jail but... he's making every attempt he can to now comply with the orders...*

Having regard to the parties' resolution, Mr Bowman's conduct and the sentencing range in other cases similar to the prevailing circumstances, the court made orders to the effect that:

- the court found Mr Bowman and the two companies guilty of contempt of court for failure to comply with the earlier enforcement order made by the court;
- a conviction was recorded against Mr Bowman and the two companies;
- Mr Bowman was sentenced to imprisonment for four months, wholly suspended for an operational period of two years;
- the earlier enforcement order made by the court was varied and replaced with a new set of orders, requiring Mr Bowman and the two companies to cease various unlawful uses immediately and pay the council's professional costs in the sum of $10,000.

The court noted that the orders "would not have been made unless the court was satisfied that they represented an appropriate outcome in the circumstances, which are serious ones."

Developer's appeal struck out following developer's disobedience and delay in Queensland Planning and Environment Court

Ronald Yuen | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Slinger v Sunshine Coast Regional Council and Ors* [2013] QPEC 73 heard before Robertson DCJ

March 2014

In brief

The case of *Slinger v Sunshine Coast Regional Council and Ors* [2013] QPEC 73 concerned two appeals to the Queensland Planning and Environment Court relating to a development approval for a material change of use for a detached house at Sunshine Beach.

In one appeal, Mr Slinger, the developer, appealed against the conditions of a development approval while in the other appeal, Howen Proprietary Limited, a submitter, appealed against the council's development approval.

Howen sought orders that Mr Slinger's appeal be struck out for want of prosecution and that Howen's appeal be allowed, which would have the effect of refusing Mr Slinger's development application. The issue for the court to determine was whether, considering the court rules, Mr Slinger's conduct warranted the making of those orders.

As Mr Slinger had not satisfactorily progressed the appeals and complied with the court orders or the court rules and as the delay was attributable solely to him, the court held that Mr Slinger's appeal be struck out, and adjourned Howen's appeal to allow Mr Slinger further time to consider the implications of Howen's appeal being allowed.

Obligation to proceed in an "expeditious way" under Planning and Environment Court Rules 2010

The court first referred to rule 4(3) of the *Planning and Environment Court Rules 2010*, which states that "In a proceeding in the court, a party impliedly undertakes to the court and to the other parties, to proceed in an expeditious way" and rule 5(c), which states that "The court may... impose appropriate sanctions if a party does not comply with these rules or an order of the court".

Rule 19(3) further states that "the party to a proceeding with the onus in the proceeding must, as soon as practicable but within 3 months after the... appellant files the originating process for the proceeding, apply to the court for an order or directions about the proceeding". The court stated that Mr Slinger had the onus of establishing that his appeal should be allowed and that Howen's appeal should be dismissed.

Failure to progress appeal in compliance with court order exposed an appeal to dismissal

The court also referred to rule 280(1) of the *Uniform Civil Procedure Rules 1999*, which provide that if an applicant was required to take a step or comply with an order of a court within a stated time and did not do what was required, then another party could apply to the court for an order dismissing the proceeding for want of prosecution.

Want of prosecution to be established as basis for striking out appeal

In considering Howen's application to strike out Mr Slinger's appeal, the court referred to the following 12 non-exhaustive factors to be considered in an application to strike out for want of prosecution established in the case of *Tyler v Custom Credit Corporation Limited* [2000] QCA 178, and which were adopted by the Queensland Planning and Environment Court in *Family Assets Proprietary Limited v Gold Coast City Council & Ors* [2007] QPEC 8:

> *(1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;*
>
> *(2) how long ago the litigation was commenced or causes of action were added;*

(3) what prospects the plaintiff has of success in the action;

(4) whether or not there has been disobedience of Court orders or directions;

(5) whether or not the litigation has been characterised by periods of delay;

(6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;

(7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;

(8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;

(9) how far the litigation has progressed;

(10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an application for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;

(11) whether there is a satisfactory explanation for the delay; and

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

Did developer's conduct warrant an order striking out his appeal?

The court noted the following conduct by Mr Slinger which was relevant to the determination of Howen's application:

- Mr Slinger commenced his appeal on 4 November 2011 and took no steps to progress it until it was listed, on the court's initiative, for mention on 9 August 2012.
- By an order of the court, the parties were directed to participate in a mediation. A mediation was arranged for 7 December 2012, but was subsequently postponed at Mr Slinger's request.
- The mediation was held on 1 February 2013 and at the mediation, it was agreed that Mr Slinger would consider the matters raised in the mediation and provide a response to the parties by 14 March 2013. Mr Slinger did not comply with this timeframe but instead continuously sought extensions of time to provide his response.
- Despite indicating to the court that he was not in a financial position to progress the appeals, Mr Slinger did not take any steps, as suggested by the council, to finalise the appeals in an expeditious and inexpensive way or otherwise communicate with Howen in relation to its offer not to recover its costs from Mr Slinger if Mr Slinger took the steps in accordance with the council's suggestion.
- At a review on 6 September 2013 Mr Slinger was granted further time to understand the consequences of Howen's appeal being allowed and the development application being refused. Mr Slinger was also ordered to file promptly a notice of party acting in person. However, Mr Slinger never filed the notice.

The court found that Mr Slinger had:

> *...failed to comply with the implied undertaking to the Court and to the other parties to proceed in an expeditious way. He failed to apply for directions within three months of the originating proceedings and he didn't comply with Judge Long SCs order of the 6th September to file a notice of party acting in person.*

The court ordered that Mr Slinger's appeal be struck out and considered the following factors to be relevant in making such an order:

- Mr Slinger's disobedience of court directions and orders;
- the delay which was solely attributable to Mr Slinger;
- the fact that the litigation was commenced nearly two years ago in relation to a development application made on 1 February 2008;
- no other party was to blame for the delay;
- the delay had caused significant expense to both Howen and the other parties, including the council.

The court was prepared to give Mr Slinger further time to consider the implications of Howen's appeal and therefore adjourned that appeal. However, the court made it clear that if Mr Slinger did not progress that appeal in a satisfactory way, then it would be the court's intention to order that that appeal be allowed, which would leave Mr Slinger with no development approval at all.

Economic need for integrated retirement and aged care facility justifies the approval despite conflict with planning scheme

Ronald Yuen | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rintoul & Ors v Brisbane City Council and Greengate Property Group (No. 2)* [2013] QPEC 47 heard before Robertson DCJ

March 2014

In brief

In *Rintoul & Ors v Brisbane City Council and Greengate Property Group (No. 2)* [2013] QPEC 47, the Queensland Planning and Environment Court has found that while a proposed development of an aged care facility was in minor conflict with the *Brisbane City Plan 2000*, there was a need for a facility of such kind as proposed which outweighed the conflict.

The court dismissed the appeal commenced by a number of submitters, predominantly residents in the locality, against the Brisbane City Council's (**council**) decision to approve Greengate Property Group's development application for an integrated retirement and aged care facility in Woolloongabba, Brisbane. (Please see also our earlier article, *Costs application dismissed following withdrawal of an application in pending proceeding*, on page 58).

Changed proposal addressed amenity and design issues

The land affected by the proposed development was surrounded by pre-1946 houses and was improved by a locally listed heritage place, St Luke's Catholic Church, a pre-1946 dwelling and a two-storey concrete building constructed in 1948 which was previously used as a school. The proposed development would retain the church and relocate the pre-1946 dwelling, but would replace the old school building with four separate buildings of three and four storeys in height.

During the course of the appeal, Greengate made changes to the proposed development which addressed some of the amenity and design issues. As a result of the changes to the proposed development and the joint meetings of the town planners and heritage architects, the issues in the appeal were narrowed.

Court considered heritage value of old school building, scale of development and relocation of pre-1946 dwelling

Consequently, in the context of determining whether the proposed development was in conflict with the Brisbane City Plan 2000, the merits issues which the court was required to consider were related to:

- the heritage value of the old school building;
- the scale of the proposed development and its impact on amenity and character and heritage values of the surrounding area and also on the church on the land;
- the relocation of the pre-1946 dwelling on the land.

Court accepted council's position that old school building had no cultural heritage significance

The submitters argued through expert evidence that the old school building had cultural heritage significance and its demolition would therefore detract from the fabric and setting of the church.

The court observed that the council made a conscious decision not to list the land as a Heritage Precinct on the Heritage Register as, had it done so, it would have included and recognised the heritage values of both the church and the old school building. The council instead listed only the church on the Heritage Register as a heritage place.

The court further observed that the heritage values ascribed to the old school building were based on an independent assessment undertaken by the submitters' expert in the course of the appeal. Accordingly, in effect, the court was being asked to put itself in the place of the council and make an independent assessment of the old school building in the appeal.

The court noted that such an approach, if accepted, would constitute an error of law and consequently, it would not entertain an approach of such kind. The submitters' contention that the old school building had cultural heritage significance was dismissed.

The proposed development would have no unacceptable amenity impact and would not unacceptably impair the view of the church from Taylor Street

The submitters contended that:

- the scale of the proposal would cause an unacceptable amenity impact on the character of the surrounding locality;
- the proposed development would unacceptably impair the view of the church from Taylor Street given its height and bulk, which would be in conflict with the Heritage Place Code of the *Brisbane City Plan 2000*.

The court recognised that the *Brisbane City Plan 2000*, when read as a whole, emphasised the importance of development to be of a density, bulk and scale compatible with surrounding residential areas and not compromise local amenity.

The court accepted that the concerned residents' issues on the amenity impacts of the proposed development were genuinely held, but noted that they must be considered in the context of their reasonable expectations as informed by the applicable planning scheme controls.

The court observed that the land was in the Community Use - Community Facilities (CU-2) Area, which meant that it could be developed for other uses which could have similar amenity impacts to the proposed development, without any input from the surrounding residents.

In this regard, Greengate's visual amenity expert produced overshadowing modelling evidence which illustrated the shadowing that could be expected from the proposed development and a theoretical code compliant proposal on the land.

It was demonstrated that there was very little difference between the overshadowing from the proposed development and the overshadowing from the theoretical code compliant proposal. On this basis, the court was satisfied that the proposal would have no unacceptable amenity impact.

In reliance on the expert evidence, in particular the montage submitted by Greengate's visual amenity expert, the court also found that the proposed development would not unacceptably impair the view of the church from Taylor Street.

The montage represented very closely the view of the church from Taylor Street and it effectively demonstrated that the church would remain a prominent feature despite having buildings on either side. The court therefore was satisfied that the proposed development was not in conflict with the Heritage Place Code.

Relocated pre-1946 dwelling would still be protected by Demolition Code

As the land was within a Demolition Control Precinct, the Demolition Code under the *Brisbane City Plan 2000* applied to the relocation of the pre-1946 dwelling. The court noted that the relocation was in conflict with the Demolition Code, but concluded that the conflict was of a minor nature, particularly given that the dwelling would still be in the Demolition Control Precinct after its relocation and remain protected by the Demolition Code.

Further, any loss to the visual character of Taylor Street as a result of the relocation would commensurately contribute to the visual character of Mossgrove and Queen Bess Street (being the new location of the pre-1946 dwelling), which was also made up of predominantly pre-1946 houses.

Need for proposed development was a sufficient ground to overcome minor conflict with Brisbane City Plan 2000

The court was satisfied that, based on the evidence of economic need and aged care experts, there was a need for a facility of such kind as proposed, particularly given that the land was sited conveniently to public transport and major hospitals.

While the proposed development was in minor conflict with the *Brisbane City Plan 2000*, the court was satisfied that the established need for the proposed development was sufficient to overcome such conflict.

Engaging with local government about your development proposal

Jamon Phelan-Badgery | Ian Wright

This article discusses the obligations of councillors and local government officers when seeking a development approval

March 2014

In brief

When seeking a development approval from the local government, it is useful to understand the basic obligations of councillors and local government officers in performing their functions.

Getting your application right increases your chances of success

To avoid disputes and lessen the overall costs of the development approval process, it is recommended that you:

- seek a recommendation from another developer or the Planning Institute Australia for a good town planner to help you to prepare an application;
- take strategic advice from the town planner and other relevant consultants for the design of the development and the preparation of the development application;
- understand the way the application will be assessed, including its potential weaknesses;
- design a proposal that has planning merit, so that local government officers and councillors can justify a decision to approve it.

Roles and responsibilities of the local government

The local government is ordinarily empowered to administer the planning laws of the relevant State, including the determination of development applications.

These powers must be exercised within the scope of the power, in good faith and with reasonable care.

A local government officer's role is to assess a development application and advise the local government. Occasionally a development application may be decided by an officer exercising a delegated authority from the local government.

A councillor may be involved in a development application in various roles, including as a mediator between interests, an elected community representative and a decision maker.

Political aspects of a development proposal

A development application may be open for public submissions, which the decision maker will be required to consider in deciding whether to give an approval.

If your development is controversial and you wish to engage a councillor as a mediator between you and the interests opposing the proposal, a high level of formality should be expected. The councillor will likely seek delegated authority from the council to assist in negotiations and involve other local government officers in any meetings with you.

You may also approach your elected representative as a member of the public and communicate your views in support of the proposal. However, keep in mind that the councillor has a responsibility to represent the current and future interests of all residents and your views will not be the only views they must consider.

Lobbying activities (such as a professional lobbyist acting for a third party client) may be the subject of State laws. Become familiar with these requirements if you are undertaking lobbying.

In a decision maker role, a councillor will need to keep an open mind until all information is available, including the recommendations of the local government officers and any public submissions.

Balancing the private and public interests involved

Overall, the laws governing planning and development seek to balance the private property interests of landowners and the public interest in orderly development.

Having considered public submissions on a development proposal, the decision must be made in accordance with planning principles and the applicable planning laws, based on the merits of the application. The decision must be made in good faith, which would include avoiding any improper purpose, bias or personal or preferential interest.

Ordinarily, an officer's recommendation will be followed by a local government unless there is a finely balanced planning issue involved and there are good grounds why a contrary decision is justified.

A councillor's overall responsibility is to act in the public interest for the whole local government area. This means the decision must be a decision that a reasonable elected councillor who is not influenced by personal considerations would make.

The role of differential general rates and special rates and charges in funding development infrastructure

Ian Wright | Luke Grayson

This article discusses the scope of the power under the *Local Government Act 2009* and *Local Government Regulation 2012* for Queensland local governments to levy differential general rates and special rates and charges to fund development infrastructure

March 2014

In brief

State and local governments are faced with the onerous responsibility of satisfying the private and community infrastructure needs of the residents of individual local government areas.

Funding is critical to the provision of this infrastructure. It determines the financial independence of the particular local government as well as the rate and type of development within the local government area.

In the last decade, the sources and methods of funding infrastructure have been placed under increasing pressure. Increasing demands have been imposed on State and local governments in relation to the adoption of higher standards of infrastructure provision and greater levels of accountability.

The limited availability of funding has resulted in poor infrastructure services and inhibited the ability of State and local governments to participate in forward planning.

Due to the problems confronted with the funding of infrastructure, legislative changes have been made on a regular basis over the last decade to the powers of State and local governments in relation to the provision of infrastructure with the view to improve the provision of private and community infrastructure.

Conceptual framework for infrastructure funding

infrastructure can be divided into two conceptual categories:

- *Community infrastructure* – this is infrastructure which supports community activity or is available for community use such as public open space, community centres, libraries and schools.
- *Private benefit infrastructure* – this is infrastructure which supports the physical functioning of a community such as water supply, sewerage, roads and flood mitigation works.

In relation to the funding of infrastructure, community infrastructure which benefits the community as a whole is generally funded by State and local governments through taxes whereas private benefit infrastructure is generally funded on a user pays basis by the users of the infrastructure.

However infrastructure cannot be easily classified into community infrastructure and private benefit infrastructure.[1] Rather, there is a continuum of infrastructure from those items that involve a total user subsidy (such as schools, police and prisons) to those where total cost recovery from users may be appropriate (such as power supply, telecommunications and energy). This continuum is shown in Figure 1 – Infrastructure continuum.

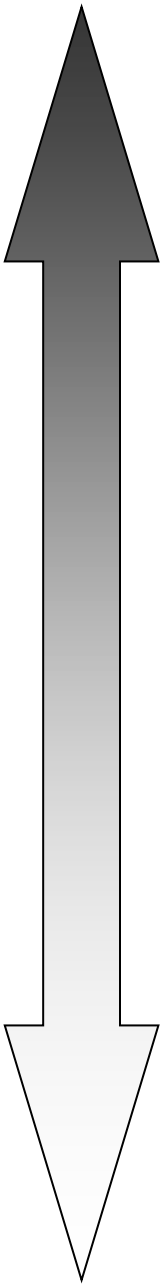
Whilst development infrastructure is generally considered to be private benefit infrastructure and as such is generally provided on a user pays basis, it is important to note that development infrastructure may also provide a broader community benefit.

Where development infrastructure provides a broader community benefit, State and local governments must decide what proportion of the costs of the private benefit infrastructure should be recovered from a landowner or a developer as opposed to being funded from the community through taxes.

1 Spiller, M., *Strategies for Funding Urban Infrastructure – A Response to the Industry Commission Agenda*, 3(2) Urban Futures Journal, 1.

Figure 1 Infrastructure continuum

Items with a high warranted user subsidy component



- Primary Schools
- Secondary Schools
- Metropolitan Open Space
- Emergency Services
- Community Services
- Police
- Community Health Care
- Pre-Schools
- Neighbourhood Centres
- Library Services
- Hospitals
- District Open Space
- Child Care Centres
- Universities and TAFE
- Sporting, Recreation and Cultural Facilities
- Public Transport
- Arterial Roads
- Local Parks
- Dams
- Water Treatment Plants
- Truck Water Mains
- Water Supply Pump Stations, Service
- Reservoirs, Feeder Mains and Lead-in Mains
- Estate Reticulation
- (Sewerage) Water Treatment and Outfall
- Trunk Sewer
- Pump Stations, Intermediate Carriers and Lead-in Mains
- Estate Sewer Reticulation
- District Stormwater Management
- Estate Stormwater Management
- Sub-Arterial Roads
- Distributor Roads
- Trunk Energy
- Estate Roads
- Energy Reticulation
- Telecommunications

Items with a high 'user pays' component

Source: Better Cities Program 1993 – 27-28

Infrastructure funding mechanisms

Relevant legislation

In Queensland, the infrastructure funding mechanisms of a local government are established under the following legislation:

- *Local government legislation* – being the *Local Government Act 2009* (**LGA**) and *Local Government Regulation 2012* (**LGR**).
- *Planning legislation* – being the *Sustainable Planning Act 2009* (**SPA**) and *Sustainable Planning Regulation 2009* (**SPR**).

Local government legislation

Local government legislation empowers a local government to make rates and charges.

Rates and charges are levies that a local government imposes:

- on land;
- for a service, facility or activity that is supplied or undertaken by:
  - the local government; or
  - someone on behalf of the local government (including a garbage collection contractor, for example).

A local government has the power to levy the following four types of rates and charges:

- *General rates (including differential rates)* – These are levies for services, facilities and activities that are supplied or undertaken for the benefit of the community in general (rather than a particular person).
- *Special rates and charges* – These are levies for services, facilities and activities that have a special association with particular land.
- *Utility charges* – These are levies for a service, facility or activity for waste management, gas, sewerage or water utilities.
- *Separate rates and charges* – These are levies for any other service, facility or activity.

Examples of these rates and charges include the following:

- *General rates (including differential rates)* – Examples include general rates which contribute to the cost of roads and library services that benefit the community in general.
- *Special rates and charges* – Examples include special rates and charges for the following:
  - The cost of maintaining a road in an industrial area that is regularly used by heavy vehicles.
  - The cost of replacing the drainage system in only part of the local government area.
  - On land that is used only by businesses that would benefit from the promotion of tourism in the local government area.
- *Utility charges* – Examples include the following:
  - Refuse charges.
  - Water service charges.
  - Wastewater and trade waste charges.
- *Separate rates and charges* – Examples include separate rates and charges for the following:
  - *Environment levy* – to fund expenditure on the development of an environmental policy framework and the implementation of physical/biological, cultural, social and economic environmental initiatives.
  - *State Emergency Service levy* – to fund expenditure for a volunteer State Emergency Service together with the provision of disaster planning and management support for the units.
  - *Waste management facilities levy* – to fund the provision, improvement and management of waste management facilities including landfill sites, transfer stations, weighbridge and waste bins.
  - *Disaster, restoration and resilience levy* – to fund infrastructure restoration projects (such as bridges, roads), funding shortfalls, interest and redemption payments on loans associated with recovery work and community resilience recovery through agreed community recovery programs.
  - *City transport improvement levy* – to fund local roads and to partner with public and private organisations to improve State roads and provide expanded bus services, Council cabs, ferry services, bicycle, pedestrian and rapid transport.

- *Recreational space levy* – to fund the purchase of open space land for active and passive recreational use by the community.
- *Open space preservation levy* – to fund the preservation of open space including the acquisition of land and non-acquisition purposes directly relevant to open space preservation and nature conservation.

It is relevant to note that in the case of the withdrawing Councils (Gold Coast City Council, Logan City Council and Redland City Council) from the Southern SEQ Distributor-Retailer Authority (Allconnex) the power to levy utility charges for a water service or wastewater service (other than a trade waste service) is limited by the capping provisions of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*.

Planning legislation

Planning legislation empowers a local government to fund infrastructure through the following mechanisms:

- Conditions of a development approval.
- Adopted infrastructure charges.
- Infrastructure agreements.

These infrastructure funding mechanisms are based on a concept of infrastructure which is defined as including land, facilities, services and works used for supporting economic activity and meeting environmental needs.[2]

Infrastructure is then relevantly classified into 2 types under planning legislation:

- *State infrastructure* – being State schools infrastructure, public transport infrastructure, State-controlled roads infrastructure, emergency services infrastructure, health infrastructure, freight rail infrastructure, State, urban and rural residential water cycle management infrastructure and justice administration facilities.[3]
- *Development infrastructure* – which is land and works for the following:[4]
  - Urban and rural residential water cycle management infrastructure including infrastructure for water supply, sewerage, collecting water, treating water, stream managing, disposing of waters and flood mitigation.
  - Transport infrastructure including roads, vehicle lay-bys, traffic control devices, dedicated public transport corridors, public parking facilities predominantly servicing a local area, cycle ways, pathways, ferry terminals and the local function (but not any other function) of State-controlled roads.
  - Local public parks infrastructure including playground equipment, playing fields, courts and picnic facilities.
  - Local community facilities including for example community halls or centres, public recreation centres and public libraries.

Development infrastructure is then relevantly classified into 2 categories:

- *Trunk infrastructure* – this is the development infrastructure identified in a priority infrastructure plan.

  Trunk infrastructure is the higher order or shared development infrastructure which is intended to provide network distribution and collection functions to a large number of users within a benefited area catchment. The purpose of trunk infrastructure is to provide a network from which individual users can be serviced. Examples of trunk infrastructure include the following:
  - Bulk water collection, treatment and distribution infrastructure.
  - Sewer mains and sewerage treatment works.
  - Local government provided roads such as arterial or sub-arterial roads in a typical hierarchy, dedicated public transport corridors or works carried out on a State-controlled road to meet local traffic needs.
  - Flood mitigation works servicing an entire catchment.
  - Gross pollutant traps or regional wetlands.
  - Regional and district level playing fields.
- *Non-trunk infrastructure* – this is the development infrastructure which is not trunk infrastructure.[5]

  Non-trunk infrastructure provides a direct user benefit to individual users. The purpose is to provide connections to individual users or mitigate the impact of development on trunk infrastructure. Examples of non-trunk infrastructure include the following:
  - Water and sewer reticulation to lots within a new urban subdivision.

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2 Schedule 3 of the SPA.

3 Schedule 3 of the SPA.

4 Schedule 3 of the SPA.

5 Schedule 3 of the SPA.

- A local access street.
- Provision of a turning lane at an intersection to accommodate increased traffic from a nearby development.
- An on-site stormwater detention basin to ensure new development does not increase the existing runoff from a site.

Relevantly, it is important to note that the State government's Discussion Paper on the Infrastructure Planning and Charging Framework Review released in June 2013 relevantly proposes the following changes to the infrastructure planning and funding framework under the planning legislation:

- Development infrastructure to be limited to essential development infrastructure.
- Trunk infrastructure to include matters currently considered to be non-trunk infrastructure.

Summary of infrastructure funding mechanisms

The mechanisms under local government legislation and planning legislation for a local government to fund infrastructure are summarised in Table 1 – Summary of infrastructure funding mechanisms.

This paper focuses on the use of general rates (including differential general rates) and special rates and charges under local government legislation to fund development infrastructure.

Table 1 Summary of infrastructure funding mechanisms

Conceptual category of infrastructure	Infrastructure (as defined by the SPA)	Local government legislation funding mechanisms				Planning legislation funding mechanisms		
		General rates (including differential general rates)	Special rates and charges	Utility charges	Separate rates and charges	Conditions of a development approval	Adopted infrastructure charges	Infrastructure agreements
Community infrastructure	State infrastructure being State-controlled roads infrastructure.	×	×	×	×	✓	×	✓
	State infrastructure being: – State schools infrastructure – public transport infrastructure – emergency services infrastructure.	×	×	×	×	×	×	✓
	Other community infrastructure.	×	×	×	✓	×	×	✓
Private benefit infrastructure	Development infrastructure.	✓	✓	✓	×	✓	✓	✓
	Other private benefit infrastructure.	×	×	✓	×	✓	×	✓

Rates and charges

Under local government legislation, rates and charges have four fundamental characteristics:

- *Levy* – Rates and charges are levies which are a pure tax (in the case of a general rate) or a fee for service charge (in the case of special rates and charges, utility charges and separate rates and charges).

- *Levy for a local government service, facility or activity* – Rates and charges are levied for the supply or undertaking of local government services, facilities or activities. They are not levied for the supply of services, facilities or activities by other levels of government or by other entities.
- *Levy for a service, facility or activity supplied by a local government* – Rates and charges are levied for the supply or undertaking of services, facilities or activities by a local government or someone on behalf of a local government such as a waste contractor. They are not levied for the supply of a local government activity by an entity other than a local government or someone on behalf of the local government.
- *Levy on land* – Rates and charges are levied on land rather than on the owner of the land personally. This has the following consequences:
  - *Characteristics of land owner irrelevant* – Rates and charges cannot be levied by reference to a characteristic of the owner of the land such as their ability to pay.
  - *Liability attaches to person as a landowner* – A liability for a rate or charge is only binding on a person in their capacity as the current or subsequent owner of the land.

General rates

Under local government legislation, general rates have the following characteristics in addition to those applicable to all rates and charges:

- *Mandatory rate and charge* – General rates must be levied by a local government on all rateable land.
- *Pure tax* – General rates are a pure tax the quantum of which is unrelated to the cost of particular services provided to or received by particular land.
- *Ad valorem tax* – General rates are a tax based on the statutory value of land which is levied as the same cent in the dollar of rateable value for all rateable land.
- *Tax for community benefit infrastructure* – General rates are for services, facilities and activities for the benefit of the community in general (rather than a particular person). General rates are therefore a tax for the provision of community benefit infrastructure rather than a fee for service charge for private benefit infrastructure.

Differential general rates

Under local government legislation differential general rates have the following characteristics in addition to those applicable to general rates:

- *Statutory purpose to eliminate unfairness* – Differential general rates have the objective of enabling there to be a more equitable relationship between the revenue raised from particular land and the circumstances relevant to that land than would be the case with a general rate where a single ad valorem rate is levied for all rateable land.
- *Differential ad valorem taxes* – Differential general rates are a tax based on the statutory value of land which is levied at different rates of cents in the dollar of rateable value for different categories of rateable land.
- *Different categories of rateable land* – Differential general rates are levied on different categories of rateable land by reference to criteria which relate to the attributes of the land and not the attributes of the owner of the land such as the land owner's capacity to pay. Categories created only by reference to real property descriptions as opposed to criteria or characteristics of the land is not permissible.[6] Relevant attributes of the land may include the following:
  - Land use or zoning of the land.[7]
  - Infrastructure and services available to the land.
  - Location of the land.
  - Economic circumstances affecting the land.
  - Environmental issues affecting the land.
- *Differential rates of cents in the dollar of rateable value* – Differential general rates are levied at different rates of cents in the dollar of rateable value for each different category of rateable land. Relevant factors which may be taken into account in deciding the different ad valorem rates include the following:
  - The valuation of land within the category relative to other land.[8]

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6 *Arana Hills Property Pty Ltd v Townsville City Council* (Unreported Qld Supreme Court No. 881 of 7994, 24 February 1995).

7 *Houghton v Brisbane City Council* (1992) 14 QCLR 278.

8 *Sunwater v Burdekin Shire Council* [2002] QSC 433, at [38].

- The use to which the land might be put, including its highest and best use.[9]
- The burden the land or its use may have upon the local government's budget.[10]
- The impact of the use of the land on Council services, including the following:[11]
  - Number of employees on the land.
  - Nature of the business carried out on the land.
- The value of the land including its potential to earn income for the land owner.[12]
- The revenue-producing capacity of the land, including the current use of the land and its use for large-scale income-producing activities (eg power stations):[13]

- *Reasonableness of the differential ad valorem rates* – Differential general rates must not levy differential ad valorem rates which are so unreasonable that no reasonable local government could have imposed those rates. This will be held to occur where the differential ad valorem rates are unjustifiably high or produce an extreme or outrageous result.[14]

Special rates and charges

Under local government legislation, special rates and charges have the following fundamental characteristics in addition to those applicable to all rates and charges:

- *Discretionary rate and charge* – Special rates and charges may only be levied by a local government on particular rateable land.
- *Special association with particular land* – Special rates and charges may be levied for services, facilities and activities that have a special association with particular rateable land because of any of the following:
  - The land or its occupier specially benefits from the service, facility or activity.
  - The land or its occupier has or will have special access to the service, facility or activity.
  - The land is or will be used in a way that specially contributes to the need for the service, facility or activity.
  - The occupier of the land specially contributes to the need for the service, facility or activity.
- *Fee for service charge* – Special rates and charges are a fee for service charge the quantum of which is related to the cost of particular services provided to or received by the particular rateable land.
- *User-pays charge for private benefit infrastructure* – Special rates and charges are for services, facilities and activities for the benefit of particular rateable land rather than the community in general and as such are a fee for service charge for private benefit infrastructure rather than a tax for the provision of community benefit infrastructure.
- *Plans for private benefit infrastructure* – Special rates and charges must be supported by the following plans:
  - *Overall plan* – An overall plan which states the service, facility or activity, the particular rateable land, the estimated cost and time of carrying out the overall plan which must be adopted:
    - before or at the same time as the local government first resolves to levy the special rate and charge; and
    - before any work for the service, facility or activity is commenced.[15]
  - *Annual implementation plan* – An annual implementation plan setting out the actions to be carried out in a relevant financial year for the service, facility or activity which is adopted before or at the budget meeting for each year of the period for carrying out the overall plan even if no works for the service, facility or activity are being carried out for that year.[16]
- *Reasonableness of the user-pays charge* – Special rates and charges must not levy charges which are so unreasonable that no reasonable local government could have imposed those charges. This will be held to occur where the charges are unjustifiably high or produce an extreme or outrageous result.

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9 *Xstrata Coal Qld Pty Ltd and Ors v Council of the Shire of Bowen* [2010] QCA 170, at [21]-[22].

10 *Xstrata Coal Qld Pty Ltd and Ors v Council of the Shire of Bowen* [2010] QCA 170, at [21]-[22].

11 *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2012] 1 Qd R 171, at [93].

12 *Xstrata Coal Qld Pty Ltd and Ors v Council of the Shire of Bowen* [2010] QCA 170, at [21]-[22].

13 *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2012] 1 Qd R 171, at [93].

14 See statements made in *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2012] 1 Qd R 171, at [53]-[57].

15 *Whiting v Somerset Regional Council* [2010] QSC 200, at [29]; *E Cocco &Sons Investments Pty Ltd v Gold Coast City Council* [2014] QSC 10, at [37] and [57].

16 *E Cocco &Sons Investments Pty Ltd v Gold Coast City Council* [2014] QSC 10, at [83]-[85], LGR, section 94(6).

Funding development infrastructure

Differential general rates

Differential general rates cannot be used to levy a differential ad valorem rate for a specified category of land in order to meet the cost of new or proposed infrastructure for that category, as general rates (including differential general rates) are intended to fund community benefit infrastructure rather than private benefit infrastructure. This follows from the following:

- First, general rates are for services, facilities and activities for the benefit of the community in general (rather than a particular person) and as such are a tax for the provision of community benefit infrastructure rather than a fee for service charge for private benefit infrastructure such as development infrastructure.
- Second, the statutory purpose of differential general rates is to eliminate some of the issues of relative inequity which may occur between broad classes of ratepayers from the levying of a single ad valorem rate on all rateable land. The purpose is not to tax particular rateable land to recover the cost of trunk development infrastructure required to service that particular land.

Special rates and charges

Special rates and charges cannot be levied for particular rateable land in order to meet the gap for the development of the rateable land arising from the difference between an infrastructure charge (calculated using a short-run marginal cost methodology under a priority infrastructure plan) and an adopted infrastructure charge (calculated using a capped average cost methodology under an adopted infrastructure charges resolution) intended to fund trunk infrastructure. This follows from the following:

- First, special rates and charges are for the carrying out of services, facilities and activities that have a special association with particular land and which are to be identified in an overall plan before being carried out.
- Second, trunk infrastructure is the higher order or shared development infrastructure which is intended to provide network distribution and collection functions to a large number of users within a benefited area catchment. The purpose of trunk infrastructure is to provide a network from which individual users can be serviced. The trunk infrastructure required to service a benefited area catchment therefore does not have the requisite "special association with particular land" located with the benefited area catchment to satisfy that test for a special rate and charge.
- Third, infrastructure charges and adopted infrastructure charges are intended to fund trunk infrastructure identified in a priority infrastructure plan some of which may have already been carried out in terms of the provision of land or works contributions for trunk infrastructure. Existing work cannot be the subject of an overall plan or a resolution for special rates and charges which can only relate to the carrying out of future work.
- Fourth, the levying and receipt of infrastructure charges and adopted infrastructure charges does not impose a legal obligation on a local government to provide the relevant trunk infrastructure whereas the levying and receipt of special rates and charges requires the local government to carry out the relevant service, facility or activity or to refund the special rates and charges to the relevant land owner.
- Fifth, whilst a resolution or overall plan for special rates and charges is not invalid merely because the resolution or overall plan does not identify all rateable land to which the special rate or charge could have been levied, the failure to include all rateable land is likely to result in the special rate and charge being held to be unreasonable if the special rates and charges on the rateable land is unjustifiably high or produces an extreme or outrageous result that would not have been the case had all the relevant rateable land been included.
- Sixth, special rates and charges are concerned with funding the estimated cost of carrying out the overall plan for the service, facility or activity having a special association with particular rateable land whereas an infrastructure charge is concerned with funding the short-run marginal cost that is the incremental cost for the provision of development infrastructure to fund future development. That is, the cost that is being funded by a special rate and charge and an infrastructure charge is different.

Guideposts for minimising infrastructure costs

General differential rates and special rates and charges therefore only offer limited opportunity to fund the development infrastructure required to service future growth.

A local government which is confronted with limited financial capacity to fund the development infrastructure required to service future growth should prudently adopt infrastructure planning and funding policies which will improve and not exacerbate its financial sustainability.

The following guideposts for infrastructure planning and funding policies should be considered in such circumstances:

- First, an integrated infrastructure planning model – This could be based on the following policies:
  - First, the planning assumptions for the planning scheme and the priority infrastructure plan should be based on the low-medium series growth projections and not the high series growth projections.
  - Second, projected growth should be provided for within the existing priority infrastructure area where possible by reducing lot sizes and providing for dual occupancy and other low to medium density residential development.
  - Third, the priority infrastructure area should only be extended to those development fronts that require the least cost and which the local government has the financial capacity to fund.
- Second, an integrated infrastructure funding model – This could be based on the following policies:
  - First, development outside of the priority infrastructure area or in the priority infrastructure plan but inconsistent with the planning assumptions, should be subject to conditions of development approval requiring financial contributions for additional trunk infrastructure costs.
  - Second, a conservative infrastructure offsets policy involving the following:
    - Offsets are strictly limited to trunk infrastructure.
    - No cross crediting between infrastructure networks.
    - Valuation of land and work contributions is based on the lower of the actual and planned values (rather than actual values).
  - Third, a conservative refunding policy involving the following:
    - The payment of refunds only from adopted infrastructure charges received from development within the catchment serviced by the trunk development infrastructure which has been provided.
    - The payment of refunds for only that proportion of an adopted infrastructure charge allocated to the relevant infrastructure network.
  - Fourth, a conservative capital works program which is limited to only essential trunk development infrastructure and the provision of trunk development infrastructure at a lower standard of service.
  - Fifth, increased revenue from rates and charges involving the following:
    - A review of the differential general rating system to remove cross subsidies.
    - Separate rates and charges to fund community benefit infrastructure such as the environment, parkland, open space, community facilities, pedestrian and bikeways and other local government facilities such as emergency services.
- Third, property development to fund trunk infrastructure – A local government could review its land holdings to identify land in proximity to proposed development infrastructure which could be developed by the local government or someone on behalf of the local government to fund the development infrastructure.

Conclusions

In conclusion, whilst general differential rates and special rates and charges provide limited opportunity to fund the development infrastructure required to service future growth, a local government appropriately can implement other infrastructure planning and funding policies to manage the funding of development infrastructure consistent with its financial sustainability.

Successful party ordered to bear own costs: a reminder that winners are not always grinners

Ronald Yuen | Dimitri Simianakis

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cox & Ors v Brisbane City Council and Anor (No. 2)* [2013] QPEC 78 heard before Rackemann DCJ

April 2014

In brief

In *Cox & Ors v Brisbane City Council and Anor (No. 2)* [2013] QPEC 78, an application for costs by Childhood Cancer Support Inc has resulted in the Queensland Planning and Environment Court exercising the discretion provided by the new costs provisions of the *Sustainable Planning Act 2009* by ordering that each party bear its own costs.

Unsuccessful appeal against development approval was nevertheless based on legitimate interests

Childhood Cancer Support Inc sought a costs order following an unsuccessful submitter appeal by local residents against the council's approval of a development application for a multi-unit development in Herston, Brisbane. The concerns of the local residents included the alleged over-development of the site and associated amenity and privacy issues. While Childhood Cancer Support Inc successfully resisted the appeal, additional conditions were imposed by the court to address visual and amenity impacts of the proposed development.

Section 457 of the *Sustainable Planning Act 2009*, to which the appeal was subject, provides the court with an open discretion to determine whether to award costs. This discretion must be exercised judicially and have regard to relevant circumstances, including the parties' relative success and their interests and conduct, both leading up to and in the proceeding.

The court considered the local residents had a legitimate interest in the matter and acted reasonably both leading up to and in the proceeding. Whilst Childhood Cancer Support Inc was successful, on balance, the court exercised the discretion by ordering that each party bear its own costs.

Local residents' concern for the protection of amenity given greater weight than claims to commercial rental interests

Childhood Cancer Support Inc submitted that the interest of those local residents who owned rental properties could properly be described as commercial for the purpose of section 457(2)(b) of the *Sustainable Planning Act 2009*, notwithstanding that they might not be commercial competitors in the conventional sense.

The court noted that the weight which would be placed on the commercial interests of the parties, in exercising its discretion, would vary based on the circumstances. In this instance, the court observed that those residents' interest was an understandable concern for the protection of amenity and as such, was not inclined to give great weight to the commercial nature of the interest of those residents.

Charity status had no substantial bearing on court's exercise of discretion over costs

Childhood Cancer Support Inc contended that as it was a charity, the costs it bore from the appeal were from donations or from the limited resources received from government. The court found it difficult to see why it would have a substantial bearing on the exercise of the court's discretion, which Childhood Cancer Support Inc acknowledged.

Court rejected claim that the local residents' case was unmeritorious

Childhood Cancer Support Inc submitted that the issues raised by the local residents, which focussed on compliance with the planning scheme and the acceptability of amenity issues were not strongly arguable.

While the court ultimately concluded that the relevant performance criteria under the relevant codes in the planning scheme were met, the court noted that it was not a foregone conclusion, given that the proposed development was substantially at odds with the acceptable solutions in the relevant codes and the compliance of the relevant performance criteria was assessed based on evaluative judgment, rather than objective specific measurement.

Similarly, the acceptability of amenity issues required an evaluative assessment, which was open to another view, despite the court finding the amenity impacts to be acceptable. The court therefore did not accept the submission made by Childhood Cancer Support Inc that "the case of all the appellants at trial was so unmeritorious that the hearing was not necessary" and did not consider it to be appropriate to make a costs order on the basis of section 457(2)(d) of the *Sustainable Planning Act 2009*.

Court did not consider the relatively lesser level of the likely impact on some of the residents should necessarily lead to a costs order against them

In support of its costs application, Childhood Cancer Support Inc submitted that there were no findings that any of the residents, with one exception, would be significantly impacted by the proposed development.

The court accepted that the potential impacts on other residents were of a markedly lower level than for the excepted property. However, the court did not consider that the relatively lesser level of the likely impact on other residents would necessarily lead to a costs order against them.

This was further supported by the court's findings that the residents had a legitimate interest in the matters of concern and had acted reasonably and that the case was reasonably arguable.

Order for parties to bear own costs on the basis of legitimate interest despite rejection of appeal against development approval

The court acknowledged that Childhood Cancer Support Inc was ultimately successful in resisting the appeal. However, on balance, the court believed that it was appropriate for each party to bear their own costs, particularly having regard to the interests and conduct of the local residents, namely:

- they had a legitimate interest in the matters of concern;
- they raised bona fide matters of town planning evidence, which were supported by the professional opinions of a qualified and experienced town planner;
- they acted reasonably both leading up to and in the proceeding;
- they ran a unitary and respectable case.

Similarly, the court dismissed the application by the local residents for their costs of resisting the costs application made by Childhood Cancer Support Inc, on the grounds that Childhood Cancer Support Inc had an arguable basis for seeking the favourable exercise of the court's discretion since it was successful in the appeal.

The court therefore ordered that each party bear their own costs of the proceeding, which included their costs associated with the application for costs.

Approval of an expansion of a cattle feedlot on the Darling Downs

Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Morgan v Toowoomba Regional Council & Ors and Allen v Toowoomba Regional Council & Ors* [2013] QPEC 58 heard before Durward SC DCJ

April 2014

In brief

In the case of *Morgan v Toowoomba Regional Council & Ors and Allen v Toowoomba Regional Council & Ors* [2013] QPEC 58, the Queensland Planning and Environment Court heard two appeals relating to a development approval for a material change of use for the expansion of a cattle feedlot on land located at Irvingdale. The issues for the court to determine primarily related to air quality, odour emissions and operational competency.

In one appeal, the developer, Peter Morgan, appealed against the conditions imposed by the Toowoomba Regional Council under the development approval. In the other appeal, David Allen, a submitter, appealed against the council's decision to approve the development.

The court dismissed Mr Allen's appeal and allowed Mr Morgan's appeal subject to conditions. The court also awarded costs against Mr and Ms McInnerney for the introduction of additional new evidence during the hearing.

Conflicting methodologies used by parties to argue separation distance between feedlot development and other uses

In deciding whether the proposed development adversely impacted on the air quality and odour emissions on other uses in the area, the court had to resolve conflicting methodologies in respect of determining the appropriate separation distances between those uses.

The developer, Mr Morgan, contended that:

- the appropriate separation distances should be ascertained by applying the "S Factor" method set out in the "Reference Manual for the Establishment and Operation of Beef Cattle Feedlots in Queensland". prepared by DPIF, and dated 2005 (**Feedlot Reference Manual**);
- the Feedlot Reference Manual had been successfully used at a number of other feedlot sites in most states in Australia; and
- when adopting the "S Factor" method the results indicated that the development, subject to relevant conditions, complied with the requirements of the Feedlot Reference Manual and provided for adequate separation distances between the proposed development and other uses in the area.

The submitter, Mr Allen, contended that:

- odour modelling should be carried out and relied upon when determining the appropriate separation distance between the proposed development and other uses in the area;
- odour modelling had been supported by a number of research documents and was applied in the case of *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112;
- the results of the odour modelling indicated that the required separation distances between the proposed development and uses in the area were significantly exceeded.

Feedlot Reference Manual accepted by court as appropriate method to assess adverse impacts

The court found in favour of the methodology adopted by the developer on the basis that:

- Mr Allen's approach contained three distinct errors relating to:
  - wind direction and movement resulting from errors in topography;
  - the configuration, size and dimension of the manure stockpile to be located on the site;
  - the size of cattle pens;

- the objective of the Feedlot Reference Manual was to limit any adverse impacts and unreasonable interference with the amenity of neighbours to cattle feedlots;
- the proposed development would meet the requirements prescribed under the Feedlot Reference Manual and therefore, should meet the reasonable expectations of the residents in the area; and
- there would be no adverse air quality and odour impacts provided the proposed development be conditioned in accordance with the council's draft conditions of approval and draft conditions imposed by the Department of Agriculture, Fisheries and Forestry (as refined over the course of the hearing).

Operational competency and capacity to comply with approval conditions called into question

The operational competency of Mr Morgan and his management team was called into question by Mr and Ms McInnerney and Ms Reimers in the Allen appeal.

Mr and Ms McInnerney and Ms Reimers contended that in the existing feedlot operation, Mr Morgan had not been able to comply with the conditions of his existing development approval. Consequently there was no certainty that Mr Morgan would comply with any approval of the proposed development granted by the court.

In support of their contentions, Mr and Ms McInnerney and Ms Reimers sought to rely on a number of complaints that had been made to the council in respect of the operations of the existing feedlot operation.

In response Mr Morgan submitted that:

- the complaints were not relevant to the determination of the appeals as they related to the existing feedlot operations;
- the complaints resulted from the existing stockpile of manure which had already been removed; and
- the complaints had not been independently validated.

The court, although accepting the evidence of Mr and Ms McInnerney and Ms Reimers noted that:

- some aspects of the material put forward was strictly inadmissible and consequently no weight was given to it;
- the existing feedlot operations commenced prior to the introduction of the Feedlot Reference Manual and hence at that time, it was unclear as to the appropriate operating and maintenance procedures to follow;
- Mr Morgan, upon being advised of the complaints, took steps to deal with those complaints; and
- no serious action was taken against Mr Morgan by the council or the Department of Environment and Heritage Protection in respect of the existing facilities.

Conditions imposed by the council deemed to satisfy concerns raised by the submitters

Prior to the hearing of the appeals, a set of draft conditions of approval was agreed to by the council and Mr Morgan, which were refined over the course of the hearing to address the concerns and issues of Mr Allen and the submitters who had elected to join the appeals.

In this regard, the court noted that:

- the traffic, roads, noise, dust and landscaping issues had been resolved over the course of the hearing and consequently were not the subject of determination; and
- the issues associated with air quality and odour were appropriately addressed in the council's draft conditions of approval and draft conditions imposed by the Department of Agriculture, Fisheries and Forestry (as refined over the course of the hearing).

Costs awarded against Mr and Ms McInnerney for the introduction of additional new evidence

The court also awarded costs against Mr and Ms McInnerney for introducing new evidence during the hearing.

In the course of the hearing, Mr and Ms McInnerney sought leave from the court to introduce new evidence by their air quality and odour expert in respect of the appropriateness of the odour modelling.

Consequently, Mr and Ms McInnerney were ordered by the court to pay the costs incurred by each of the parties of and incidental to the introduction of the further evidence.

COLIN BIGGERS & PAISLEY LAWYERS

English High Court narrows the scope for legal challenges of Environmental Impact Assessments

Ian Wright | Monica Wilkie

This article discusses the decision of the Queen's Bench Division Administrative Court of the English High Court in the matter

April 2014

In brief

The case of *Bishop's Stortford Civic Federation v East Hertfordshire District Council & Ors* [2014] EWHC 348 involved an appeal to the Queen's Bench Division Administrative Court of the English High Court. The appeal was sought by the Bishop's Stortford Civic Federation against East Hertford District Council and Anley Trustees Limited and Maison Anley Property Nominee Limited, who together represented Henderson Global Investors Limited.

The Federation, via an application for judicial review, appealed the council's decision to grant planning permission to Henderson Global Investors. His Honour Judge Cranston heard the appeal, which was sought on the following grounds:

- there was a prejudicial outcome as a result of a non-planning committee member attending and addressing a committee meeting which made a significant planning decision;
- unfairness was caused by an alleged technical breach of a regulation by failing to provide the opportunity to comment.

His Honour rejected both grounds, and consequently dismissed the appeal.

High Court considered whether participation of non-planning committee members in committee meeting was prejudicial

The first ground of appeal was whether the council's decision to allow non-planning committee members, in particular Councillor Tindale, to attend and make an address at the committee meeting was prejudicial to the Federation, since the meeting granted Henderson Global Investors planning permission.

"Polluting the well": claim that non-planning councillor's intervention was motivated by a wish to gain advantage for planning applicant

The Federation submitted that Councillor Tindale's attendance and speech at the council executive's planning committee meeting "polluted the well". It was also argued that Councillor Tindale's intervention significantly influenced the planning committee's decision, that his motivation for his address was to influence the committee, and that he spoke at a time that was strategic and advantageous to Henderson Global Investors' plans. The Federation concluded this point by arguing that it could not be said with certainty that the committee's decision to approve the plans would have been the same regardless of Councillor Tindale's speech, since the plans were approved "by the narrowest of margins".

His Honour found that Councillor Tindale did not "pollute the well" with his address and he did not mislead the committee or suggest that the principle of the mixed-use development had already been approved at a previous full council meeting. His Honour noted the irrelevance of Councillor Tindale's motivations for addressing the committee, given that the point of contention was the impact of his words, not his motivations.

No express prohibition on attendance by non-planning councillor

His Honour was not convinced Councillor Tindale's address affected the committee members' ability to reach a proper decision. Councillor Tindale had a right to attend and address the committee meeting. While the council's constitution did not expressly allow attendance of non-planning committee members, his Honour noted that unless there is an express provision preventing attendance, "the law is that … any councillor can, with the committee's permission … attend and address it" with the exception of any apparent prejudicial or personal interest, which was not the case here.

Court upheld integrity of committee members and rejected notion that councillors ought to "explain their voting"

In his speech, Councillor Tindale referred to a prior decision made between Henderson Global Investors and the council which concerned the redevelopment of the site as a mixed-use development. His Honour rejected the notion that mention of this, among other things, influenced a decision that would have otherwise been different. He noted that the councillors, having integrity in their positions, would only give consideration to planning matters and this decision did not constitute a planning matter. To suggest that the planning committee would have voted differently but for Councillor Tindale's speech would undermine the committee's ability to make informed and independent decisions based on all the information provided. Further, to ask that councillors "explain their voting is especially to be deplored. Prudence is the sensible judicial approach in this context."

Claim that the council failed to provide the opportunity to comment on environmental impact assessment, which amounted to unfairness and a breach of a regulation

The second ground of appeal was whether the council was in breach of what was then regulation 19 of the *Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulation 1999* by failing to provide the Federation and others the opportunity to comment on additional documents submitted by Henderson Global Investors after outline permission had been granted. It was challenged that the council's actions, in this respect, were "unfair".

The Federation submitted that the council acted unfairly by granting planning permission and not providing the Federation and others the opportunity to comment on the additional documents submitted by Henderson Global Investors. These documents were the Environmental Statement Addendum and a Supplementary Planning Statement, which were provided after the creation of the Government's National Planning Policy Framework (**NPPF**), which replaced the planning policies considered in the development application.

Documents available via planning file but not conventionally publicised - a fair opportunity to be informed?

The Federation argued that the council failed to follow the requirements under the then regulation 19 of the Regulation (now regulation 22 of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2011* SI 2011). This included providing a fair opportunity to be informed of the further information relating to the development application which had not been published in the required manner. The documents were available via the planning file but there was no public consultation process. The Federation further argued that the Addendum contained substantive information that was captured by regulation 19(1) and (2) of the Regulation as both "further information" and "any other information" respectively. The information should have been publicised to allow parties like the Federation to "make representations, which it would have done".

No unfairness despite lack of adequate publishing practice

His Honour found there was no unfairness, although he conceded that a better publishing practice could have been adopted. Nevertheless, the documents were placed on the planning file, and the Federation had the opportunity to comment. The introduction of the NPPF did not affect the substance and effect of Henderson Global Investors' application. Further, it was concluded that the additional information provided by Henderson Global Investors was only an update and did not contain information relevant for planning considerations at the meeting; it was not substantive information and therefore was not captured under regulation 19 of the Regulation. If it was captured under the Regulation, this breach and unfairness would be entirely technical. In this case, however, his Honour found that the breach would not have resulted in a different outcome. Further, he would have "withheld a remedy because there was no substantial prejudice to the Federation".

Court rejected appeal finding no prejudice or unfairness from attendance of non-planning committee member and technical breach

His Honour rejected both claims on the grounds that the decision of the committee was not prejudiced by Councillor Tindale's presence as they were able to exercise proper and independent discretion. There was also no unfairness to the Federation as a result of what his Honour concluded was a technical breach of the regulation. The granting of planning permission to Henderson Global Investors was upheld.

Application for costs dismissed as appeals invalidly commenced

Ben Caldwell

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Yeats Consulting Pty Ltd T/A Sedgman Yeats v Logan City Council* [2014] QPEC 2 heard before Searles DCJ

April 2014

In brief

In *Yeats Consulting Pty Ltd T/A Sedgman Yeats v Logan City Council* [2014] QPEC 2 the Queensland Planning and Environment Court has dismissed an application for costs by Yeats Consulting Pty Ltd and Yeats & Associates Pty Ltd in respect of two appeals each of them had commenced against environmental protection orders issued by the Logan City Council on the grounds that the court had no jurisdiction to hear the appeals.

The court determined that as the appeals against the environmental protection orders, issued under section 358 of the *Environmental Protection Act 1994*, were commenced prior to seeking an internal review of the council's decision, the court had no jurisdiction to hear the appeals and the application for costs was therefore dismissed.

Jurisdiction to hear the appeals

Sections 521 and 531 of the *Environmental Protection Act 1994* require that prior to commencing an appeal against an environmental protection order issued by a local government under section 358 of that Act, the recipient of the order must first seek an internal review of the decision to issue the order unless the decision was made by the local government itself; or the local government's chief executive officer personally.

The purpose of the internal review as referenced in the explanatory notes was "whilst matters of policy may not be resolved by the review of a decision, technical mistakes or misunderstandings may be resolved without reference to the court."

Was the decision to issue the environmental protection orders made by the local government itself or the chief executive officer personally?

The environmental protection orders were issued by a development compliance officer pursuant to a delegation from the council. Despite the orders being issued by the officer, as the officer's signature was accompanied by words to the effect that it was on behalf of the council's chief executive officer, Yeats Consulting and Yeats & Associates contended that:

- the decision to issue the environmental protection orders had been made by the chief executive officer personally;
- it was therefore not required to seek an internal review prior to commencing the appeals in the Queensland Planning and Environment Court.

The council responded that the environmental protection orders made it clear that they were issued by the council acting through its delegated officer. This was also supported by the content of the orders which identified that an internal review was available and such a request should be made to the chief executive officer. Such a review would not be possible if the environmental protection orders had been issued by the local government itself or the chief executive officer personally.

Court found that internal review of the decision to issue the environmental protection orders should have been sought

The court rejected the contention made by Yeats Consulting and Yeats & Associates. In making this finding, the court noted that the inclusion of the words on behalf of the chief executive officer on correspondence was used to identify official correspondence and it obviously did not mean that the chief executive officer had personally attended to all such correspondence.

The court therefore found that the appeals against the environmental protection orders were invalid as they had been commenced without first seeking an internal review of the decision to issue the orders. The court therefore dismissed the application for costs.

Reform of the Queensland infrastructure planning and charging framework

Ian Wright | Luke Grayson

This article discusses the reform of infrastructure planning and charging in Queensland

April 2014

Introduction

DSDIP discussion paper

On 28 June 2013, the Queensland Department of State Development, Infrastructure and Planning (**DSDIP**) released a discussion paper on the review of Queensland's infrastructure planning and charging framework (**Discussion Paper**).[17]

The Discussion Paper identified a three stage reform process:[18]

- public consultation from 1 July 2013 to 9 August 2013;
- government review and policy decision-making from 10 August 2013 to late 2013;
- implementation from 1 July 2014.

Draft Bill for consultation

On 17 April 2014, DSDIP released for consultation the following:

- *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014* (**Draft Bill**) and explanatory notes (**Explanatory Notes**).
- Fair Value Essential Infrastructure List and Fair Value Infrastructure Charges Schedule.

The Draft Bill proposes an infrastructure planning and charging framework (proposed capped framework) which differs from the current capped framework and the previous uncapped framework:

- *Current capped framework* – The current framework of maximum adopted infrastructure charges was introduced from 1 July 2011 (**current capped framework**).[19]
- *Previous uncapped framework* – The previous framework of uncapped infrastructure charges existed from 2003 to 30 June 2011 (**previous uncapped framework**).[20]

The Draft Bill establishes a proposed capped framework for local governments.

The proposed capped framework for distributor-retailers is proposed to be included in the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**).

The proposed capped framework for local governments and distributor-retailers is intended to be materially the same, subject to any changes which may be required as a result of the implementation of the utility model for distributor-retailers.

Themes of the presentation

This presentation has three themes:

- First, the key elements of the proposed capped framework are considered in the context of the current capped framework and previous uncapped framework, to identify the legal and practical implications for applicants and local governments.
- Second, the policy implications of the proposed capped framework are considered in the context of the current capped framework and previous uncapped framework.

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17 Discussion Paper: *Infrastructure planning and charging framework review – Options for the reform of Queensland's local infrastructure planning and charges framework*, Department of State Development, Infrastructure and Planning 28 June 2013.

18 Discussion Paper, page 8.

19 See Chapter 8 (Infrastructure) Part 2 (Infrastructure planning and funding) Division 5A (Trunk Infrastructure funding and related matters – adopted infrastructure charges) of the *Sustainable Planning Act 2009*.

20 See Chapter 5 (Miscellaneous) Part 1 (Infrastructure planning and funding) of the *Integrated Planning Act 1997* inserted by the *Integrated Planning and Other Legislation Amendment Act 2003* No. 64, section 22.

- Finally, some concluding observations are offered for the legal, practical and policy implications of the proposed capped framework.

Legal and practical implications of the proposed capped framework

Key elements of the proposed capped framework

The proposed capped framework comprises the following key elements:

- infrastructure scope;
- identification of trunk and non-trunk infrastructure;
- infrastructure planning instrument;
- State infrastructure charging instrument;
- local infrastructure charging instrument;
- infrastructure charge;
- development charge;
- provision of trunk and non-trunk infrastructure;
- offsets and refunds for trunk infrastructure and development charge;
- State infrastructure provider powers;
- infrastructure agreements;
- appeals.

Infrastructure scope

The proposed capped framework is based on a definition of development infrastructure which is materially the same as the current capped framework and previous uncapped framework, other than for the deletion of the local function of State-controlled roads from the transport infrastructure component of development infrastructure.[21]

A more limited infrastructure scope identified as the Fair Value Essential Infrastructure List has been prepared by DSDIP for the purpose of informing the calculation of a Fair Value Infrastructure Charges Schedule which, if adopted by a local government or distributor-retailer, may provide access to co-investment funding by the State government for catalyst infrastructure.[22]

The details of the co-investment funding arrangements are yet to be determined but are intended to be focused on major developers due to the scale of their projects.[23]

Identification of trunk and non-trunk infrastructure

The proposed capped framework, like the current capped framework and previous uncapped framework, empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called a **LGIP**); with development infrastructure not identified as trunk infrastructure in the LGIP considered to be non-trunk infrastructure.[24]

However under the proposed capped framework, if a local government has imposed a condition of a development approval requiring the provision of non-trunk infrastructure and the construction of the non-trunk infrastructure has not started, the applicant can make an application to the local government (called a conversion application) to convert the non-trunk infrastructure to trunk infrastructure.[25]

The identification of trunk and non-trunk infrastructure under the proposed capped framework is therefore the same as the current capped framework and previous uncapped framework, but for the significant policy change of an applicant being able to make a conversion application.

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21 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

22 The Honourable Jeff Seeney, Deputy Premier, Minister for State Development, Infrastructure and Planning, Media Statement, Thursday, 17 April 2014.

23 Coutts J, *Infrastructure charging and planning reforms*, Department of State Development, Infrastructure and Planning 30 April 2014.

24 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

25 See proposed new sections 658 (Application of sdiv 1) and 659 (Application to convert infrastructure to trunk infrastructure) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

Infrastructure planning instrument

The proposed capped framework, like the current capped framework and previous uncapped framework, requires a local government to prepare a LGIP[26]; with existing local government Priority Infrastructure Plans (**PIP**) and the infrastructure planning components of adopted infrastructure charges resolutions (called saved provisions) prepared under the current capped framework being transitioned as a deemed LGIP.[27]

The LGIP forms part of the planning scheme and does any or all of the following:[28]

- *Priority Infrastructure Area* – It identifies the Priority Infrastructure Area (**PIA**) being the area which:[29]
  - is used or approved for use for purposes other than rural or rural residential purposes (defined as **non-rural purposes**);[30]
  - is serviced or intended to be serviced with development infrastructure networks; and
  - will accommodate between 10-15 years of growth for non-rural purposes.
- *Planning assumptions* – It states the assumptions about population and employment growth and the type, scale, location and timing of future development.
- *Plans for trunk infrastructure* – It contains the plans for trunk infrastructure the local government intends to provide or for which it intends to give infrastructure charges notices.
- *Desired standard of service* – It states the desired standard of service for development infrastructure.

The LGIP under the proposed capped framework is similar to the PIP under the current capped framework and previous uncapped framework.

State infrastructure charging instrument

The proposed capped framework, like the current capped framework, empowers the Minister to prepare a State planning regulatory provision (called a **SPRP** (**adopted charges**)).[31]

The existing State Planning Regulatory Provision (adopted charges) dated July 2012 (**existing SPRP**) made under the current capped framework is deemed to be the SPRP (adopted charges).[32]

The SPRP (adopted charges) may do the following:

- *Maximum adopted charge* – It may state a maximum amount for an adopted charge.[33] This may subsequently be changed by the Minister by a gazette notice, but cannot be increased by more than the 3 year moving average annual percentage increase in the PPI index for the preceding 3 years.[34]
- *Charges breakup* – It may state the proportion of the maximum adopted charge between a local government and distributor-retailer[35] (called the **charges breakup**).[36]
- *Permitted development* – It may state development for which there may be an adopted charge.[37]
- *Methodology for calculating the cost of infrastructure for an offset and refund* – It may state the parameters for the methodology of calculating the cost of infrastructure for an offset and refund.[38]

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26 See proposed new sections 91A(1) (Requirement to review LGIP) and 117(1A) (Process for making or amending local planning instruments) in section 4 (Insertion of new s91A) and 5 (Amendment of s117 (Process for making or amending local planning instruments)) of the Draft Bill, respectively.

27 See proposed new sections 980 (PIP to LGIP) and 977(6) (Charges resolutions until 1 July 2016) in section 18 (Insertion of new ch 10, pt 11) of the Draft Bill.

28 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

29 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

30 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

31 See proposed new section 629(1) (State planning regulatory provision governing charges) in section 18 (Insertion of new ch 10, pt 11) of the Draft Bill; cf section 648B (Charges for infrastructure under State planning regulatory provisions of the *Sustainable Planning Act 2009*.

32 See proposed new section 981(1) (Existing SPRP for adopted charges) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

33 See proposed new section 629(1) (State planning regulatory provision governing charges) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

34 See proposed new sections 629(2) and (3) (State planning regulatory provision governing charges) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

35 See proposed new section 629(4)(a) (State planning regulatory provision governing charges) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

36 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

37 See proposed new section 629(4)(b) (State planning regulatory provision governing charges) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

38 See proposed new section 629(4)(c) (State planning regulatory provision governing charges) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

The SPRP (adopted charges) will be similar to the existing SPRP under the current capped framework other than for the inclusion of permitted development and the methodology for calculating the cost of infrastructure for an offset and refund.

Local infrastructure charging instrument

The proposed capped framework, like the current capped framework, empowers a local government to adopt a resolution (called a **charges resolution**) which must state the following:[39]

- *Effective date* – The charges resolution must state the date it takes effect.[40] The charges resolution takes effect on:[41]
  - if it is uploaded to the local government's website before the beginning of the identified date, on the identified date; or
  - if it is uploaded to the local government's website after the beginning of the identified date, on the day it is uploaded.
- *Adopted charges* – The charges resolution may state a charge for providing trunk infrastructure for development (called an **adopted charge**)[42] which must be consistent with the SPRP (**adopted charges**) in the following respects:[43]
  - *Permitted development* – The adopted charge must be for development for which an adopted charge is permitted.
  - *Maximum adopted charge* – The adopted charge must be for no more than the maximum adopted charge.
- *Automatic increase provision* – The charges resolution may provide for increases in a levied charge from the date it is levied to the date it is paid (called an **automatic increase provision**).[44] This cannot provide for an increase in the levied charge that is greater than the maximum adopted charge or the 3 yearly PPI index average.[45]
- *Charges breakup* – The charges resolution must state the charges breakup between the local government and distributor-retailer for all adopted charges.[46]
- *Applicable area* – The charges resolution may declare the part of the local government area to which the adopted charges are to apply.[47]
- *Methodology for the calculation of the cost of infrastructure for an offset and refund* – The resolution must include a methodology for working out the cost of infrastructure the subject of an offset and refund being the trunk infrastructure identified in the LGIP or non-trunk infrastructure which is converted to trunk infrastructure by a conversion application.[48] The methodology must be consistent with the SPRP (adopted charges) and any Ministerial guideline prescribed by a regulation.[49]

In essence the charges resolution under the proposed capped framework is similar to the adopted infrastructure charges resolution under the current capped framework other than for the inclusion of the methodology for the calculation of the cost of infrastructure for an offset and refund.

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39 See proposed new section 630(1) (Power to adopt by resolution) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill; cf section 648D (Local government may decide matters about charges for infrastructure under State planning regulatory provisions) of the *Sustainable Planning Act 2009*.

40 See proposed new section 630(3) (Power to adopt by resolution) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

41 See proposed new section 634(2) (Steps after making charges resolution) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

42 See proposed new section 630(1) (Power to adopt by resolution) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

43 See proposed new section 631(1) (Contents general) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

44 See proposed new sections 631(3) to (6) (Contents general) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

45 See proposed new sections 631(5) to (6) (Contents general) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

46 See proposed new section 632(4) (Provisions for participating local governments and distributor-retailers) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

47 See proposed new section 631(3)(a) (Contents general) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

48 See proposed new section 633(1) (Methodology for working out infrastructure costs) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

49 See proposed new section 633(2) (Methodology for working out infrastructure costs) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

Infrastructure charge

The proposed capped framework, like the current capped framework, empowers a local government to give an applicant an infrastructure charges notice (called an **ICN**)[50] which levies a charge in accordance with the adopted charge (called a **levied charge**).[51]

Infrastructure charges notice

An ICN under the proposed capped framework is materially the same as the current capped framework and previous uncapped framework other than for the following:

- *Local government development approval* – An ICN can only be given for a development approval given by a local government such that an ICN cannot be given for a development approval of a private certifier for self-assessable development under a local government's planning scheme.[52]
- *Form of the ICN* – The ICN must state the following matters in addition to those provided for under the current capped framework:
  - *Information notice* – The ICN must state the reasons for the decision and details of the appeal rights.[53]
  - *Details of the calculation of the levied charge* – The ICN must state how the amount of the levied charge has been worked out.[54]
  - *Details of an offset or refund* – The ICN must state whether an offset or refund applies and if so, the details of the offset or refund.[55]
  - *Establishment cost* – In order to identify the offset and refund it will be necessary to work out the cost of the trunk infrastructure. This will require reference to the establishment cost of infrastructure in the schedule of works in the plans for trunk infrastructure in the LGIP (although this is by no means clear).

    It is important to note that the definition of establishment cost under the proposed capped framework is materially different to the definition of establishment cost under the current capped framework in the following respects:[56]

    > *Existing infrastructure* – The value of works is that which is reflected in the local government's asset register whilst the value of land is its "*current value*" which will be interpreted to mean market value.

    > *Future infrastructure* – The local government's financing costs are excluded.

  The effect of this is that the cost of infrastructure stated in a PIP under the current capped framework, which is a deemed LGIP under the proposed capped framework, is not the establishment cost of infrastructure for the purpose of determining an offset or refund under the proposed capped framework.

Levied charge

The proposed capped framework for a levied charge is similar to the current capped framework other than for the following:

- *Additional demand* – A levied charge may only be for additional demand placed upon the trunk infrastructure which will be generated by the development.[57] A levied charge must therefore exclude demand from an existing lawful use or a future use to be carried out under a further development permit.[58] As discussed earlier, the additional demand of future self-assessable development can also not be included.
- *Levied charge attaches to the land* – A levied charge is payable by the applicant including any person in whom the development approval vests, such as an owner of the subject premises to which a development approval applies.

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50 See proposed new sections 635(1) and (2) (When charge may be levied and recovered) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

51 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

52 See proposed new section 635(1)(a) (When charge may be levied and recovered) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

53 See proposed new section 637(2) (Requirements for infrastructure charges notice) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

54 See proposed new section 637(1)(b) (Requirements for infrastructure charges notice) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

55 See proposed new section 637(1)(f) (Requirements for infrastructure charges notice) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

56 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

57 See proposed new section 636(1) (Limitation of levied charge) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

58 See proposed new section 636(2) (Limitation of levied charge) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

Furthermore a levied charge attaches to the land such that it can be recovered from owners and their successors in title in the same way as a condition of a development approval requiring the payment of infrastructure charges under the previous uncapped framework could also be recovered from owners of land.[59]

Infrastructure charge versus development charge

A levied charge under the proposed capped framework, like an adopted infrastructure charge under the current capped framework, has the following important characteristics:

- *Infrastructure charge is not a development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.[60]

  A levied charge is different to a development charge which is a charge designed to internalise the marginal external costs that are imposed by development and which has the primary goal of influencing the location and nature of development.[61]

- *Average cost approach not marginal cost approach* – The maximum adopted charges in the SPRP (adopted charges) are calculated by reference to an average cost State-wide approach; whilst the adopted charges in a charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average cost municipality-wide approach.[62]

  The average cost approach whilst favoured by State and local governments for administrative simplicity and public acceptability, is generally not favoured by most smaller developers who prefer a marginal cost site-specific approach where an infrastructure charge reflects the cost of increasing the capacity of the infrastructure to serve an additional unit of demand.[63] This marginal cost approach is also recommended by the Productivity Commission.

  Importantly levied charges under the proposed capped framework, like the current capped framework, are based on an average cost approach and are capped. As such, levied charges do not achieve full cost recovery as was the case with infrastructure charges under the previous uncapped framework. As is discussed later this is likely to have significant public policy implications.

Development charge

The proposed capped framework, like the current capped framework and previous uncapped framework, empowers a local government to impose a condition on a development approval requiring the payment of additional trunk infrastructure costs for development inconsistent with the LGIP (called an **additional payment condition**).[64]

The additional trunk infrastructure costs required by an additional payment condition is a development charge which is intended to internalise a local government's marginal external costs imposed by development that is inconsistent with the LGIP.

An additional payment condition is therefore intended to influence the location and nature of development. This is unlike a levied charge the primary purpose of which is cost recovery; albeit under the proposed capped framework and the current capped framework full cost recovery is far from being achieved.

Provision of trunk and non-trunk infrastructure

Legislative requirements for conditions

The proposed capped framework, like the current capped framework and previous uncapped framework, empowers a local government to impose a condition requiring the provision of trunk and non-trunk infrastructure if two statutory criteria are satisfied:

- *Head of power* – The condition must expressly identify one of the following heads of power for the imposition of the condition:[65]

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59 See proposed new sections 635(6)(b) and (c) (When charge may be levied and recovered) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill; cf *Montrose Creek Pty Ltd & Manningtree (Qld) Pty Ltd v Brisbane City Council* (2013) QPELR 47.

60 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

61 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

62 Clinch JP and O'Neill E *Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities*, Urban Studies, 15 March 2010, page 2152.

63 Clinch JP and O'Neill E *Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities*, Urban Studies, 15 March 2010, page 2152.

64 See proposed new section 650 (Power to impose) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

65 See proposed new section 335(1)(e) (Content of decision notice) in section 6 (Amendment of s335 (Content of decision notice) of the Draft Bill.

- *Necessary infrastructure condition* – A condition can be imposed requiring the provision of trunk infrastructure if the trunk infrastructure is necessary to service the subject premises and has not been provided or has been provided but is inadequate.[66]
- *Non-trunk infrastructure condition* – A condition can be imposed requiring the provision of non-trunk infrastructure for the following limited purposes:[67]

- *Internal network* – A network or part of a network internal to the premises.
- *Connection to external network* – The connection of the premises to an external infrastructure network.
- *Safety or efficiency of network* – The protection or maintenance of the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.
- *Relevant and reasonable requirement* – The condition must also satisfy the relevant and reasonable requirement of the SPA[68] which in the case of a necessary infrastructure condition is deemed to be met if the following are satisfied:[69]
  - *Necessary to service subject premises* – The infrastructure is necessary to service the subject premises.
  - *Efficient and cost effective solution* – The infrastructure is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.
  - *Infrastructure on the subject premises* – The infrastructure, if provided on the subject premises, is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

Conversion application for non-trunk infrastructure

The proposed capped framework, unlike the current capped framework and previous uncapped framework, empowers an applicant to make a conversion application to the local government to convert the non-trunk infrastructure imposed in a development approval condition to trunk infrastructure, if the construction of the non-trunk infrastructure has not commenced.[70]

The local government is required to take the following action for the conversion application:

- *Information requirement* – The local government may, within 30 business days, require the applicant to give, within 10 business days, the information it reasonably needs.[71]
- *Determination of application* – The local government must decide the application within 30 business days of the making of the application or the applicant complying with the information requirement.[72]
- *Notice of decision* – The local government must give a notice as soon as practicable of the making of its decision[73] which must state the following:
  - *if approved* – whether an offset or refund applies and if so the details of the offset or refund;[74]
  - *if refused* – the reasons for the refusal and the details of the appeal rights.[75]
- *Amendment of approval conditions* – The local government may, within 20 business days of converting non-trunk infrastructure to trunk infrastructure, amend the development approval in the following respects:[76]
  - remove the non-trunk infrastructure condition which is deemed to be vacated;[77]

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66 See proposed new sections 645 (Application and operation of sdiv 1), 646 (Necessary infrastructure condition for LGIP – Identified infrastructure) and 647 (Necessary infrastructure condition for other infrastructure) of the Draft Bill.

67 See proposed new section 665 (Conditions local government may impose) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

68 See sections 345 (Conditions must be relevant or reasonable) and 406 (Conditions must be relevant and reasonable) of the *Sustainable Planning Act 2009*.

69 See proposed new section 648 (Deemed compliance with necessary or reasonable requirement) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

70 See proposed new sections 658 (Application of sdiv1) and 659 (Application to convert infrastructure to trunk infrastructure) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

71 See proposed new sections 660(2) and (3) (Deciding conversion application) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

72 See proposed new sections 650(1) and (5) (Deciding conversion application) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

73 See proposed new section 661(1) (Notice of decision) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

74 See proposed new section 661(2) (Notice of decision) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

75 See proposed new section 661(3) (Notice of decision) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

76 See proposed new section 662(4) (Effect of and action after conversion) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

77 See proposed new section 662(3) (Effect of and action after conversion) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

- impose a necessary infrastructure condition for the trunk infrastructure.[78]

- *Infrastructure charges notice* – The local government must, within 10 business days of the imposition of a necessary infrastructure condition, give an infrastructure charges notice or amend an existing infrastructure charges notice to reflect whether an offset or refund applies and if so, the details of the offset or refund.[79]

The conversion application process raises a number of issues:

- *Development approval* – The conversion application can only be lodged after a development approval takes effect. It cannot be commenced whilst an appeal is on foot for the development approval; presumably on the basis that any issue in respect of the status of the infrastructure will be resolved as part of the appeal.

- *Decision criteria* – There are no decision criteria identified for the consideration of the determination application and as a result consideration will have to be given to identifying the basis for the identification of the infrastructure is trunk infrastructure in the LGIP. There does not appear to be an express power for the Minister to identify decision criteria for the conversion application, although this could be addressed by the making of a guideline,[80] an amendment to the standard planning scheme provisions[81] or the making of a regulation.[82]

Offsets and refunds for trunk infrastructure and development charge

Necessary infrastructure condition

The proposed capped framework requires a local government which has imposed a necessary infrastructure condition requiring the provision of trunk infrastructure, to take the following actions:

- *Identification of an offset and refund* – Unlike the current capped framework and previous uncapped framework, the local government must identify in the ICN the following:
  - whether an offset or refund applies and if so the details of the offset or refund[83] which is to be calculated by reference to the establishment cost of the trunk infrastructure stated in the LGIP;[84]
  - the reasons for the decision.[85]

- *Recalculation of the establishment cost for trunk infrastructure* – Unlike the current capped framework and previous uncapped framework, the local government, where requested by an applicant, must recalculate the establishment cost of the trunk infrastructure using the methodology in the charges resolution and amend the ICN accordingly.[86]

- *Offset* – The local government must offset the cost of the infrastructure against the levied charge.[87]

- *Refund* – The local government must, if the cost of the infrastructure exceeds the levied charge, provide a refund to the applicant the timing of which is to be agreed with the local government.[88]

Additional payment condition

The proposed capped framework also requires a local government which has imposed an additional payment condition requiring the payment of additional trunk infrastructure costs for development completely in the priority infrastructure area, to provide to the applicant a refund the timing of which is to be agreed with the local government.[89]

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78 See proposed new section 662(4) (Effect of and action after conversion) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

79 See proposed new section 662(5) (Effect of and action after conversion) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

80 See section 759(1)(d) (Minister may make guidelines) of the *Sustainable Planning Act 2009*.

81 See section 54 (Power to make standard planning scheme provisions) of the *Sustainable Planning Act 2009*.

82 See section 763 (Regulation-making power) of the *Sustainable Planning Act 2009*.

83 See proposed new section 637(1)(f) (Requirements for infrastructure charges notice) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

84 See proposed new section 657(1)(c) (Process) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

85 See proposed new section 637(2) (Requirements for infrastructure charges notice) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

86 See proposed new section 657 (Process) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

87 See proposed new sections 649(1) and (2) (Offset or refund requirements) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

88 See proposed new sections 649(1) and (3) to (6) (Offset or refund requirements) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

89 See proposed new section 654 (Refund for additional payment condition for development in PIA) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

Refund amount

The proposed capped framework, unlike the current capped framework and previous uncapped framework, provides that the amount of the refund is to be the proportion of the establishment cost of the infrastructure that:[90]

- *Apportionment* – may be apportioned reasonably to users of premises other than the subject premises; and
- *Subject to levied charge* – has been, is or is to be the subject of a levied charge.

The refund provisions for a necessary infrastructure condition and an additional payment condition raise a number of issues:

- *Inconsistency* – There are subtle differences in the drafting between the provisions the significance of which is hard to distinguish.
- *Apportionment* – The requirement to apportion the establishment cost between users and non-users of the subject premises, presents significant methodological difficulties and an additional administrative burden for local governments, given that the refund amount is to be stated in the ICN.
- *Infrastructure subject to levied charge* – The requirement for a refund to relate to infrastructure that has been, is or is to be the subject of a levied charge by the local government, would appear to limit a refund to only trunk infrastructure in the LGIP and not trunk infrastructure identified by a conversion application. However it is far from certain whether this was intended.

State infrastructure provider powers

State-related condition

A State infrastructure provider may impose a condition on a development approval (called a State-related condition) for infrastructure or works to protect the operation of infrastructure associated with State-controlled road infrastructure, public passenger transport infrastructure, railways, ports and airports.[91]

A State-related condition cannot be lawfully imposed by a State infrastructure provider for any other State infrastructure such as education and emergency services. A local government also has no power to impose a condition for State infrastructure.

Local government reimbursement

A local government may be required to reimburse to a State infrastructure provider which has imposed a State-related condition, levied charges for local government infrastructure which has been replaced by the State infrastructure the subject of the State-related condition.[92]

Infrastructure agreements

The proposed capped framework provides for arrangements for infrastructure agreements which are materially the same as the current capped framework and previous uncapped framework other than for the following changes:

- *Public sector entity* – A distributor-retailer is declared not to be a public sector entity[93] with the following consequences:
  - a distributor-retailer cannot enter into an infrastructure agreement under the SPA other than where a local government or other public sector entity is a party;[94]
  - a distributor-retailer is not required to give a water infrastructure agreement it enters into under the SEQ Water Act to a local government.[95]
- *Obligation to negotiate in good faith* – A local government, other public sector entities, applicants and other entities have a non-justiciable obligation, where an infrastructure agreement is proposed, to negotiate the infrastructure agreement in good faith.[96]

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90 See proposed new section 649(5) (Offset or refund requirements) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill for necessary infrastructure condition; cf proposed new section 654(2) (Refund for additional payment condition for development in PIA) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

91 See proposed new proposed new section 666 (Power to impose conditions about infrastructure) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

92 See proposed new section 669 (Reimbursement by local government for replacement infrastructure) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

93 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

94 See proposed new section 677 (Agreement for infrastructure partnerships) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

95 See proposed new section 673 (Copy of infrastructure agreement to be given to local government) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

96 See proposed new section 671 (Obligation to negotiate in good faith) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

Appeals

The proposed capped framework provides for appeals to the Planning and Environment Court and a Building and Development Committee, which are materially the same as the current capped framework other than for the following matters:

- *Infrastructure charges notices errors* – An appeal is provided for in respect of the following errors in an ICN:[97]
  - the application of the adopted charge but not the adopted charge itself;
  - the working out of additional demand for a development;
  - a decision about an offset and refund but not the establishment cost of trunk infrastructure in the LGIP or the value of the infrastructure recalculated in accordance with the methodology in the charges resolution.
- *Conversion application* – An appeal is provided for in respect of a refusal or deemed refusal of a conversion application to convert non-trunk infrastructure to trunk infrastructure.[98]

Policy implications of the proposed capped framework

Changed policy objectives

The policy objectives of the Draft Bill are to:

> *Establish a long-term local infrastructure planning and charging framework that is certain, consistent and transparent and which supports local government sustainability and development feasibility in Queensland.*[99]

The policy objectives of the Draft Bill are substantially different to the following policy objectives of the current capped framework and previous uncapped framework:[100]

> *(a) to seek to integrate land use and infrastructure plans; and*
>
> *(b) to establish an infrastructure planning benchmark as a basis for an infrastructure funding framework; and*
>
> *(c) to establish an infrastructure funding framework that is equitable and accountable; and*
>
> *(d) to integrate State infrastructure providers into the framework*.

A comparison of the policy objectives of the proposed capped framework with the current capped framework and previous uncapped framework indicate the following:

- *Accountability* – The policy objectives of certainty, consistency and transparency of the proposed capped framework are encompassed within the broader accountability objective of the current capped framework and previous uncapped framework.
- *Integration and equity* – The policy objectives of local government sustainability and development feasibility of the proposed capped framework do not encompass the broader policy objectives of integration and equity of the current capped framework and previous uncapped framework and indeed relate only to the interests of local governments and developers without consideration of the interests of other stakeholders such as landowners.
- *Economic efficiency* – The policy objectives of the proposed capped framework, current capped framework and previous uncapped framework do not purport to address the broader policy objective of economic efficiency.

The proposed capped framework is likely to have significant public policy implications given that it does not adequately address the broader policy objectives of integration, equity and economic efficiency.

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97 See proposed new sections 478(2)(b) and (c) and (3) (Appeals about infrastructure charge notice) and 535(2)(a) and (b) and (3) (Appeals about infrastructure charge decisions) in sections 8 (Replacement of s478 (Appeals about particular charges for infrastructure) and 12 (Replacement of s535 (Appeals about charges for infrastructure) of the Draft Bill respectively.

98 See proposed new sections 478B (Appeal against refusal of conversion application) and 535A (Appeals against refusal of conversion application) in sections 8 (Replacement of s478 (Appeals about particular charges for infrastructure) and 12 (Replacement of s535 (Appeals about charges for infrastructure) of the Draft Bill respectively.

99 See Explanatory Notes, page 1.

100 See section 625 (Purpose of pt 1) of the *Sustainable Planning Act 2009*.

Integration issues

Infrastructure planning

The proposed capped framework, like the current capped framework and previous uncapped framework, integrates land use and infrastructure planning reasonably well with the LGIP included in a local government planning scheme being required to identify the following:[101]

- *Priority infrastructure area (PIA)* – The PIA within which 10-15 years of land for future growth for non-rural purposes is to be serviced by trunk infrastructure.
- *Planning assumptions* – The planning assumptions for residential and non-residential growth in the PIA.
- *Plans for trunk infrastructure* – The plans for trunk infrastructure which identify the establishment cost and indicative delivery timeframes for trunk infrastructure to service the PIA.

In this regard it is relevant to note that the Productivity Commission has previously recognised for the previous uncapped framework that in Australia "*only Queensland's longer term indicative infrastructure delivery timeframes provide insights for town planners looking to make longer term planning decisions*."[102]

Infrastructure funding

The proposed capped framework, like the current capped framework, does not achieve the primary goal of an infrastructure charge; namely to ensure cost recovery for the provision of infrastructure by a local government.

The Local Government Association of Queensland has stated that under the current capped framework there is an estimated shortfall between infrastructure charges and the cost of providing infrastructure to new development of around $480 million annually.[103]

The proposed capped framework, like the current capped framework, by imposing capped infrastructure charges, has in essence, prioritised accountability (in particular certainty) over cost recovery.

However no cost benefit analysis has been released by DSDIP to establish that the benefits arising from certainty exceed the $480 million annual costs for foregone infrastructure charges as well as the unquantified costs of social inequity and economic inefficiency associated with the proposed capped framework.

The proposed capped framework, like the current capped framework, therefore does not integrate infrastructure and land use planning with infrastructure funding as was the case with previous uncapped framework; which admittedly also imposed additional costs arising from the uncertainty of that framework.

In this regard it is also relevant to note that the Productivity Commission has previously recognized, in relation to previous uncapped framework, that "*Brisbane/South-East Queensland was found to have the strongest links between budget funded initiatives and priorities outlined in their metropolitan and infrastructure plans*."[104]

Basic policy objective

The basic policy objective of any infrastructure planning and charging framework must be to ensure the integration of land use, infrastructure and funding such that infrastructure is funded so that it can be constructed prior to or current with development to ensure that existing infrastructure networks are not overwhelmed by new demand.

The proposed capped framework and current capped framework are therefore unlikely to encourage this basic policy objective, given the lack of integration between infrastructure and land use planning and infrastructure funding.

Equity issues

The proposed capped framework also does not expressly or impliedly encourage the provision of infrastructure and serviced land in a manner which encourages equity.

In particular the proposed capped framework does not encourage the following:

- *Horizontal equity* – Those persons that benefit from infrastructure should be the persons that pay for the infrastructure (benefits principle). This clearly is not the case given that capped charges are calculated by means of an average cost approach.
- *Vertical equity* – Those persons that have the greater ability to pay should contribute more towards the cost of providing infrastructure than do those who have a lesser ability to pay (liability-to-pay principle).

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101 See proposed new section 627 (Definitions for ch 8) in section 17 (Replacement of ch 8 (Infrastructure)) of the Draft Bill.

102 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*, Research Report, Volume 1, April 2011, page 193.

103 Local Government Association of Queensland (2013), *Submission to Infrastructure Planning and Charging Framework Review*, Brisbane.

104 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*, Research Report, Volume 1, April 2011, page 192.

In particular the proposed capped framework, like the current capped framework, encourages the following inequities:

- *Inequity between developers* – The developers of low cost development fronts (generally infill development undertaken by smaller entrepreneurial developers) will subsidise the higher cost development fronts (generally greenfield or brownfield development undertaken by larger institutional developers).
- *Inequity between landowners* – The landowners of lower cost development fronts (generally in infull locations) will subsidise the landowners of higher cost development fronts (generally in greenfield or brownfield locations).

The proposed capped framework, encouraging as it does horizontal and vertical inequities, is therefore likely to give rise to further issues of political unacceptability from landowners, smaller entrepreneurial developers and local governments in the short to medium term.

Economic efficiency issues

The proposed capped framework, to the extent that it does not provide for full cost recovery, does not encourage the provision of infrastructure and serviced land which is economically efficient.

In particular the proposed capped framework does not encourage economic efficiency in the following respects:[105]

- *Productive efficiency* – The total average cost for infrastructure and serviced land should be minimised by developing land where the total environmental, social and financial cost of providing additional infrastructure and serviced land is the lowest. In general terms this is likely to be in locations near serviced land.
- *Allocative efficiency* – The price for infrastructure and serviced land should accordingly reflect the costs incurred in its provision and should not be distorted by taxes, subsidies or other measures. The price for infrastructure should therefore reflect its marginal cost, ie the cost of increasing the capacity of infrastructure to produce one more unit of service to satisfy demand, rather than its average cost.
- *Dynamic efficiency* – The infrastructure and serviced land to be provided in the short term should also impose over the long term, the least infrastructure cost, whilst providing the maximum amount of choice for development.

The proposed capped framework encourages non-rural settlement patterns which are not economically efficient and are likely to result in dead weight losses that will impose long term financial costs on State and local governments, smaller entrepreneurial developers and some landowners.

Productivity Commission assessments

The Discussion Paper which preceded the Draft Bill for the proposed capped framework and the Report of the Infrastructure Charges Taskforce[106] whose recommendations were implemented in the current capped framework, do not refer to or expressly consider the analysis of developer contributions undertaken by the Productivity Commission or the Henry Tax Review.

It is a concern that the proposed capped framework and the current capped framework do not accord with the following public policy recommendations of the Productivity Commission and the Henry Tax Review:

- 1993 Report on Taxation and Financial Policy Impacts on Urban Settlement:
  - *Charges should, wherever possible, reflect any significant locational differences in the costs of providing urban infrastructure. Where they cannot do so, they should at least seek to avoid systematic locational bias.*[107]
  - *While it is necessary to charge explicitly for costs that are common to all developments to transmit efficient location incentives within cities, cost recovery is desirable for reasons of efficient resource management and decision making in relation to the provision of new infrastructure.*[108]
- 2004 Inquiry Report on First Home Ownership:

  Recommendation 7.1 –

  Developer charges (and charging for infrastructure generally) should be:
  - *necessary — with the need for the services concerned clearly demonstrated;*

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105 Industry Commission (1993) *Taxation and Financial Policy Impacts of Urban Settlement Volume 1: Report* Australian Government Publishing Service Canberra, pages 102.

106 Infrastructure Charges Taskforce (2011) *Final Report: Recommended Reform of Local Government Development Infrastructure Charging Arrangements* March 2011.

107 Industry Commission (1993) *Report on Taxation and Financial Policy Impacts on Urban Settlement*, Chapter B3, section 3.4.

108 Industry Commission (1993) *Report on Taxation and Financial Policy Impacts on Urban Settlement*, Chapter B3, section 3.5.

- *efficient — justified on a whole-of-life cost basis and consistent with maintaining financial disciplines on service providers by precluding over-recovery of costs; and*
- *equitable — with a clear nexus between benefits and costs, and only implemented after industry and public input.*[109]

Recommendation 7.2 –

Investments in items of social or economic infrastructure that provide benefits in common across the wider community should desirably be funded out of borrowings and serviced through rates, taxes or usage charges.

Charges are more likely to satisfy the above principles if the processes for establishing and applying them are sound and transparent. Further, efficiency would be enhanced if charging regimes provide developers with some flexibility in the timing of developments and the design of the infrastructure.[110]

Recommendation 7.3 –

Authorities and utilities imposing developer contributions and charges should:

- *follow guidelines based on principles set out in recommendations 7.1 and 7.2 and be subject to independent regulatory scrutiny;*
- *provide for 'out of sequence' development if developers are prepared to meet the cost consequences;*
- *be open to proposals for alternative infrastructure arrangements that meet the needs of the households concerned;*
- *allow appeals on the amounts charged, or their coverage; and*
- *be accountable for how money raised from charges is spent.*

The Commission recognises that these principles and practices ostensibly apply already to much existing charging for housing-related infrastructure. There is also substantial regulatory oversight of the charging practices of utilities. However, especially at the local government level, current practice provides scope for improvement.[111]

- 2009 Australian Future Tax System (Henry Tax Review):

  Recommendation 70 –

  COAG should review infrastructure charges (sometimes called developer charges) to ensure they appropriately price infrastructure provided in housing developments. In particular, the review should establish practical means to ensure that these charges are set appropriately to reflect the avoidable costs of development, necessary steps to improve the transparency of charging and any consequential reductions in regulations.

- 2011 Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessments:

  Broadly, the appropriate allocation of capital costs hinges on the extent to which infrastructure provides services to those in a particular location relative to the community more widely. The Commission has previously enumerated the following principles:

  - *use upfront charging to finance major shared infrastructure, such as trunk infrastructure, for new developments where the incremental costs associated with each development can be well established and where such increments are likely to vary across developments. This would also accommodate 'out of sequence' development;*
  - *infill development where system-wide components need upgrading or augmentation that provide comparable benefits to incumbents, this should be funded out of borrowings and recovered through rates or taxes (or the fixed element in periodic utility charges);*
  - *for local roads, paving and drainage it is efficient for developers to construct them, dedicate them to local government and pass the full costs on to residents (through higher land purchase prices) on the principle of beneficiary pays;*
  - *for social infrastructure which satisfies an identifiable demand related to a particular development (such as a neighbourhood park) the costs should be allocated to that development with upfront developer charges an appropriate financing mechanism;*

109 Productivity Commission (2004) *First Home Ownership Inquiry Report* Melbourne, page 177.

110 Productivity Commission (2004) *First Home Ownership Inquiry Report* Melbourne, page 177.

111 Productivity Commission (2004) *First Home Ownership Inquiry Report* Melbourne, page 177.

- *for social infrastructure where the services are dispersed more broadly, accurate cost allocation is difficult if not impossible and should be funded with general revenue unless direct user charges (such as for an excludable service like a community swimming pool) are possible.*[112]

The Productivity Commission is also currently completing its final report on public infrastructure. Given the previous recommendations of the Productivity Commission, it remains to be seen whether the proposed capped framework will be endorsed as the previous uncapped framework was, leading practice in developer contributions.[113]

Conclusions

Reforms similar to current capped framework

The proposed capped framework is not significantly different to the current capped framework.

The proposed capped framework seeks to improve the current capped framework by introducing reforms principally for the administration of offsets and refunds for the provision of work and financial contributions for trunk infrastructure.

In particular the proposed capped framework introduces the following reforms:

- *Identified offsets and refunds* – A local government must identify an offset and refund in an infrastructure charges notice.
- *Recalculation of the cost of infrastructure* – A local government which is requested by an applicant, must recalculate the establishment cost of trunk infrastructure in accordance with the methodology in its charges resolution.
- *Conversion of non-trunk infrastructure* – A local government, which receives a conversion application, must consider whether to convert a non-trunk infrastructure contribution to trunk infrastructure.
- *Appeals* – An applicant is given appeal rights to review a local government decision in respect of an offset and refund (other than a recalculation decision) and a conversion application.

Impact of proposed capped framework

The proposed capped framework will impose the following additional financial costs on local governments:

- *Administrative costs* – The cost of the determination of ICNs, recalculation requests, conversion applications and appeals; albeit these costs can be recovered by a local government through a review of its cost-recovery fee schedule.
- *Reduced levied charges* – The cost of the reduction of levied charges from higher offset and refund values; estimated by the LGAQ as being in the vicinity of $480 million annually.

That said, the proposed capped framework does provide greater certainty for developers, will reduce the cost of the administration of an offset and refund for developers and on balance is likely to be less costly to administer than the current capped framework.

Whilst the proposed capped framework does provide a net improvement on the current capped framework, it has not addressed the more fundamental and enduring public policy issues of lack of integration, inequity and economic inefficiency associated with the current capped framework and which the previous uncapped framework had purported to address, consistent with the recommendations of the Productivity Commission.

It is therefore unlikely that the benefits of the proposed capped framework in terms of increased certainty will be outweighed by the financial cost of some $480 million of under-recovered infrastructure charges and the unquantified costs of likely social inequity and economically inefficient settlement patterns.

Furthermore the financial impacts on local governments, landowners and entrepreneurial developers is likely to give rise to further political unacceptability in the short to medium term.

Further policy review

In conclusion, whilst the State government is to be congratulated for improving the current capped framework, it has not addressed the critical public policy issues currently being considered by the Productivity Commission in its review of public infrastructure and as a result I believe we have not heard the end of infrastructure charges reform in Queensland.

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[112] Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessments*.

[113] See Productivity Commission 2014 *Public Infrastructure Draft Report*, Melbourne March 2014.

Infrastructure charges in Queensland – a different perspective

Ian Wright | Rhett Oliver

This article discusses the future of infrastructure planning and funding in Queensland

May 2014

In brief

We believe we are paying too much attention to the small details of the infrastructure framework and that we must focus instead on the bigger picture, being the development of a new integrated infrastructure planning and funding model.

Infrastructure planning and funding is critical to the construction and property development sector and is having an enormous effect on our State.

In this article we would like to provide some broad policy guideposts for the future of infrastructure planning and funding for development in south-east Queensland over the next 20 years. We work from the premise that you have to understand the past to know the present and plan for the future.

To develop these policy guideposts for the future, we first must take a step back in time to remind ourselves of Queensland's economic models in the past.

Queensland's economic model historical foundation

Queensland's current economic model was established by the Bjelke-Peterson coalition government of the 1970s and was based on the simple principle of lower taxes and charges being funded by mining royalties (Knox 2012).

The economic model involved five elements (Eadie 2014:19):

- First, mining royalties were distributed to the regions and cities and towns as State government grants for development infrastructure;
- Secondly, local governments used State government grants together with rates revenue to build development infrastructure for future development;
- Thirdly, local governments levied future development with infrastructure charges to recover the rates revenue but not the State government grants expended by local governments in building development infrastructure;
- Fourthly, the resulting cheap residential land and lower taxes attracted population growth, resulting in Queensland experiencing an 88 per cent increase in population over 20 years, compared to the 50 per cent Australian average; and
- Finally, many of the new Queenslanders brought retirement savings and set up a small business, which drove growth in south-east Queensland and Brisbane in particular.

The Beattie and Bligh Labor governments subsequently utilised the economic model to fund increased expenditure on education and health services.

This increased expenditure on education and health services (as opposed to economic infrastructure) was predicated on rising mining royalties, in particular from coal mining in Queensland's regions.

Challenges to the economic model

By 2009, the Queensland economic model was coming under significant challenges from two areas:

- First, the global financial crisis significantly reduced coal prices and exports;
- Secondly, the Labor Federal government introduced taxes, in particular the mining tax and the carbon tax, which created significant uncertainty in mining investment, particularly in coal in Queensland.

The resulting damage to the Queensland budget in terms of reduced revenue from mining royalties was in the order of $400 million by 2011 (see Table 1).

Table 1 Queensland's mining royalty gap - 2008 to 2012

Year	Budget coal royalties ($ million)	Actual coal royalties ($ million)	Gap ($ million)
2008	1,020	1,035	15
2009	3,213	3,103	**-110**
2010	1,433	1,786	353
2011	2,766	2,357	**-409**
2012	2,755	2,386	**-369**

Bligh government's policy response

The Bligh government was, therefore, confronted with increasing spending on education and health services (as opposed to productive economic infrastructure) with increasing deficits.

Its policy response to the impending fiscal crisis was fourfold:

- First, the privatisation of State government assets;
- Secondly, the cutting of State government grants to local governments to fund development infrastructure. For example, the average annual subsidy was reduced from $480 million in the period from 2002 to 2010 to $225 million in the period from 2011 to 2013 (LGAQ 2013a:iii);
- Thirdly, local governments were empowered to levy infrastructure charges under priority infrastructure plans from developers to recover the abolished capital subsidy program of the State government. In effect the State government's subsidy of up to 50 per cent for development infrastructure was passed on to developers;
- Fourthly, the resulting significant increases in infrastructure charges when combined with suppressed housing demand and reduced financing in the context of the global financial crisis adversely impacted on development feasibility and housing affordability, resulting in the introduction of capped infrastructure charges and capped water charges for SEQ water businesses.

Queensland's economic model broken

The Bligh government's policy responses had the effect of breaking the Queensland economic model in four respects:

- First, State government per capita investment in development infrastructure dropped significantly below that of other Australian states. This is shown in Table 2:

State	Investment per capita ($)
New South Wales	76.35
Victoria	9.25
Queensland	3.95

Source: LGAQ 2013a:iii

- Secondly, the abolition of the capital subsidy program, capping of infrastructure charges and reduced income from SEQ water businesses is estimated to have reduced local government revenues by $800 million a year (LGAQ 2013a:iii);
- Thirdly, capped charges were also utilised unwisely by some local governments, particularly in rural and regional areas, to increase their infrastructure charges beyond the short term marginal cost of the provision of that infrastructure, such that their capped charges functioned as a tax on development;
- Finally, the political fallout of privatisation brought down the Bligh government in March 2012, while the combination of local taxation increases and reduced economic activity in the construction and property development sector resulted in 44 mayors being voted out of office in the April 2012 elections — the largest turnover in local political leaders since World War II (LGAQ 2013a:2).

Newman government's challenges

The Newman government confronted five significant challenges:

- First, Queensland did not have an integrated State and local government infrastructure planning model;
- Secondly, Queensland did not have a sustainable or feasible infrastructure funding model;
- Thirdly, the residential property industry was dead as a result of poor public policy;
- Fourthly, the Queensland economic model was consequently broken;
- Finally, the Queensland fiscal position was unsustainable and urgent budget consolidation was required.

The Newman government's Queensland Commission of Audit made three fundamental recommendations (QCOA 2013):

- First, fiscal consolidation – to be achieved by reducing expenditure (some $5.5 billion in the 2012/2013 budget) and by reducing debt (by some $25-$30 billion) to regain the State's AAA credit rating;
- Secondly, reducing the role of government – to be achieved by privatising government assets and providing for greater private sector delivery of public services;
- Thirdly, long-term financial planning – to be achieved by improved budget, cash and asset management practices underpinned by an Inter-Generational Report for the State with a 40-year perspective and a 10-year State Infrastructure Plan.

Guideposts for the future

Just prior to publication, some details of the State's infrastructure charges reform package were released. In our opinion, these reforms do not appear to have delivered a long-term solution.

If our policy goal is the rebooting of the Queensland economic model through a revived construction and property development sector, which we believe it should be, then, in our opinion, the following are considered as critical preconditions for the achievement of that goal:

- First, an integrated infrastructure planning model - as recommended by the Queensland Commission of Audit, a 10-year State Infrastructure Plan linked to the financial capacity of the State to fund that infrastructure should be complemented by a 10-year Local Infrastructure Plan, which is also linked to the financial capacity of local governments to fund local development infrastructure.
- Secondly, an integrated infrastructure funding model based on four principles:
  - Infrastructure charges should be linked to the funding of essential development infrastructure at affordable design standards (i.e. water supply, sewerage, transport and local parks), with social infrastructure such as district and regional sport, recreational and community facilities being funded through local government rates;
  - Infrastructure charges should be calculated on the short run marginal cost, that is, the incremental cost of the provision of additional development infrastructure to fund future development (PCA 2014:123);
  - Infrastructure charges can be capped by the State government to achieve State economic objectives such as the promotion of the construction and property development sector, or State social objectives such as housing affordability;
  - State government subsidies through affordable capped infrastructure charges should be funded by the State government through compensatory grants to local governments, or as in the case of New South Wales, through a Priority Infrastructure Fund which is used to fund local development infrastructure (PCA 2014:149).
- Thirdly, State and local government owned property should increasingly be used to fund development infrastructure (PCA 2014:147). Examples include:
  - The development of airport lands to fund airport and transport infrastructure, as has occurred with Brisbane and other Australian airports;
  - The development of land and airspace around railway stations to fund railway infrastructure, such as has occurred at the Toowong and Central railway stations in Brisbane, Chatswood railway station in Sydney and Melbourne Central railway station;
  - The development of land around road transport infrastructure to fund associated road transport infrastructure.

We are of the view that the focus on public policy needs to move away from debates over infrastructure charges, offsets and refunds and instead shift to the critical issues of the development of an integrated infrastructure planning and funding model and the rebooting of the Queensland economic model.

If we remain focused on fighting over infrastructure charges, offsets and refunds, we will truly be missing the woods for the trees.

Regional Planning Interests Bill passed by Queensland Parliament

Ian Wright | Harry Ashton

This article discusses the recently passed *Regional Planning Interests Act 2014* by the Queensland government and the impacts on existing and future resource operations

May 2014

In brief

The Queensland government has recently passed the *Regional Planning Interests Act 2014* into parliament, which may impact existing and future resource operations by expanding the assessment and approval process.

Key concepts

Area of Regional Interest – The priority land use for a particular area designated by a regional plan or regulation as a priority agricultural area, priority living area, strategic cropping area or strategic environmental area.

Relevant Activity – An activity that is likely to have an impact on an Area of Regional Interest prescribed by regulation or an activity authorised by a resources authority under the *Geothermal Energy Act 2010*, *Greenhouse Gas Storage Act 2009*, *Mineral Resources Act 1989*, *Petroleum Act 1923* or *Petroleum and Gas (Production and Safety) Act 2004*.

Regional Interest Authority – An authority to conduct either a resource activity or a regulated activity in an Area of Regional Interest.

Regional Interest Decision – A decision made by the Chief Executive in respect of an application to obtain a Regional Interest Authority.

Regional Interest Condition – A condition imposed as a result of a Regional Interest Decision.

Resource Authorities may need additional approval

The *Regional Planning Interests Act 2014* (Qld) (**Act**) requires a person conducting a Relevant Activity in an Area of Regional Interest to obtain a Regional Interest Authority unless the activity is subject to a specific exemption. There are four areas of regional interest:

- priority agricultural areas;
- priority living areas;
- strategic cropping areas;
- strategic environmental areas.

There are a number of key changes to the Bill being enacted, namely:

Removal of the local government veto

The Bill previously required the Chief Executive to follow any decision made by the local government where the local government was acting as an assessing agency. This requirement has been removed, meaning the local government no longer has a direct power to refuse or veto a project within its jurisdiction.

Exemption for an activity with an existing approval

The Bill previously provided an exemption for a regulated activity being carried out in an Area of Regional Interest in accordance with a "resource activity work plan" except for an activity carried out in a resource priority agricultural area that contains a source of water required for the ongoing use for the proposed priority agricultural land.

This exemption has been expanded under the Act to include all resource activities that are carried out on the land under a resource authority or environmental authority provided that:

- there is no need for any further authority or approval relating to the location, nature or extent of the expected surface impacts of the activity;
- the resource or environmental authority identifies the location, nature and extent of the expected surface impacts of the activity.

This exemption seeks to provide further assurance to existing resource projects, however, the revisions fail to provide certainty regarding:

- what are further approvals;
- to what extent surface impacts of an activity were disclosed in an original application.

Additional transitional provisions

Additional transitional provisions have been included in relation to the *Strategic Cropping Land Act 2011* (Qld). Projects previously exempt under this act will remain exempt and current validation applications will be assessed as if the application was for a Regional Interest Authority.

Stay of operation

The Bill previously required activities conducted under a Regional Interest Authority to be stayed pending the outcome of any appeal lodged in relation to the Regional Interest Authority. This requirement has now been removed.

Approval attaches to the land

A Regional Interest Authority attaches to the land despite any change in the land's ownership or occupation. This means that a Regional Interest Authority will be treated similar to a development approval under land use planning legislation (the *Sustainable Planning Act 2009*) and cannot be transferred like an environmental authority.

Government release of draft Regional Planning Interests Regulation

The State government has released the draft Regional Planning Interests Regulation, which includes the specific assessment criteria and referral agencies for an application for a Regional Interest Authority for each respective regional interest area.

Criteria for assessment

Areas of regional interest	Assessment criteria
Priority agricultural area	Activity will not result in a material impact on the use of priority agricultural land in a priority agricultural area. The activity will not result in a material impact on a region in relation to the use of an area in a region of priority agricultural land.
Priority living area	The location , nature and conduct of the activity is compatible with the planned future for the priority living area stated in the planning instrument under the *Sustainable Planning Act 2009*.
Strategic cropping area	The activity will not result in a material impact: ▪ on strategic cropping land on a property in a strategic cropping area; ▪ on strategic cropping land in an area in a strategic cropping area.
Strategic environmental area	The activity will not result in a material impact on an environmental attribute of a strategic environmental area identified as a management area. The activity will not result in a widespread or irreversible impact on an environmental attribute in a strategic environmental area identified as a protection area.

Application process

If a Regional Interest Authority is required an application must be made in the approved form, accompanied by a report assessing the impact of the proposed activity in the Area of Regional Interest with reference to the assessment criteria and acceptable outcome contained in the Regulations.

A copy of the application must be provided to the landowners of the land on which the activity is to be conducted. If the activity is within a priority living area, the applicant must also publicly advertise the application in a local paper and provide a notice to the landowners. The notice and public advertisement must be in the approved form and state the following:

- a submission can be made in relation to the application;
- the closing date for the submission;
- that making a submission does not give rise to a right to appeal.

The Chief Executive may, prior to making a decision, refer the application to an Assessing Agency. These are summarised in the following table.

Areas of regional interest	Assessing agency
Priority agricultural area	The department administering the *Environmental Protection Act 1994*
Priority agricultural area that includes one or more regionally significant water source	Department of Natural Resources and Mines
Priority living area	The local government for the largest existing settlement area included in the priority living area
Area of strategic cropping	Department of Natural Resources and Mines
Strategic environmental area	The department administering the *Environmental Protection Act 1994* and the Department of Natural Resources and Mines

The assessing agency has a defined function under the Regulations in that it is to determine whether the proposed activity meets each outcome for each Area of Regional Interest.

The assessing agency may be satisfied that an activity meets the required outcome for the Area of Regional Interest if the application demonstrates that the activity proposed to be conducted is outlined in the prescribed solution contained in the Regulations.

The Chief Executive must decide the application after considering the recommendations of the assessing agency. The Chief Executive may approve all or part of the application with or without a Regional Interest Condition or refuse the application.

Review of Queensland's new infrastructure planning and charging framework

Ian Wright | Jamon Phelan-Badgery | Luke Grayson

This article discusses Queensland's new infrastructure planning and charging framework, introduced by the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014*

May 2014

Introduction

Infrastructure isn't everything but in the long term it is almost everything

The ultimate objective of urban planning is to improve the level and sustainability of a community's wellbeing. The living standards of a community are a function of its social, environmental and economic capital.

Infrastructure including both physical conveyance assets such as sewerage, water and transport (often called economic infrastructure) and specialised services such as schools and hospitals (often called social infrastructure), is critical to the social, environmental and economic capital of the community.

To channel Paul Krugman the Nobel winning economist, "Infrastructure isn't everything in urban planning but in the long run it is almost everything."[114]

Critically where the cost of development is high, it is largely because land prices are high and generally land prices are high when there is a shortage of well-located and serviced land.[115]

Investment in infrastructure, in particular economic infrastructure, places downward pressure on land prices and ultimately the cost of development. When appropriately integrated with development through urban planning, infrastructure can therefore significantly improve productivity by promoting development at a lower cost.

This will be critically important especially in South East Queensland where it is estimated that the population will grow between 2012 and 2060 by some 2.3 million (up 110%).[116]

The planning and funding of infrastructure is therefore important, not only to drive productivity and economic growth in the short to medium term, but also to service our rapidly expanding cities and regions in the long term.

Bill introduced to Parliament

It is against these challenges that the Queensland government's recent response to the funding of development infrastructure by local governments should be considered.

On 8 May 2014 the Queensland government introduced the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014* (**Bill**) and explanatory notes (**Explanatory Notes**) into the Queensland Parliament. The Bill is expected to be passed, potentially with amendments, and implemented from 1 July 2014.

The Bill proposes an infrastructure planning and charging framework (**proposed capped framework**) which differs from the current capped framework and the previous uncapped framework:

- *Current capped framework* – The current framework of maximum adopted infrastructure charges was introduced from 1 July 2011 (**current capped framework**).[117]
- *Previous uncapped framework* – The previous framework of uncapped infrastructure charges existed from 2003 to 30 June 2011 (**previous uncapped framework**).[118]

The Bill establishes a proposed capped framework for local governments by amendments to the *Sustainable Planning Act 2009* (**SPA**) and for distributor-retailers by amendments to the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**).

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114 Krugman P (1997) *The Age of Diminishing Expectations*, MIT Press, page 11.

115 Low P (2013) *Productivity and Infrastructure*, Speech to the IARIN-UNSW Conference on Productivity Measurement Drivers and Trends, Sydney 26 November 2013.

116 Productivity Commission (2013) *An Ageing Australia: Preparing for the Future*, Research Paper, November 2013, page 51.

117 See Chapter 8 (Infrastructure) Part 2 (Infrastructure planning and funding) Division 5A (Trunk Infrastructure funding and related matters – adopted infrastructure charges) of the *Sustainable Planning Act 2009*.

118 See Chapter 5 (Miscellaneous) Part 1 (Infrastructure planning and funding) of the *Integrated Planning Act 1997* inserted by the *Integrated Planning and Other Legislation Amendment Act 2003* No. 64, section 22.

The proposed capped framework for local governments and distributor-retailers is materially the same, subject to any changes which may be required as a result of the implementation of the utility model for distributor-retailers. This paper focuses on the proposed capped framework from the perspective of a local government.

Themes of the paper

This paper has 3 themes:

- First, the key elements of the proposed capped framework are considered in the context of the current capped framework and previous uncapped framework, to identify the legal and practical implications for applicants and local governments.
- Second, the policy implications of the proposed capped framework are considered in the context of the current capped framework and previous uncapped framework.
- Finally, some concluding observations are offered for the legal, practical and policy implications of the proposed capped framework.

Legal and practical implications of the proposed capped framework

Key elements of the proposed capped framework

The proposed capped framework comprises the following key elements which are addressed in this paper:

- Infrastructure scope
- Identification of trunk and non-trunk infrastructure
- Infrastructure planning instrument
- State infrastructure charging instrument
- Local infrastructure charging instrument
- Infrastructure charge
- Development charge
- Provision of trunk and non-trunk infrastructure
- Offsets and refunds for trunk infrastructure and development charge
- State infrastructure provider powers
- Infrastructure agreements
- Appeals.

Infrastructure scope

The proposed capped framework is based on a definition of development infrastructure which is materially the same as the current capped framework and previous uncapped framework, other than for the deletion of the local function of State-controlled roads from the transport infrastructure component of development infrastructure.[119]

A more limited infrastructure scope identified as the Fair Value Essential Infrastructure List has been prepared by DSDIP for the purpose of informing the calculation of a Fair Value Infrastructure Charges Schedule which, if adopted by a local government or distributor-retailer, may provide access to co-investment funding by the State government for catalyst infrastructure.[120]

The details of the co-investment funding arrangements are yet to be determined but are intended to be focused on major developers due to the scale of their projects.[121] Given the uncertainty associated with the co-investment funding by the State government, it is unlikely that local governments and distributor-retailers will adopt, at least in the short term, the Fair Value Infrastructure Charges Schedule.

Identification of trunk and non-trunk infrastructure

The proposed capped framework, like the current capped framework and previous uncapped framework, empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called a **LGIP**); with development infrastructure not identified as trunk infrastructure in the LGIP considered to be non-trunk infrastructure.[122]

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119 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

120 The Honourable Jeff Seeney, Deputy Premier, Minister for State Development, Infrastructure and Planning, Media Statement, Thursday, 17 April 2014.

121 Coutts J, *Infrastructure charging and planning reforms*, Department of State Development, Infrastructure and Planning 30 April 2014.

122 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

However under the proposed capped framework, if a local government has imposed a condition of a development approval requiring the provision of non-trunk infrastructure and the construction of the non-trunk infrastructure has not started, the applicant can make an application to the local government (called a **conversion application**) to convert the non-trunk infrastructure to trunk infrastructure.[123]

The identification of trunk and non-trunk infrastructure under the proposed capped framework is therefore the same as the current capped framework and previous uncapped framework, but for the significant policy change of an applicant being able to make a conversion application.

Infrastructure planning instrument

The proposed capped framework, like the current capped framework and previous uncapped framework, requires a local government to prepare a LGIP[124]; with existing local government priority infrastructure plans (**PIP**) and the infrastructure planning components of adopted infrastructure charges resolutions (called **saved provisions**) prepared under the current capped framework being transitioned as a deemed LGIP.[125]

The LGIP forms part of the planning scheme and does any or all of the following:[126]

- *Priority infrastructure area* – It identifies the priority infrastructure area (**PIA**) being the area which:[127]
  - is used or approved for use for purposes other than rural or rural residential purposes (defined as **non-rural purposes**);[128]
  - is serviced or intended to be serviced with development infrastructure networks; and
  - will accommodate between 10-15 years of growth for non-rural purposes.
- *Planning assumptions* – It states the assumptions about population and employment growth and the type, scale, location and timing of future development.
- *Plans for trunk infrastructure* – It contains the plans for trunk infrastructure the local government intends to provide or for which it intends to give infrastructure charges notices.

  The plans for trunk infrastructure will identify the trunk infrastructure items to be provided by the local government including the establishment cost of the trunk infrastructure.
- *Desired standard of service* – It states the desired standard of service for development infrastructure.

The LGIP under the proposed capped framework is similar to the PIP under the current capped framework and previous uncapped framework.

State infrastructure charging instrument

The proposed capped framework, like the current capped framework, empowers the Minister to prepare a State planning regulatory provision (called a **SPRP (adopted charges)**).[129]

The existing State Planning Regulatory Provision (adopted charges) dated July 2012 (**existing SPRP**) made under the current capped framework is deemed to be the SPRP (adopted charges).[130]

The SPRP (adopted charges) may do the following:

- *Maximum adopted charge* – It may state a maximum amount for an adopted charge.[131] This may subsequently be changed by the Minister by a gazette notice, but cannot be increased by more than the 3 year moving average annual percentage increase in the PPI index for the preceding 3 years.[132]

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123 See proposed new sections 658 (Application of sdiv 1) and 659 (Application to convert infrastructure to trunk infrastructure) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

124 See proposed new sections 94A(1) (Requirement to review LGIP) and 117(2) (Process for preparing, making or amending local planning instruments) in clause 5 (Insertion of new ch 3, pt 2, div 4, sdiv 2) and 6 (Amendment of s117 (Process for making or amending local planning instruments)) of the Bill, respectively.

125 See proposed new sections 982 (PIP to LGIP) and 979(7) (Charges resolutions until 1 July 2016) in clause 19 (Insertion of new ch 10, pt 11) of the Bill.

126 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

127 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

128 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

129 See proposed new section 629(1) (State planning regulatory provision governing charges) in clause 19 (Insertion of new ch 10, pt 11) of the Bill; cf section 648B (Charges for infrastructure under State planning regulatory provisions of the *Sustainable Planning Act 2009*.

130 See proposed new section 983(1) (Existing SPRP for adopted charges) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

131 See proposed new section 629(1) (State planning regulatory provision governing charges) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

132 See proposed new sections 629(2) and (3) (State planning regulatory provision governing charges) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

- *Charges breakup* – It may state the proportion of the maximum adopted charge between a local government and distributor-retailer[133] (called the **charges breakup**).[134]
- *Permitted development* – It may state development for which there may be an adopted charge.[135]
- *Method for working out the cost of infrastructure for an offset and refund* – It may state the parameters for the method for working out the cost of infrastructure for an offset and refund.[136]

The SPRP (adopted charges) will be similar to the existing SPRP under the current capped framework other than for the inclusion of permitted development which may be subject to an adopted charge and the method for working out the cost of infrastructure for an offset and refund.

Local infrastructure charging instrument

The proposed capped framework, like the current capped framework, empowers a local government to adopt a resolution (called a **charges resolution**) which must state the following:[137]

- *Effective date* – The charges resolution must state the date when an adopted charge under the resolution takes effect.[138] The charges under the charges resolution take effect on:[139]
  - if it is uploaded to the local government's website before the beginning of the identified date, on the identified date; or
  - if it is uploaded to the local government's website after the beginning of the identified date, on the day it is uploaded.
- *Adopted charges* – The charges resolution may state a charge for providing trunk infrastructure for development (called an **adopted charge**)[140] which must be consistent with the SPRP (adopted charges) in the following respects:[141]
  - *Permitted development* – The adopted charge must be for development for which an adopted charge is permitted.
  - *Maximum adopted charge* – The adopted charge must be for no more than the maximum adopted charge.
- *Automatic increase provision* – The charges resolution may provide for increases in a levied charge from the date it is levied to the date it is paid (called an **automatic increase provision**).[142] This cannot provide for an increase in the levied charge that is greater than the maximum adopted charge or the 3 yearly PPI index average.[143]
- *Charges breakup* – The charges resolution must state the charges breakup between the local government and distributor-retailer for all adopted charges.[144]
- *Applicable area* – The charges resolution may declare the part of the local government area to which the adopted charges are to apply.[145]
- *Method for the working out of the cost of infrastructure for an offset and refund* – The resolution must include a method for working out the cost of infrastructure the subject of an offset or refund being the trunk infrastructure identified in the LGIP or non-trunk infrastructure which is converted to trunk infrastructure by a conversion

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133 See proposed new section 629(4)(a) (State planning regulatory provision governing charges) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

134 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

135 See proposed new section 629(4)(b) (State planning regulatory provision governing charges) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

136 See proposed new section 629(4)(c) (State planning regulatory provision governing charges) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

137 See proposed new section 630(1) (Power to adopt charges by resolution) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill; cf section 648D (Local government may decide matters about charges for infrastructure under State planning regulatory provisions) of the *Sustainable Planning Act 2009*.

138 See proposed new section 630(3) (Power to adopt charges by resolution) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

139 See proposed new section 634(2) (Steps after making charges resolution) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

140 See proposed new section 630(1) (Power to adopt charges by resolution) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

141 See proposed new section 631(1) (Contents—general) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

142 See proposed new sections 631(3) to (6) (Contents—general) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

143 See proposed new sections 631(5) to (6) (Contents—general) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

144 See proposed new section 632(4) (Provisions for participating local governments and distributor-retailers) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

145 See proposed new section 631(3)(a) (Contents—general) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

application.[146] The method must be consistent with the parameters in the SPRP (adopted charges) or a Ministerial guideline prescribed by a regulation.[147]

In essence the charges resolution under the proposed capped framework is similar to the adopted infrastructure charges resolution under the current capped framework other than for the inclusion of the method for the working out of the cost of infrastructure for an offset and refund.

Infrastructure charge

The proposed capped framework, like the current capped framework, empowers a local government to give an applicant an infrastructure charges notice (called an **ICN**)[148] which levies a charge in accordance with the adopted charge (called a **levied charge**).[149]

Infrastructure charges notice

An ICN under the proposed capped framework is materially the same as the current capped framework and previous uncapped framework other than for the following:

- *Local government development approval* – An ICN can only be given for a development approval given by a local government such that an ICN cannot be given for a development approval of a private certifier for self assessable development under a local government's planning scheme.[150]
- *Form of the ICN* – The ICN must state the following matters in addition to those provided for under the current capped framework:
  - *Information notice* – The ICN must state the reasons for the decision and details of the appeal rights.[151]
  - *Details of the calculation of the levied charge* – The ICN must state how the amount of the levied charge has been worked out.[152]
  - *Details of an offset or refund* – The ICN must state whether an offset or refund applies and if so, the details of the offset or refund.[153] In order to identify the offset and refund it will be necessary to work out the cost of the trunk infrastructure. This will require reference to the establishment cost of infrastructure in the schedule of works in the plans for trunk infrastructure in the LGIP (although this is by no means clear).

    It is important to note that the definition of establishment cost under the proposed capped framework is materially different to the definition of establishment cost under the current capped framework in the following respects:[154]

    > Existing infrastructure – *The value of works is that which is reflected in the local government's asset register whilst the value of land is its "current value" which will be interpreted to mean market value*.

    > Future infrastructure – *The local government's financing costs are excluded*.

    This has a number of practical consequences:

    > Operational issue – *The effect of this is that the cost of infrastructure stated in a PIP under the current capped framework, which is a deemed LGIP under the proposed capped framework, is not the establishment cost of infrastructure for the purpose of determining an offset and refund under the proposed capped framework.*

    > Policy issue – *Given that the establishment cost of trunk infrastructure is not used to calculate a charge, as was the case with the previous uncapped framework, and is only used to work out an offset and refund, the exclusion of a local government's financing costs to fund the provision of trunk infrastructure is appropriate, otherwise those costs which are not met by an applicant would inflate an offset and refund.*

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146 See proposed new section 633(1) (Working out cost of infrastructure for offset or refund) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

147 See proposed new section 633(2) (Working out cost of infrastructure for offset or refund) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

148 See proposed new sections 635(1) and (2) (When charge may be levied and recovered) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

149 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

150 See proposed new section 635(1)(a) (When charge may be levied and recovered) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

151 See proposed new section 637(2) (Requirements for infrastructure charges notice) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

152 See proposed new section 637(1)(b) (Requirements for infrastructure charges notice) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

153 See proposed new section 637(1)(f) (Requirements for infrastructure charges notice) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

154 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

Levied charge

The proposed capped framework for a levied charge is similar to the current capped framework other than for the following:

- *Additional demand* – A levied charge may only be for additional demand placed upon the trunk infrastructure which will be generated by the development.[155] A levied charge must therefore exclude demand from an existing lawful use or a future use to be carried out under a further development permit.[156] As discussed earlier, the additional demand of future self assessable development can also not be included.
- *Levied charge attaches to the land* – A levied charge is payable by the applicant including any person in whom the development approval vests, such as an owner of the subject premises to which a development approval applies.

  Furthermore a levied charge attaches to the land such that it can be recovered from owners and their successors in title in the same way as a condition of a development approval requiring the payment of infrastructure charges under the previous uncapped framework could also be recovered from owners of land.[157]

Infrastructure charge versus development charge

A levied charge under the proposed capped framework, like an adopted infrastructure charge under the current capped framework, has the following important characteristics:

- *Infrastructure charge is not a development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.[158]

  A levied charge is different to a development charge which is a charge designed to internalise the marginal external costs that are imposed by development and which has the primary goal of influencing the location and nature of development.[159]
- *Average cost approach not marginal cost approach* – The maximum adopted charges in the SPRP (adopted charges) are calculated by reference to an average cost State-wide approach; whilst the adopted charges in a charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average cost municipality-wide approach.[160]

  The average cost approach whilst favoured by State and local governments for administrative simplicity and public acceptability, is generally not favoured by most smaller developers who prefer a marginal cost site-specific approach where an infrastructure charge reflects the cost of increasing the capacity of the infrastructure to serve an additional unit of demand.[161] This marginal cost approach is also recommended by the Productivity Commission, as is discussed later in this paper.

  Importantly levied charges under the proposed capped framework, like the current capped framework, are based on an average cost approach and are capped. As such, levied charges in some cases do not achieve full cost recovery whilst in other cases results in over-recovery or a tax; policy positions which were intended to be avoided as was the case with infrastructure charges under the previous uncapped framework. As is discussed later the economic distortions resulting from under-recovery and over-recovery are likely to have significant public policy implications.

Development charge

The proposed capped framework, like the current capped framework and previous uncapped framework, empowers a local government to impose a condition on a development approval requiring the payment of additional trunk infrastructure costs for development inconsistent with the LGIP (called an **additional payment condition**).[162]

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155 See proposed new section 636(1) (Limitation of levied charge) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

156 See proposed new section 636(2) (Limitation of levied charge) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

157 See proposed new sections 635(6)(b) and (c) (When charge may be levied and recovered) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill; cf *Montrose Creek Pty Ltd & Manningtree (Qld) Pty Ltd v Brisbane City Council* (2013) QPELR 47.

158 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

159 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

160 Clinch JP and O'Neill E *Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities*, Urban Studies, 15 March 2010, page 2152.

161 Clinch JP and O'Neill E *Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities*, Urban Studies, 15 March 2010, page 2152.

162 See proposed new section 650 (Power to impose) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

The additional trunk infrastructure costs required by an additional payment condition is a development charge which is intended to internalise a local government's marginal external costs imposed by development that is inconsistent with the LGIP.

An additional payment condition is therefore intended to influence the location and nature of development. This is unlike a levied charge, the primary purpose of which is cost recovery; albeit under the proposed capped framework and the current capped framework full cost recovery is far from being achieved.

Provision of trunk and non-trunk infrastructure

Legislative requirements for conditions

The proposed capped framework, like the current capped framework and previous uncapped framework, empowers a local government to impose a condition requiring the provision of trunk and non-trunk infrastructure if two statutory criteria are satisfied:

- *Head of power* – The condition must expressly identify one of the following heads of power for the imposition of the condition:[163]
  - *Necessary infrastructure condition* – A condition can be imposed requiring the provision of trunk infrastructure if the trunk infrastructure is necessary to service the subject premises and has not been provided or has been provided but is inadequate.[164]
  - *Non-trunk infrastructure condition* – A condition can be imposed requiring the provision of non-trunk infrastructure for the following limited purposes:[165]
    - Internal network – *A network or part of a network internal to the premises.*
    - Connection to external network – *The connection of the premises to an external infrastructure network.*
    - Safety or efficiency of network – *The protection or maintenance of the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.*
- *Relevant and reasonable requirement* – The condition must also satisfy the relevant and reasonable requirement of the SPA[166] which in the case of a necessary infrastructure condition is deemed to be met if the following are satisfied:[167]
  - *Necessary to service subject premises* – The infrastructure is necessary to service the subject premises.
  - *Efficient and cost effective solution* – The infrastructure is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.
  - *Infrastructure on the subject premises* – The infrastructure, if provided on the subject premises, is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

Conversion application for non-trunk infrastructure

The proposed capped framework, unlike the current capped framework and previous uncapped framework, empowers an applicant to make a conversion application to the local government to convert the non-trunk infrastructure imposed in a development approval condition to trunk infrastructure, if the construction of the non-trunk infrastructure has not commenced.[168]

The local government is required to take the following action for the conversion application:

- *Decision criteria* – A regulation may prescribe criteria relevant to a decision about the conversion application.[169] No draft decision criteria have been provided during public consultation.
- *Information requirement* – The local government may, within 30 business days, require the applicant to give, within 10 business days, the information it reasonably needs to decide the application.[170]

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163 See proposed new section 335(1)(e) (Content of decision notice) in clause 7 (Amendment of s335 (Content of decision notice) of the Bill.

164 See proposed new sections 645 (Application and operation of sdiv 1), 646 (Necessary infrastructure condition for LGIP-Identified infrastructure) and 647 (Necessary infrastructure condition for other infrastructure) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

165 See proposed new section 665 (Conditions local governments may impose) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

166 See sections 345 (Conditions must be relevant or reasonable) and 406 (Conditions must be relevant and reasonable) of the *Sustainable Planning Act 2009*.

167 See proposed new section 648 (Deemed compliance with necessary or reasonable requirements) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

168 See proposed new sections 658 (Application of sdiv 1) and 659 (Application to convert infrastructure to trunk infrastructure) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

169 See proposed new section 660(2) (Deciding conversion application) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

- *Determination of application* – The local government must decide the application within 30 business days of the making of the application or the applicant complying with the information requirement.[171]
- *Notice of decision* – The local government must give a notice as soon as practicable of the making of its decision[172] which must state the following:
  - *If approved* – whether an offset or refund applies and if so the details of the offset or refund;[173]
  - *If refused* – the reasons for the refusal and the details of the appeal rights.[174]
- *Amendment of approval conditions* – The local government may, within 20 business days of converting non-trunk infrastructure to trunk infrastructure, amend the development approval in the following respects:[175]
  - remove the non-trunk infrastructure condition which no longer has effect;[176]
  - impose a necessary infrastructure condition for the trunk infrastructure.[177]
- *Infrastructure charges notice* – The local government must, within 10 business days of the imposition of a necessary infrastructure condition, give an ICN or amend an existing ICN to reflect whether an offset or refund applies and if so, the details of the offset or refund.[178]

The conversion application process raises the following issues:

- *Development approval* – The conversion application can only be lodged after a development approval takes effect. It cannot be commenced whilst an appeal is on foot for the development approval; presumably on the basis that any issue in respect of the status of the infrastructure will be resolved as part of the appeal.
- *Decision criteria* – If there is an interim period in which a regulation has not prescribed decision criteria relevant to a decision about a conversion application, consideration may need to be given to determining interim criteria to determine conversion applications.

Offsets and refunds for trunk infrastructure and development charge

Necessary infrastructure condition

The proposed capped framework requires a local government which has imposed a necessary infrastructure condition requiring the provision of trunk infrastructure, to take the following actions:

- *Identification of an offset and refund* – Unlike the current capped framework and previous uncapped framework, the local government must identify in the ICN the following:
  - whether an offset or refund applies and if so the details of the offset or refund[179] which is to be calculated by reference to the establishment cost of the trunk infrastructure stated in the LGIP;[180]
  - the reasons for the decision.[181]
- *Recalculation of the establishment cost for trunk infrastructure* – Unlike the current capped framework and previous uncapped framework, the local government, where requested by an applicant, must recalculate the establishment cost of the trunk infrastructure using the method for working out the cost of the infrastructure in the charges resolution and amend the ICN accordingly.[182]

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170 See proposed new sections 660(3) and (4) (Deciding conversion application) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

171 See proposed new sections 650(1) and (6) (Deciding conversion application) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

172 See proposed new section 661(1) (Notice of decision) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

173 See proposed new section 661(2) (Notice of decision) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

174 See proposed new section 661(3) (Notice of decision) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

175 See proposed new section 662(3) (Effect of and action after conversion) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

176 See proposed new section 662(2) (Effect of and action after conversion) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

177 See proposed new section 662(3) (Effect of and action after conversion) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

178 See proposed new section 662(4) (Effect of and action after conversion) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

179 See proposed new section 637(1)(f) (Requirements for infrastructure charges notice) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

180 See proposed new section 657(1)(b) (Process) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

181 See proposed new section 637(2) (Requirements for infrastructure charges notice) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

182 See proposed new section 657 (Process) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

- *Offset* – The local government must offset the cost of the infrastructure against the amount worked out by applying the adopted charge.[183]
- *Refund* – The local government must, if the cost of the infrastructure exceeds the amount worked out by applying the adopted charge, provide a refund to the applicant the timing of which is to be agreed with the local government.[184]

Additional payment condition

The proposed capped framework also requires a local government which has imposed an additional payment condition requiring the payment of additional trunk infrastructure costs for development completely in the priority infrastructure area, to provide to the applicant a refund the timing of which is to be agreed with the local government.[185]

Refund amount

The proposed capped framework, unlike the current capped framework and previous uncapped framework, provides that the amount of the refund is to be the proportion of the establishment cost of the infrastructure that:[186]

- *Apportionment* – may be apportioned reasonably to users of premises other than the subject premises; and
- *Subject to levied charge* – has been, is or is to be, the subject of a levied charge.

The refund provisions for a necessary infrastructure condition and an additional payment condition raise a number of issues:

- *Inconsistency* – There are subtle differences in the drafting between the provisions the significance of which is hard to distinguish.
- *Apportionment* – The requirement to apportion the establishment cost between users and non-users of the subject premises, presents significant methodological difficulties and an additional administrative burden for local governments, given that the refund amount is to be stated in the ICN.
- *Infrastructure subject to levied charge* – The requirement for a refund to relate to infrastructure that has been, is, or is to be, the subject of a levied charge by the local government, would appear to limit a refund to only trunk infrastructure in the LGIP and not trunk infrastructure identified by a conversion application. However it is far from certain whether this was intended.

State infrastructure provider powers

State-related condition

A State infrastructure provider may impose a condition on a development approval (called a **State-related condition**) for infrastructure or works to protect the operation of infrastructure associated with State-controlled road infrastructure, public passenger transport infrastructure, railways, ports and airports.[187]

A State-related condition cannot be lawfully imposed by a State infrastructure provider for any other State infrastructure such as education and emergency services. A local government also has no power to impose a condition for State infrastructure.

Local government reimbursement

A State infrastructure provider which has imposed a State-related condition may require a local government to reimburse the State infrastructure provider for levied charges for local government infrastructure which has been replaced by the State infrastructure the subject of the State-related condition.[188]

Infrastructure agreements

The proposed capped framework provides for arrangements for infrastructure agreements which are materially the same as the current capped framework and previous uncapped framework other than for the following changes:

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183 See proposed new sections 649(1) and (2) (Offset or refund requirements) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

184 See proposed new sections 649(1) and (3) to (4) (Offset or refund requirements) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

185 See proposed new section 654 (Refund if development in PIA) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

186 See proposed new section 649(3) (Offset or refund requirements) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill for necessary infrastructure condition; cf proposed new section 654(2) (Refund for additional payment condition for development in PIA) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

187 See proposed new section 666 (Power to impose conditions about infrastructure) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

188 See proposed new section 669 (Reimbursement by local government for replacement infrastructure) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

- *Public sector entity* – A distributor-retailer is declared not to be a public sector entity[189] with the following consequences:
  - a distributor-retailer cannot enter into an infrastructure agreement under the SPA other than where a local government or other public sector entity is a party;[190]
  - a distributor-retailer is not required to give a water infrastructure agreement it enters into under the SEQ Water Act to a local government.[191]
- *Obligation to negotiate in good faith* – A local government, other public sector entities, applicants and other entities have a non-justiciable obligation, where an infrastructure agreement is proposed, to negotiate the infrastructure agreement in good faith.[192]

Appeals

The proposed capped framework provides for appeals to the Queensland Planning and Environment Court and a Building and Development Committee, which are materially the same as the current capped framework other than for the following matters:

- *Infrastructure charges notices errors* – An appeal is provided for in respect of the following errors in an ICN:[193]
  - the application of the adopted charge but not the adopted charge itself;
  - the working out of additional demand for a development;
  - a decision about an offset and refund but not the establishment cost of trunk infrastructure in the LGIP or the value of the infrastructure recalculated in accordance with the method in the charges resolution.
- *Conversion application* – An appeal is provided for in respect of a refusal or deemed refusal of a conversion application to convert non-trunk infrastructure to trunk infrastructure.[194]

Policy implications of the proposed capped framework

Changed policy objectives

The policy objectives of the Bill are to:

> *Establish a long-term local infrastructure planning and charging framework that is certain, consistent and transparent and which supports local government sustainability and development feasibility in Queensland.*[195]

The policy objectives of the Bill are substantially different to the following policy objectives of the current capped framework and previous uncapped framework:[196]

> *(a) to seek to integrate land use and infrastructure plans; and*
>
> *(b) to establish an infrastructure planning benchmark as a basis for an infrastructure funding framework; and*
>
> *(c) to establish an infrastructure funding framework that is equitable and accountable; and*
>
> *(d) to integrate State infrastructure providers into the framework.*

A comparison of the policy objectives of the proposed capped framework with the current capped framework and previous uncapped framework indicate the following:

- *Accountability* – The policy objectives of certainty, consistency and transparency of the proposed capped framework are encompassed within the broader accountability objective of the current capped framework and previous uncapped framework.

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189 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

190 See proposed new section 677 (Agreement for infrastructure partnerships) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

191 See proposed new section 673 (Copy of infrastructure agreement to be given to local government) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

192 See proposed new section 671 (Obligation to negotiate in good faith) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

193 See proposed new sections 478(2)(b) and (c) and (3) (Appeals about infrastructure charges notice) and 535(2)(a) and (b) and (3) (Appeals about infrastructure charges decisions) in clause 9 (Replacement of s 478 (Appeals about particular charges for infrastructure) and 12 (Replacement of s 535 (Appeals about charges for infrastructure) of the Bill respectively.

194 See proposed new sections 478A (Appeals against refusal of conversion application) and 535A (Appeals against refusal of conversion application) in clause (Replacement of s 478 (Appeals about particular charges for infrastructure) and 12 (Replacement of s 535 (Appeals about charges for infrastructure) of the Bill respectively.

195 See Explanatory Notes, page 1.

196 See section 625 (Purpose of pt 1) of the *Sustainable Planning Act 2009*.

- *Integration and equity* – The policy objectives of local government sustainability and development feasibility of the proposed capped framework do not encompass the broader policy objectives of integration and equity of the current capped framework and previous uncapped framework and indeed relate only to the interests of local governments and developers without consideration of the interests of other stakeholders such as landowners.
- *Economic efficiency* – The policy objectives of the proposed capped framework, current capped framework and previous uncapped framework do not purport to address the broader policy objective of economic efficiency.

The proposed capped framework is likely to have significant public policy implications given that it does not adequately address the broader policy objectives of integration, equity and economic efficiency.

Integration issues

Infrastructure planning

The proposed capped framework, like the current capped framework and previous uncapped framework, integrates land use and infrastructure planning reasonably well with the LGIP included in a local government planning scheme being required to identify the following:[197]

- *Priority infrastructure area (**PIA**)* – The PIA within which 10-15 years of land for future growth for non-rural purposes is to be serviced by trunk infrastructure.
- *Planning assumptions* – The planning assumptions for residential and non-residential growth in the PIA.
- *Plans for trunk infrastructure* – The plans for trunk infrastructure which identify the establishment cost and indicative delivery timeframes for trunk infrastructure to service the PIA.

In this regard it is relevant to note that the Productivity Commission has previously recognised for the previous uncapped framework that in Australia "*only Queensland's longer term indicative infrastructure delivery timeframes provide insights for town planners looking to make longer term planning decisions.*"[198]

Infrastructure funding

The proposed capped framework, like the current capped framework, does not achieve the primary goal of an infrastructure charge; namely to ensure cost recovery for the provision of infrastructure by a local government.

The Local Government Association of Queensland has stated that under the current capped framework there is an estimated shortfall between infrastructure charges and the cost of providing infrastructure to new development of around $480 million annually.[199]

The proposed capped framework, like the current capped framework, by imposing capped infrastructure charges, has in essence, prioritised accountability (in particular certainty) over cost recovery.

However no cost benefit analysis has been released by DSDIP to establish that the benefits arising from certainty exceed the $480 million annual costs for foregone infrastructure charges as well as the unquantified costs of social inequity and economic inefficiency associated with the proposed capped framework.

The proposed capped framework, like the current capped framework, therefore does not integrate infrastructure and land use planning with infrastructure funding as was the case with the previous uncapped framework; which admittedly also imposed additional costs arising from the uncertainty of that framework.

In this regard it is also relevant to note that the Productivity Commission has previously recognised, in relation to the previous uncapped framework, that "*Brisbane/South-East Queensland was found to have the strongest links between budget funded initiatives and priorities outlined in their metropolitan and infrastructure plans.*"[200]

Basic policy objective

The basic policy objective of any infrastructure planning and charging framework must be to ensure the integration of land use, infrastructure and funding such that infrastructure is funded so that it can be constructed prior to or current with development to ensure that existing infrastructure networks are not overwhelmed by new demand.

The proposed capped framework and current capped framework are therefore unlikely to encourage this basic policy objective, given the lack of integration between infrastructure and land use planning and infrastructure funding.

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197 See proposed new section 627 (Definitions for ch 8) in clause 18 (Replacement of ch 8 (Infrastructure)) of the Bill.

198 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*, Research Report, Volume 1, April 2011, page 193.

199 Local Government Association of Queensland (2013), *Submission to Infrastructure Planning and Charging Framework Review*, Brisbane, page ii.

200 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment*, Research Report, Volume 1, April 2011, page 192.

Equity issues

The proposed capped framework also does not expressly or impliedly encourage the provision of infrastructure and serviced land in a manner which encourages equity.

In particular the proposed capped framework does not encourage the following:

- *Horizontal equity* – Those persons that benefit from infrastructure should be the persons that pay for the infrastructure (benefits principle). This clearly is not the case given that capped charges are calculated by means of an average cost approach.
- *Vertical equity* – Those persons that have the greater ability to pay should contribute more towards the cost of providing infrastructure than do those who have a lesser ability to pay (liability-to-pay principle).

In particular the proposed capped framework, like the current capped framework, encourages the following inequities:

- *Inequity between developers* – The developers of low cost development fronts (generally infill development undertaken by smaller entrepreneurial developers) will subsidise the higher cost development fronts (generally greenfield or brownfield development undertaken by larger institutional developers).
- *Inequity between landowners* – The landowners of lower cost development fronts (generally in infill locations) will subsidise the landowners of higher cost development fronts (generally in greenfield or brownfield locations).

The proposed capped framework, encouraging as it does horizontal and vertical inequities, is therefore likely to give rise to further issues of political unacceptability from landowners, smaller entrepreneurial developers and local governments in the short to medium term.

Economic efficiency issues

The proposed capped framework, to the extent that it does not provide for full cost recovery, does not encourage the provision of infrastructure and serviced land which is economically efficient.

In particular the proposed capped framework does not encourage economic efficiency in the following respects:[201]

- *Productive efficiency* – The total average cost for infrastructure and serviced land should be minimised by developing land where the total environmental, social and financial cost of providing additional infrastructure and serviced land is the lowest. In general terms this is likely to be in locations near serviced land.
- *Allocative efficiency* – The price for infrastructure and serviced land should accordingly reflect the costs incurred in its provision and should not be distorted by taxes, subsidies or other measures. The price for infrastructure should therefore reflect its marginal cost; that is the cost of increasing the capacity of infrastructure to produce one more unit of service to satisfy demand, rather than its average cost.
- *Dynamic efficiency* – The infrastructure and serviced land to be provided in the short term should also impose over the long term, the least infrastructure cost, whilst providing the maximum amount of choice for development.

The proposed capped framework encourages non-rural settlement patterns which are not economically efficient and are likely to result in dead weight losses that will impose long term financial costs on State and local governments, smaller entrepreneurial developers and some landowners.

Productivity Commission assessments

The Discussion Paper which preceded the Bill for the proposed capped framework[202] and the Report of the Infrastructure Charges Taskforce[203] whose recommendations were implemented in the current capped framework, do not refer to or expressly consider the analysis of developer contributions undertaken by the Productivity Commission or the Henry Tax Review.

It is a concern that the public policy recommendations of the Productivity Commission and the Henry Tax Review have not been implemented in relation to the proposed capped framework and the current capped framework. The following recommendations of the Productivity Commission and the Henry Tax Review are relevant:

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201 Industry Commission (1993) *Taxation and Financial Policy Impacts of Urban Settlement Volume 1: Report* Australian Government Publishing Service Canberra, page 102.

202 Discussion Paper: *Infrastructure planning and charging framework review – Option for the reform of Queensland's local infrastructure planning and charging framework*, Department of State Development, Infrastructure and Planning 28 June 2013.

203 Infrastructure Charges Taskforce (2011) *Final Report: Recommended Reform of Local Government Development Infrastructure Charging Arrangements* March 2011.

- 1993 Report on Taxation and Financial Policy Impacts on Urban Settlement:
  - *Charges should, wherever possible, reflect any significant locational differences in the costs of providing urban infrastructure. Where they cannot do so, they should at least seek to avoid systematic locational bias.*[204]
  - *While it is necessary to charge explicitly for costs that are common to all developments to transmit efficient location incentives within cities, cost recovery is desirable for reasons of efficient resource management and decision making in relation to the provision of new infrastructure.*[205]
- 2004 Inquiry Report on First Home Ownership:

  Recommendation 7.1 –

  Developer charges (and charging for infrastructure generally) should be:

  - *necessary — with the need for the services concerned clearly demonstrated;*
  - *efficient — justified on a whole-of-life cost basis and consistent with maintaining financial disciplines on service providers by precluding over-recovery of costs; and*
  - *equitable — with a clear nexus between benefits and costs, and only implemented after industry and public input.*[206]

  Recommendation 7.2 –

  Investments in items of social or economic infrastructure that provide benefits in common across the wider community should desirably be funded out of borrowings and serviced through rates, taxes or usage charges.

  Charges are more likely to satisfy the above principles if the processes for establishing and applying them are sound and transparent. Further, efficiency would be enhanced if charging regimes provide developers with some flexibility in the timing of developments and the design of the infrastructure. [207]

  Recommendation 7.3 –

  Authorities and utilities imposing developer contributions and charges should:

  - *follow guidelines based on principles set out in recommendations 7.1 and 7.2 and be subject to independent regulatory scrutiny;*
  - *provide for 'out of sequence' development if developers are prepared to meet the cost consequences;*
  - *be open to proposals for alternative infrastructure arrangements that meet the needs of the households concerned;*
  - *allow appeals on the amounts charged, or their coverage; and*
  - *be accountable for how money raised from charges is spent.*

  The Commission recognises that these principles and practices ostensibly apply already too much existing charging for housing-related infrastructure. There is also substantial regulatory oversight of the charging practices of utilities. However, especially at the local government level, current practice provides scope for improvement.[208]
- 2009 Australian Future Tax System (Henry Tax Review):

  Recommendation 70 –

  COAG should review infrastructure charges (sometimes called developer charges) to ensure they appropriately price infrastructure provided in housing developments. In particular, the review should establish practical means to ensure that these charges are set appropriately to reflect the avoidable costs of development, necessary steps to improve the transparency of charging and any consequential reductions in regulations.
- 2011 Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessments:

  Broadly, the appropriate allocation of capital costs hinges on the extent to which infrastructure provides services to those in a particular location relative to the community more widely. The Commission has previously enumerated the following principles:

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204 Industry Commission (1993) *Report on Taxation and Financial Policy Impacts on Urban Settlement*, Chapter B3, section 3.4.

205 Industry Commission (1993) *Report on Taxation and Financial Policy Impacts on Urban Settlement*, Chapter B3, section 3.5.

206 Productivity Commission (2004) *First Home Ownership Inquiry Report* Melbourne, page 177.

207 Productivity Commission (2004) *First Home Ownership Inquiry Report* Melbourne, page 177.

208 Productivity Commission (2004) *First Home Ownership Inquiry Report* Melbourne, page 177.

- *use upfront charging to finance major shared infrastructure, such as trunk infrastructure, for new developments where the incremental costs associated with each development can be well established and where such increments are likely to vary across developments. This would also accommodate 'out of sequence' development*
- *infill development where system-wide components need upgrading or augmentation that provide comparable benefits to incumbents, this should be funded out of borrowings and recovered through rates or taxes (or the fixed element in periodic utility charges)*
- *for local roads, paving and drainage it is efficient for developers to construct them, dedicate them to local government and pass the full costs on to residents (through higher land purchase prices) on the principle of beneficiary pays*
- *for social infrastructure which satisfies an identifiable demand related to a particular development (such as a neighbourhood park) the costs should be allocated to that development with upfront developer charges an appropriate financing mechanism*
- *for social infrastructure where the services are dispersed more broadly, accurate cost allocation is difficult if not impossible and should be funded with general revenue unless direct user charges (such as for an excludable service like a community swimming pool) are possible.*[209]

- 2014 Public Infrastructure Draft Report:
  - *Developer contributions are up-front contributions that property developers are required to make to infrastructure associated with the land they develop. … This has been a contentious issue because many infrastructure costs previously recovered over time from home owners through utility charges and council rates are now recovered up-front from developers. However, such a shift can be justified on economic grounds. It gives developers an incentive to take account of a wider range of infrastructure costs when deciding where and how to develop land, which could facilitate more efficient provision of housing and associated infrastructure (Henry et al. 2009; PC 2004). …*[210]
  - *In principle, developer contributions should only be made to the extent that infrastructure is attributable to the properties being developed. This is straightforward for infrastructure that is clearly related to a developed property, such as that linking a property to a local network. It is less straightforward for networked infrastructure shared with other developments, such as water mains. Ideally, the incremental cost attributable to each property would be reflected in developer charges. For social infrastructure that provides broad-based benefits to the community, such as a library, government funding from a broad-based revenue source can be more appropriate than developer contributions. The principle of apportioning only attributable costs to developers has been embodied in legislative arrangements in New South Wales, Queensland, Western Australia and Tasmania.*[211]

Commonwealth government

The State government's proposed capped framework also does not take into account the recommendations of the Commonwealth Commission of Audit in relation to the financing of infrastructure or the fiscal strategy of the 2014 Commonwealth Budget released on 13 May 2014.

The Commission of Audit provides the following recommendations in relation to the role of government, in particular the Commonwealth government, in financing infrastructure:

> *The Commission's Phase One recommendations on addressing the degree of vertical fiscal imbalance within the Federation propose that the States have access to the personal income tax system so they are in a better position to fund their own priorities including infrastructure. In this situation, the need for separate tied funding from the Commonwealth for infrastructure will diminish.*
>
> *Recognising that reforms to the Federation will take time to develop and implement, the Commission recommends in the interim that existing infrastructure funding arrangements between the Commonwealth and the States be consolidated, with:*
>
> *a. a single funding pool to be set aside and available for allocation to the States on a formulaic basis, including appropriate funding for maintenance and disaster mitigation with the Commonwealth having no involvement in project selection;*
>
> *b. eligibility for access to the funding pool would be conditional on each State having in place robust project evaluation and governance processes including cost benefit analyses that meet relevant criteria set by the Commonwealth;*
>
> *c. Financial Assistance Grants paid to local governments for local roads and made through the States should be included in this arrangement; and*

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209 Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessments*.

210 Productivity Commission (2014) *Public Infrastructure: Draft Report*, Melbourne, pages 147-148.

211 Productivity Commission (2014) *Public Infrastructure: Draft Report*, Melbourne, pages 147-148.

d. *as part of the consolidation, the Government should reconsider whether the Nation-building Funds should be maintained in their current form or instead rolled into the single funding pool.*[212]

As envisaged by the Commission of Audit, the 2014 Commonwealth Budget sets the groundwork for a renegotiation of Commonwealth and State financial arrangements in relation to the funding of economic and social infrastructure.

Whilst most attention has focused on the impact on individual incomes of short term fiscal measures to reduce welfare entitlements and increase taxes, it is the medium term fiscal strategy that will ultimately determine long term incomes.

The medium term strategy involves redirecting existing spending from entitlements and future expenditure on social infrastructure in particular schools and hospitals, to economic infrastructure in particular transport infrastructure.

Relevantly the Budget is intended to deliver $50 billion of expenditure on economic infrastructure, comprising some $40 billion of already committed funding together with a $11.6 billion Infrastructure Growth Package, which is estimated to contribute to $125 billion of additional infrastructure adding approximately 1% to gross domestic product.[213]

However the investment in economic infrastructure of National interest has been at the expense of Commonwealth grants for social infrastructure to Queensland State and local governments. In particular:

- *Federal Assistance Grants* – The Commonwealth has reduced the Federal Assistance Grants to Queensland local government by some $182 million by removing the indexation of the grants to take account of inflation and population increases.[214]
- *State government grants* – The Commonwealth has also significantly reduced grants to the State government for health and education by cancelling some existing arrangements and limiting the indexation of grants to the consumer price index rather than medical inflation costs which are generally about two to three times higher than normal inflation rates.[215]

The reduction in grants for social infrastructure to Queensland State and local governments will inevitably result in a reduction of the funding and delivery of economic infrastructure by State and local governments. This raises further policy concerns as to the appropriateness of the proposed capped framework which will further constrain the funding and delivery of development infrastructure by local governments.

Conclusions

Reforms similar to current capped framework

The proposed capped framework is not significantly different to the current capped framework.

The proposed capped framework seeks to improve the current capped framework by introducing reforms principally for the administration of offsets and refunds for the provision of work and financial contributions for trunk infrastructure.

In particular the proposed capped framework introduces the following reforms:

- *Identified offsets and refunds* – A local government must identify an offset and refund in an ICN.
- *Recalculation of the cost of infrastructure* – A local government which is requested by an applicant, must recalculate the establishment cost of trunk infrastructure in accordance with the method for working out the cost of trunk infrastructure in its charges resolution consistent with the parameters identified by the Minister.
- *Conversion of non-trunk infrastructure* – A local government which receives a conversion application must consider whether to convert a non-trunk infrastructure contribution to trunk infrastructure.
- *Appeals* – An applicant is given appeal rights to review a local government decision in respect of an offset and refund (other than a recalculation decision) and a conversion application.

Impact of proposed capped framework

The proposed capped framework will impose the following additional financial costs on local governments:

- *Administrative costs* – The cost of the determination of ICNs, recalculation requests, conversion applications and appeals; albeit these costs can be recovered by a local government through a review of its cost-recovery fee schedule.

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212 See National Commission of Audit (2014) *Towards Responsible Government* Phase Two Report, page 34.

213 Australian Government (2014) *Budget 2014-15: Budget Paper 1: Budget Strategic Outlook*.

214 Local Government Association of Queensland *Queensland Council's Share the Plan of Federal Budget*, News Release, 14 May 2014.

215 Honourable Tim Nicholls, Treasurer of Queensland, May 15 2014, Brisbane Times.

- *Reduced levied charges* – The cost of the reduction of levied charges from higher offset and refund values; estimated by the LGAQ as being in the vicinity of $480 million annually.

That said, the proposed capped framework does provide greater certainty for developers, will reduce the cost of the administration of an offset and refund for developers and on balance is likely to be less costly to administer than the current capped framework.

Enduring policy issues remain

Whilst the proposed capped framework does provide a net improvement on the current capped framework, it has not addressed the more fundamental and enduring public policy issues of lack of integration, inequity and economic inefficiency associated with the current capped framework and which the previous uncapped framework had purported to address, consistent with the recommendations of the Productivity Commission.

It is therefore unlikely that the benefits of the proposed capped framework in terms of increased certainty will be outweighed by the financial cost of some $480 million of under-recovered infrastructure charges and the unquantified costs of likely social inequity and economically inefficient settlement patterns. This is especially the case given the further annual reduction of $182 million in grants to local governments and the much more significant reductions in grants to the Queensland government resulting from the 2014 Commonwealth Budget.

Furthermore the financial impacts on local governments, landowners and entrepreneurial developers is likely to give rise to further political unacceptability in the short to medium term.

Further policy review inevitable

In conclusion, whilst the Queensland government is to be congratulated for improving the current capped framework, the proposed capped framework is clearly inconsistent with the policy principles for developer contributions recommended by the Productivity Commission and does not take account of the proposals for reform of Commonwealth and State financial arrangements for infrastructure outlined in the Commission of Audit and the fiscal constraints imposed on Queensland State and local governments by the 2014 Commonwealth Budget.

It is therefore very unlikely that we have heard the end of infrastructure charges reform in Queensland with the result that future reform in the short term is inevitable.

New changes to Building Sustainability Index (BASIX) targets in NSW

Maysaa Parrino

This article discusses the New South Wales government's proposed changes to the BASIX scheme

May 2014

In brief

The NSW government's proposed changes to the BASIX scheme involve a 20%-50% reduction on baseline water consumption and a reduction of up to 50% in energy emissions.

NSW government announces proposed changes to BASIX targets

The Building Sustainability Index (**BASIX**) scheme was introduced in 2004 as a water and energy efficiency target requirement for all new homes constructed in NSW.

In December 2013 the NSW Department of Planning and Infrastructure announced proposed changes to the BASIX targets. The proposed new targets were published for public comment until 31 January 2014, but it appears that significant interest from stakeholders who raised their concerns resulted in an extension for submissions to 14 February 2014.

Currently BASIX targets require energy and water use reductions of up to 40% on residential developments and 20% on multi-unit residential developments of over six storeys.

The government's proposed new BASIX targets include increases to the following targets:

- **Water consumption targets** – between 20% and 50% reduction on baseline consumption.
- **Energy emissions** – up to 50% reduction.
- **Thermal comfort (heating and cooling)** – an increase of approximately one star equivalent to 5.5 to 6 stars out of 10 under the Nationwide House Energy Rating Scheme (**NatHERS**).

NSW government's view of benefits of increased BASIX targets

The NSW government claims that the proposed increases to BASIX targets will:

- bring them in line with national standards;
- create a "fair for all" scheme;
- prepare for the changing climate;
- provide financial savings by reducing the overall projected price increases for water, electricity and gas;
- ensure that more people benefit from water and energy efficient homes;
- create improved design utilising more energy efficient technology in keeping with current trends.

The Allan Consulting Group cost benefit analysis supporting the proposed new BASIX target estimates $1.3 billion in household savings over time, less $794 million increased capital costs for buildings.

Further, the government claims that the average cost of compliance with the proposed new BASIX targets will be $3,322.

Cost of complying with increased BASIX targets could exceed government estimates

An article in the Sydney Morning Herald on 21 January 2014, titled *Cost increases as BASIX rule revisions hit homes*, claimed that home builders will in fact pay up to $8,000 more in complying with the proposed new BASIX targets. A more detailed analysis claims that the average regional four-bedroom, single-storey home will incur an increased cost from $724 to $8,950, with a more typical five-bedroom, double-storey home incurring a cost of $8,930 from the current $2,645.

Ultimately, the article claims that the increase in costs in complying with the new proposed BASIX targets detrimentally impacts on housing affordability, outweighing the benefits claimed by the NSW government.

Support for efficient use of energy and water

There appears to be a significant number of those in support of the NSW government's proposed new BASIX targets and in fact, some of those supporters have even submitted that the proposed new targets need to go further.

Proper consideration needs to be given to the benefits sought to be achieved and whether the proposed new BASIX targets can achieve those benefits practically.

It is not uncommon for those who can afford it and have the available space to go beyond the current BASIX requirements to achieve energy efficiency in their homes. However, imposing targets that may impact negatively by restraining housing affordability due to cost or limiting the ability to comply due to land area requires further assessment and the availability of alternatives to achieve those targets.

Efficient water and energy use: financial and practical considerations

By way of example, the upfront cost and physical requirements of a 2,000 litre rainwater tank as opposed to a 10,000 litre underground rainwater tank can raise the following issues:

- where to locate a 10,000 litre rainwater tank which can be up to 3m in height and diameter
- the cost of excavation and removal of soil/clay/shale when installing a 10,000 litre rainwater tank underground
- cost of a 10,000 litre rainwater tank compared to a 2,000 litre tank
- cost of associated pumps and equipment to achieve the BASIX requirements of the 10,000 litre rainwater tank
- the overall benefit that would be achieved by the installation of a 10,000 litre rainwater tank compared to a 2,000 litre rainwater tank

Ultimately, the ideal outcome is to achieve a balance between increased water and energy efficiency of residential buildings and overall benefit to the community and environment whilst maintaining housing affordability. What is the perfect balance?

Soggy end for groundwater extraction proposal

Ronald Yuen | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2014] QCA 21 heard before Margaret McMurdo P and Fraser and Morrison JJA

May 2014

In brief

Gillion Pty Ltd v Scenic Rim Regional Council & Ors [2014] QCA 21 was an application for leave to appeal to the Queensland Court of Appeal from the Queensland Planning and Environment Court, in which Gillion Pty Ltd was unsuccessful in establishing grounds to appeal based upon contended errors of law, leading to the refusal of the application with costs.

The applicant applied for leave to appeal against the refusal of its development application by the Queensland Planning and Environment Court

In order to make a successful application for leave to appeal against the decision of the Planning and Environment Court, Gillion Pty Ltd was required to establish an error of law in the reasons for decision of the Queensland Planning and Environment Court.

The court did not unduly interpret the precinct intent to apply across the shire

Gillion Pty Ltd's first ground of appeal was that an error of law had been made by the Queensland Planning and Environment Court because it had incorrectly interpreted that the precinct intent in Overall Outcome 46 (**OO46**) for the Tamborine Mountain Zone Code under the *Beaudesert Shire Planning Scheme 2007* applied across the Shire, and that such incorrect interpretation had diminished the importance of the significant deficiency identified in OO46 which attributed to the identification of the proposed commercial groundwater extraction not being consistent development.

Despite the use of the word "Shire" rather than "Zone" in the reasoning of the decision of the Queensland Planning and Environment Court, having regard to the repeated references to the Village Residential Precinct (within which the subject land is located) being in the Tamborine Mountain Zone and its focus on the zone in its reasons, the Court of Appeal held that the court "appreciated that the relevant Planning Scheme provisions related to the Tamborine Mountain Zone rather than any other Zone within the Shire".

Nonetheless, the Court of Appeal found that the court's conclusion that the deliberate policy position of excluding commercial groundwater extraction from the consistent table of uses in the Tamborine Mountain Zone was significant, was open on the evidence and would not have been affected by an error of law in the court's analysis of the deficiency identified in OO46 for which Gillion Pty Ltd contended.

No failure to account for the deficiency in the precinct intent in determining the nature and extent of the conflict with the planning scheme

The second ground Gillion Pty Ltd sought to establish was that the Queensland Planning and Environment Court failed to take into account the deficiency identified in OO46 and such failure impacted on the court's conclusion that the exclusion of commercial groundwater extraction from the consistent table of uses in the Tamborine Mountain Zone was a deliberate policy position and that the conflict with the planning scheme was significant.

The Court of Appeal held that the court did take into account the identified deficiency in OO46 and as such, Gillion Pty Ltd had not established an error of law in that regard. The Court of Appeal noted that the Queensland Planning and Environment Court's assessment of the extent of conflict between the proposed development and the planning scheme only involved questions of fact which were not open to be challenged in the Court of Appeal.

Arguments relating to construction of the planning scheme not accepted

A third ground was asserted by Gillion Pty Ltd that the Queensland Planning and Environment Court erred in failing to take into account that the relevant provisions in the planning scheme which were considered by the court were general provisions in the planning scheme applicable to any development properly characterised as commercial groundwater extraction irrespective of its size, location, intensity and scale and to that end, the proposed development did not include each of the elements contemplated by the definition of commercial groundwater extraction.

However, the Court of Appeal noted that the generality of the relevant provisions did not of itself indicate that the conflict of the proposed development with the planning scheme was not significant and further, the fact that not all elements of the definition of commercial groundwater extraction were met was of no significance in circumstances where the proposed development nonetheless fell within the definition.

Gillion Pty Ltd also asserted that the Queensland Planning and Environment Court erred in principle by not reading the planning scheme as a whole in arriving to its conclusion that the conflict of the proposed development with the planning scheme was significant. This was not accepted by the Court of Appeal given the detailed analysis of the planning scheme undertaken and explanation of the conclusions reached sufficiently demonstrated that the court had construed the planning scheme as a whole.

Approval of a furniture upholstery home based business at South Maclean

Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Anderson v Logan City Council and Waack* [2014] QPEC 10 heard before Rackemann DCJ

May 2014

In brief

In the case of *Anderson v Logan City Council and Waack* [2014] QPEC 10, the Queensland Planning and Environment Court heard an appeal commenced by Mrs Sonya Anderson against the decision of the Logan City Council to approve a development application lodged by Mr Dean Waack and Mrs Fiona Waack for a material change of use for a home based business (category 3) furniture upholstery business in respect of land located at South Maclean.

The issues for determination by the court related to traffic, dust and noise. In this regard, the council was the only party in the appeal that nominated experts in those areas.

The court dismissed the appeal in the absence of an appearance by or on behalf of Mrs Anderson and approved the proposed development subject to conditions.

The appeal was heard in the absence of Mrs Anderson

On the day of the hearing, no appearance was made by or on behalf of Mrs Anderson.

Mr and Mrs Waack sought to have the appeal dismissed given the non-appearance by Mrs Anderson. However, as Mr and Mrs Waack carried the onus to demonstrate that the proposed development application should be approved, the court did not consider it appropriate to dismiss the appeal because of the non-appearance by Mrs Anderson.

The court determined to proceed with the hearing of the appeal after noting the following:

- a representative of Mrs Anderson was aware of the hearing dates and that an appearance by or on behalf of Mrs Anderson was necessary;
- there was no proper basis for Mrs Anderson not preparing for the hearing or an adjournment of the hearing.

Conditions imposed by the council appropriately resolved the issues in dispute relating to noise and dust

The court determined that the proposed development would not cause any adverse noise or air quality impacts of any significance having regard to the following:

- the limited scope of the proposed development and number of employees to be engaged;
- the individual report and evidence provided by the council's noise and air quality expert which concluded that:
  - the risk of unacceptable acoustic amenity or air quality consequences as a result of the proposed development was expected to be negligible; and
  - the proposed conditions of approval were considered appropriate to protect the acoustic amenity and air quality of the surrounding land uses.

Conditions imposed by the council appropriately resolved the issues in dispute relating to traffic

The court determined that the proposed development would not cause any adverse traffic impacts on the surrounding areas given that:

- the scale of the proposed development was very small;
- there was no reason to believe that the limit of 10 vehicle trips per day associated with the proposed development imposed by the council would likely be exceeded; and
- if necessary, the council could take appropriate steps to monitor the area to enforce compliance.

Whilst the court considered the proposed conditions of approval were appropriate, in order to provide sufficient certainty that the standard of the proposed driveway and car parking spaces under the council's planning scheme would be met, the court required the proposed conditions of approval to be amended to the effect of requiring compliance of the standard.

Sufficient grounds to approve the proposed development despite any conflict with the council's planning scheme or draft planning scheme

The court observed that the subject land was included within the Countryside Precinct of the Mount Lindesay Corridor Zone which sought to protect and encourage broad hectare farming. However, the court noted that the council's planning scheme had been overtaken by events, insofar as it related to that part of the precinct in which the subject land was included, as it had been subdivided to rural residential sized lots and used for residential purposes. The court further noted that the subject land was included in the rural residential zone under the council's draft planning scheme.

In the event that there was any conflict with the relevant provisions of the Countryside Precinct, the court found that there were sufficient grounds to approve the proposed development notwithstanding any conflict which included:

- the planning scheme had been overtaken by events as set out above;
- the level of any conflict would be very low;
- the proposed development would provide economic benefits without causing any consequential detrimental or amenity impacts;
- home based businesses which were compatible with residential amenity and would protect the natural values and character of the local area also found some support from the council's planning scheme.

Council successfully defends a challenge against its decision to impose monetary contributions

Ronald Yuen | Caitlin Stiles

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bremer Waters Pty Ltd v Ipswich City Council* [2013] QCA 392 heard before Muir and Morrison JJA and Applegarth J

May 2014

In brief

The case of *Bremer Waters Pty Ltd v Ipswich City Council* [2013] QCA 392 concerned an application by Bremer Waters Pty Ltd to the Queensland Court of Appeal, for leave to appeal against the decision of the Queensland Planning and Environment Court, which dismissed Bremer's application for declarations that Ipswich City Council had acted unlawfully in respect of its determination of monetary contributions for the provision of infrastructure.

The grounds of appeal were generally described as follows:

- the 1999 infrastructure contributions policies were not valid and there was no power to impose condition 24 of the development approval;
- section 6.1.31 of the *Integrated Planning Act 1997* (**IPA**) did not authorise the imposition of conditions requiring a contribution towards the cost of supplying infrastructure, other than water supply and sewerage infrastructure;
- the 1999 water supply and sewerage infrastructure contribution policy was not valid as it was not self-contained;
- condition 24 of the development approval could not lawfully require payment of contributions in accordance with the 2004 policies which were not in force when condition 24 was imposed;
- the council had no power to change condition 24.

The application for leave was refused by the Court of Appeal and Bremer was ordered to pay the council's costs of and incidental to the appeal.

Council had substantially complied with the process to make the 1999 planning scheme policies

Bremer contended that the Queensland Planning and Environment Court had incorrectly applied section 2.1.20 (Compliance with sch 3) of the IPA in respect of the making of the 1999 planning scheme policies where the council did not purport to follow the process required by section 2.1.19 (Process for making or amending planning scheme policies) of the IPA.

The Court of Appeal observed that whether there was substantial compliance with the process stated in schedule 3 of the IPA was not dependent on the council's intention or on whether it purported to act under a particular head of power. Further, it was observed that nothing in the IPA required the council to identify the power it was exercising in making a policy.

The Court of Appeal accepted the Queensland Planning and Environment Court's position that the council was, by virtue of section 2.1.20, excused from the requirement under section 2.1.19 of following the process stated in schedule 3 for making or amending a planning scheme policy if the policy was made or amended in substantial compliance with the process stated in schedule 3.

The Court of Appeal noted that sections 2.1.19 and 2.1.20 must be read, construed and applied together. It was accepted by the Court of Appeal that it was contemplated under section 2.1.20 that strict compliance with section 2.1.19 was not required and it was the process which would be the subject of substantial compliance. The Court of Appeal observed that the court considered the question of substantial compliance at considerable length and carefully considered the process followed, resulting in the conclusion that there had been substantial compliance.

Further, it was accepted by the Court of Appeal that whether or not there has been substantial compliance was a question of fact and degree. In the circumstances, it was found that Bremer had not established an error of law and as such, had not made out this ground of appeal.

The council was not restricted to only conditioning for water supply and sewerage infrastructure under a transitional IPA provision

Bremer contended that, given the effect of the words "as if the repealed Act had not been repealed" in section 6.1.31(2)(c) (Conditions about infrastructure for applications) of the IPA, the power under that section to impose conditions requiring monetary contributions towards the cost of supplying infrastructure was limited to water supply and sewerage infrastructure and, did not extend to road, social and open space infrastructure.

Accordingly, the Queensland Planning and Environment Court, by concluding that infrastructure in section 6.1.31(2)(c) had the meaning given to it in schedule 10 (Dictionary) of the IPA, had overlooked the mandate that a local government was returned to its pre-IPA position.

The Court of Appeal accepted the proposition that had the legislature intended to limit the conditions' power in section 6.1.31 to water supply and sewerage infrastructure it would have done so expressly. Further, it was noted that section 6.1.31(2) was concerned with the method by which contributions may be imposed, rather than the categories of contributions.

The Court of Appeal also accepted the council's submission that there was in fact power under the *Local Government (Planning and Environment) Act 1990* (which was the pre-IPA position) to impose conditions requiring contributions towards the cost of road works infrastructure, social infrastructure and open space (parks) infrastructure.

It was not accepted by the Court of Appeal that the council's power under section 6.1.31(2)(c) to impose conditions for the payment of contributions towards the cost of supplying infrastructure was limited to water supply and sewerage infrastructure.

Planning scheme policies can refer to a separate document to provide an element in the calculation of infrastructure contributions

Bremer contended that the Queensland Planning and Environment Court erred in its decision in finding that the council's 1999 planning scheme policy complied with the requirements under sections 6.2(2) and 6.2(6) (Contributions towards water supply and sewerage works) of the *Local Government (Planning and Environment) Act 1990* and that it did not need to be "self-contained" and could refer to another document prepared by the council (being the Local Government's Register of General Charges) for the purpose of the calculation of infrastructure contributions.

The Court of Appeal considered the implications of the words "determined in accordance with" and "determined under" under sections 6.2(2) and 6.2(6) and accepted that section 6.2 did not provide that the contribution amount must be "fixed by" a policy or that it be "stated in" a policy. It was further accepted by the Court of Appeal that a payment would be considered being determined under a policy where the policy specified the means of calculating the payment either within the body of the policy or in part by reference to another document.

The Court of Appeal held that the contribution amount was determined under the 1999 policy and was not fixed by the Register of General Charges and the incorporation of the Register in the policy was only a "means of identifying a sum for insertion in the formula for calculating infrastructure charges contained in the policy", and as such, Bremer had not made out this ground of appeal.

Conditions may allow for a contribution rate to be fixed by a policy not in force at the time the condition was imposed, but when the contribution becomes payable

Bremer contended that the council had no power, at the time of the imposition of condition 24 of the development approval, to apply rates for contributions fixed in accordance with relevant planning scheme polices at the time the contributions became payable.

Bremer on appeal sought to distinguish the decisions referred to by the Queensland Planning and Environment Court but did not refer to any decisions that supported its contention, nor did it identify any reason in principle why a condition could not fix a contribution rate by reference to policies in force from time to time in the absence of a relevant statutory prohibition.

Consequently, the Court of Appeal did not consider this ground of appeal was made out by Bremer.

Councils have the power to unilaterally change interrelated conditions as a result of a request to change a condition within a development approval

Bremer contended that the council did not have the requisite power to unilaterally change condition 24 of the development approval upon request under section 3.5.33 (Request to change or cancel conditions) of the IPA, by Bremer, to change condition 2 of the development approval. This request was made to remove the requirement to pay contributions for the Community Building, a matter only addressed in condition 24(a).

The Court of Appeal considered the relevance of condition 24 to the request to amend condition 2 and how the requested amendment to condition 2 would affect condition 24. It was noted that section 3.5.33(5) of the IPA provided for the entity which decided the condition required to be changed to "decide the request" and that section 3.5.33(7)(a) of the IPA allowed the council to "assess and decide a request having regard to the matters the entity would have regard to if the request were a development application". Accordingly, the Court of Appeal considered that the powers and requirements provided for under section 3.5.33 authorised the change of condition 24 and condition 2.

Further, the Court of Appeal observed that an acceptance of Bremer's contention would substantially constrain local authorities in dealing with applications for changes in conditions, particularly when determining whether to approve the applications where the approval would produce a result that other conditions would no longer be adequate, appropriate or desirable. In the circumstances, this ground of appeal was not made out by Bremer.

Court found favourably for Masters Home Improvement Centre at Noosaville

Ronald Yuen | Nadia Czachor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hydrox Nominees Pty Ltd v Noosa Shire Council* [2014] QPEC 18 heard before Rackemann DCJ

July 2014

In brief

The case of *Hydrox Nominees Pty Ltd v Noosa Shire Council* [2014] QPEC 18 involved an appeal in the Planning and Environment Court commenced by Hydrox Nominees Pty Ltd against the Noosa Shire Council's decision to refuse a development application to facilitate the establishment of a Masters store at Noosaville. The main issues in dispute were whether the proposed Masters store was in conflict with the planning scheme and if so, were there sufficient grounds to justify approval, despite the conflict.

Whilst the court found that the proposed Masters store was in conflict with the planning scheme, there was significant public or community and planning need for the proposed Masters store and it would bring benefits to the community. As such, the appeal was allowed and further hearing was adjourned to allow conditions of approval to be formulated.

Council refused the development application on the grounds of the proposal's conflict with the planning scheme, insufficient grounds to justify approval and its potential to adversely impact on the economic viability of existing businesses

Hydrox Nominees made a development application for a material change of use for a Masters store on about 3.51 hectares of vacant, cleared land at Noosaville.

Under the council's planning scheme, the land is within but at the periphery of the Noosa Shire Business Centre which is the principal retail and business centre for the Shire of Noosa. The Noosa Shire Business Centre is identified as a Major Regional Activity Centre under the South East Queensland Regional Plan. The proposed Masters store is consistent with the South East Queensland Regional Plan.

Contrary to the recommendations of its planning officer, the council refused the development application on such grounds which included:

- the proposed Masters store had the potential to adversely impact on the economic viability of numerous existing businesses, particularly in the Noosaville locality;
- the proposed Masters store was not sufficiently consistent with the planning scheme and there were insufficient grounds to justify approval despite the conflict.

Court did not believe the proposal would likely result in an overall adverse effect

The court noted that the only large format home improvement stores on the Sunshine Coast are operated by Bunnings. However, as the most direct competitor, Bunnings did not make a submission to the development application. Nonetheless, the evidence before the court was that it was not expected to fail. Instead, the concern was expressed for smaller existing retailers.

As observed by the court, the land is within an "in centre" location and the proposed Masters store would mainly compete with existing out-of-centre retailers. Further, any concern about the potential loss of levels of service to the public would need to be weighed up against the anticipated net increase in the extent and adequacy of services available to the community.

The following operators and categories of operators were considered:

- Traditional retail facilities such as discount department stores and supermarkets – the parties' economic experts agreed there would be some impact, but it would be minor for the discount department stores and negligible for traditional facilities.

- Specialist traders – the court concluded that traders like paint, garden, tool and plumbing specialists are typically located in industrial areas, not well suited to the female patronage targeted by Masters, and therefore the majority were considered likely to continue to operate.
- Mitre 10 – having withstood a 'significant impact' from Bunnings opening, and given the evidence from the company's chief financial officer about the company's optimistic view of the future, the court preferred the evidence of Hydrox Nominee's economic expert that Mitre 10 had reasonable prospects of being able to continue.

On balance, the court was satisfied that the proposed Masters store would lead to a significant improvement in the extent and adequacy of services, even though it might result in store closures and diminution in the level of service offered by some others.

The proposal was in conflict with the planning scheme but there were a number of matters which gave support to the proposal

The court accepted that the proposed Masters store was in conflict with the planning scheme as it departed from what was intended within the relevant precincts of the Noosa Shire Business Centre by providing a substantial amount of retail development that would displace opportunity for potential future development for specified consistent uses, including non-retail uses.

Despite that, having considered the evidence before the court, the court observed the following matters which gave support to the proposed Masters store:

- the potential loss of industrial land was inconsequential given the supply of land available to service the relatively low demand for industrial land in the Noosa Shire;
- the proposed Masters store would not impact on the capacity of the Noosa Shire Business Centre to accommodate any future demand from the "white collar" section that might develop over time;
- the Noosa Shire Business Centre had sufficient land available to develop a mix of functions;
- the departure from the mix contemplated in the provisions of the planning scheme would not undermine the positive contribution of the proposed Masters store to the long term viability of the Noosa Shire Business Centre as the principal business, retail and administrative centre in Noosa;
- the land was suitable for accommodating the Masters store without unacceptable impacts and in reality, it was the only apparent opportunity to accommodate the Masters store in the locality.

The court was satisfied that there was a significant public or community, planning and economic need for the proposal

The court noted that the provision of a competitive large format improvement store in close proximity would be beneficial to families, retirees and the tourist market in the Noosa locality.

Whilst the court acknowledged that the catchment population might not be generous for two large format home improvement stores, it was satisfied that there was sufficient economic demand to support the proposed Masters store, in addition to the existing Bunnings.

Accordingly, the court was satisfied that there was a significant public or community, planning and economic need for the proposed Masters store. As such, despite the conflict with the planning scheme, there were sufficient grounds which warranted approval of the proposed Masters store.

Indemnity not punishment – the role of cost orders in enforcement proceedings to remedy or restrain the commission of a development offence

Ronald Yuen | Luke Grayson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Southern Downs Regional Council v Kemglade Pty Ltd & Anor* [2014] QPEC 19 heard before Jones DCJ

July 2014

In brief

The case of *Southern Downs Regional Council v Kemglade Pty Ltd & Anor* [2014] QPEC 19 concerned an application for costs brought in the Planning and Environment Court under section 457(9) (Costs) of the *Sustainable Planning Act 2009* by the Southern Downs Regional Council against Kemglade Pty Ltd and Mr Jan Idec in respect of the enforcement proceedings for using the premises for temporary workers' accommodation without an effective development permit, following the council successfully obtaining the enforcement orders.

The court held that there was no reason to depart from the "usual order as to costs" and Kemglade Pty Ltd and Mr Idec were ordered to pay the council's costs of its application.

Purpose of cost orders is to indemnify the successful party in respect of expenses it had to incur, not to punish the unsuccessful party

Section 457(9) of the *Sustainable Planning Act 2009* relevantly provides that "*costs of a proceeding mentioned in section 601* (Proceedings for orders), *including an application in a proceeding mentioned in that section, are in the discretion of the court but follow the event, unless the court orders otherwise.*"

The court believed the wording of section 457(9) made it clear that it was the intention of Parliament that costs in proceedings brought under section 601 should follow the event unless the court in exercising its discretion, considered that there were sufficient reasons to deprive the successful party of its costs.

As observed by the court, the primary purpose of the cost order was to indemnify the successful party in respect of the expenses it had to incur and costs were not ordered against the unsuccessful party as a form of punishment.

By reference to the High Court decision in *Oshlack v Richmond River Council* [1998] HCA 11 and the decision in *Kilvington v Grigg & Ors (No. 2)* [2011] QDC 37, the court further observed that "costs follow the event", which was often referred to as the "usual order as to costs", operated on the principle that subject to certain limited exceptions, a successful party in litigation would ordinarily be entitled to an award of costs in its favour on reasons of fairness and policy. An exception to the usual order as to costs could arise where the successful party was guilty of inefficient conduct of the proceedings.

Conduct of the respondents was both unlawful and flagrant, such unlawful use would have continued in the absence of the enforcement proceedings and there was no basis for departing from the usual order as to costs

As the council was entirely successful in the enforcement proceedings and Kemglade Pty Ltd and Mr Idec made no attempt to defend the proceedings, the court considered it clear that the council was entitled to a favourable cost order.

The court did not consider that any conduct of the council would cause it to be deprived of a favourable cost order, particularly having regard to a number of matters which included the following:

- the use of the premises for temporary workers' accommodation by Kemglade Pty Ltd and Mr Idec was unlawful and posed real, immediate and serious safety risk to the occupants;
- had the council not commenced the enforcement proceedings, the unlawful use of the premises would have continued.

Further, contrary to the assertion made by Kemglade Pty Ltd and Mr Idec, the court considered that it was necessary for the council to take steps to restrain the unlawful use of the premises so as to prevent any further danger to the occupants.

The court ordered Kemglade Pty Ltd and Mr Idec to pay the council's costs of its application accordingly.

Is it really a rezoning application or does it just look like one?

Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wigan v Redland City Council & Ors* [2014] QPEC 27 heard before Jones DCJ

July 2014

In brief

The case of *Wigan v Redland City Council & Ors* [2014] QPEC 27 concerned an application brought by Redland City Council to the Planning and Environment Court for a declaration that the development application (seeking a preliminary approval for a material change of use under section 3.1.6 of the repealed *Integrated Planning Act 1997* (**IPA**) and operational works) made by Ms Lorette Wigan was not a valid application for the purposes of the IPA and an order that the appeal be struck out.

The court held that the application was one capable of being received and considered by the council as the relevant assessment manager and if the application was not otherwise a properly made application the conduct of the council had rendered it so. Accordingly, the court dismissed the council's application.

The council submitted that the development application was not capable of being considered by the council and otherwise being dealt with under the repealed Integrated Planning Act 1997

The council submitted that the development application was not capable of being considered by the council as the assessment manager and otherwise being dealt with under the IPA, particularly having regard to the following contentions made by the council:

- the development application did not apply for an identifiable use and it could not be identified as one seeking approval of any development within the meaning under the IPA;
- the development application was in the nature of a rezoning, which could not be made under the IPA;
- the development application was not in compliance with section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA as it did not identify the development resulting from approval which would then be self assessable development and the applicable codes against which the development (if approved) would be assessed given that the proposed codes did not exist in the superseded 1988 planning scheme.

The material change of use was not for a rezoning, but rather for uses that included residential A and residential B uses

On an objective reading of the development application including the IDAS forms and the letter of owner's consent, the court considered that it was sufficiently clear that the intended material change of use was not for a rezoning, but rather for "uses including (but not limited to) Residential A and Residential B uses". The intended uses included the type of development associated with residential A development in the "urban precinct", and residential B development uses in the "high density" precincts identified in the structure plan.

In that regard, the court observed that the council when refusing the development application seemingly had little doubt that it was residential development being applied for.

It was sufficiently clear in terms of how the council's planning scheme was to be varied and an interested person should be able to identify the real effect and potential consequences of the proposed development if approved, notwithstanding the level of complexity involved in identifying the applicable codes

Whilst Ms Wigan applied to have the development application assessed under the superseded 1988 planning scheme, the council determined that the application would be assessed under the 2006 planning scheme.

Having considered the IDAS forms which accompanied the development application, the court concluded that it was clear that the development application sought to vary the effect of a local planning scheme by changing the level of assessment applicable to the proposed uses to self assessment.

The court noted that the 1988 planning scheme did not expressly contain any "codes" for the purposes of the development application. Whilst the 1988 planning scheme contained "standards", the court agreed that the development application would not be workable if it was reconciled with the standards in the 1988 planning scheme.

Despite that, the development application was assessed under the 2006 planning scheme. The court acknowledged that it was a somewhat complex exercise to identify the applicable codes under the 2006 planning scheme. However, as it was sufficiently made clear under the development application the way in which Ms Wigan wanted the council's planning scheme varied, the court considered that an interested person should be able to identify the real effect and potential consequences of the development application if approved.

The court therefore held that the development application was one capable of being received and considered by the council as the relevant assessment manager.

Negotiation and imposition of conditions produce a good outcome for adventure park

Ronald Yuen | Monica Wilkie

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Harris v Scenic Rim Regional Council* [2014] QPEC 16 heard before Preston A DCJ

July 2014

In brief

The case of *Harris v Scenic Rim Regional Council* [2014] QPEC 16 concerned an appeal commenced by Brian Harris and Wendy Harris trading as Scenic Rim Adventure Park in the Planning and Environment Court against the decision of Scenic Rim Regional Council to refuse a development application for a development permit for a material change of use for outdoor sports, recreation and entertainment (adventure and four wheel drive park and camping ground) in respect of land located at Innisplain.

Anthony Robert Halpin and David Peter Barbagallo who made properly made submissions about the development application opposing the proposal, elected to join the appeal as co-respondents.

The court found that the proposal, as amended by Mr and Mrs Harris if carried out in accordance with the proposed conditions of approval, would not have unacceptable impacts in terms of bushfire, flooding, water quality, acoustic, air quality, traffic and town planning including amenity. Accordingly, the court set aside the council's decision and replaced it with a decision to approve the amended proposal subject to conditions.

The court adjourned the hearing of the appeal to allow the parties to discuss and endeavour to agree on the conditions package.

Adverse impacts of the proposal associated with bushfire, flooding, water quality, acoustic and air quality were resolved which left the two contentious issues, namely traffic and town planning

A number of issues in respect of the proposal were raised by the parties in the appeal which included issues associated with geotechnical, vegetation, flora, fauna, good quality agricultural land, bushfire, flooding, water quality, acoustic, air quality, traffic and town planning. The council, Mr Halpin and Mr Barbagallo withdrew the issues associated with geotechnical, vegetation, flora, fauna and good quality agricultural land.

Prior to the hearing, Mr and Mrs Harris changed the development application to reduce the intensity and scale of the proposal and the change was held by the court to be a minor change.

The issues associated with bushfire, flooding, water quality, acoustic and air quality in respect of the amended proposal were resolved by agreement of the experts that they could be satisfactorily dealt with by conditions and as such, would not warrant a refusal of the amended proposal.

Notwithstanding the change made to the proposal, the council maintained that the amended proposal should be refused on traffic and town planning grounds and that it remained in conflict with the council's planning scheme, and there were not sufficient grounds to justify an approval despite the conflict.

During the course of the hearing, Mr and Mrs Harris and the council agreed on amendments to the draft conditions of approval which included a further reduction in the number of vehicles visiting the land each day (from 40 to 20) and completion of certain agreed works within 12 months of the giving of an approval.

Consequently, the council changed its position from opposing to supporting the amended proposal. Mr Barbagallo also changed his position and was no longer opposing the amended proposal. However, Mr Halpin maintained his opposition to the amended proposal on the grounds of traffic and town planning, including that it was in conflict with the council's planning scheme.

The amended proposal with the number of vehicles each day limited to 20 will not lead to unacceptable impacts on the performance or safety of the intersection or on right turns off the Mt Lindesay Highway into Tamrookum Creek Road

Both Mr and Mrs Harris and the council called traffic experts who produced two joint expert reports, the second of which addressed the amended proposal.

Both parties' traffic experts agreed that an increase in the number of vehicles turning into and out of Tamrookum Creek Road could be acceptable at the current intersection if certain roadworks and regulatory signage were undertaken, but disagreed with respect to the quantum of the increase that would be acceptable.

Mr and Mrs Harris' traffic expert considered an increase of up to 40 vehicles visiting the land each day would be acceptable. Conversely, the council's traffic expert considered an increase of more than 25 vehicles each day would be significant, but could accept a limitation of 25 vehicles visiting the land each day without further works being required to the intersection, and 20 vehicles making right turns off the Mt Lindesay Highway.

The court noted that Mr and Mrs Harris agreed further reduction in the number of vehicles visiting the land each day fell within the traffic experts' threshold of acceptable increase in traffic flow. For that reason and having regard to the following supporting factors, the court found that the amended proposal with the number of vehicles each day limited to 20 would not lead to unacceptable impacts on the performance or safety of the intersection or on right turns off the Mt Lindesay Highway into Tamrookum Creek Road:

- the Department of Transport and Main Road's general support of the original proposal (which was of a much larger scale and more intensive than the amended proposal);
- the safety record of the intersection;
- a reasonable assumption that road users would obey the road rules and road markings and signage.

The likely increase in traffic flow generated by the amended proposal along Tamrookum Creek Road would be acceptable

As part of the amended proposal, road widening and upgrading of warning and regulatory signage were to be undertaken which included the introduction of a 60/kph speed limit along Tamrookum Creek Road.

It was subsequently agreed between Mr and Mrs Harris and the council that the proposed roadworks and signage would be undertaken within 12 months of the giving of an approval. Given the roadworks and regulatory signage to be completed, both parties' traffic experts agreed that an increase in the number of vehicles using Tamrookum Creek Road as a result of the amended proposal could be acceptable.

The court found that the proposed development, with the number of vehicles visiting the land each day being limited, completion of the roadworks and signage along Tamrookum Creek Road and implementation of other traffic management measures required by the proposed conditions of approval would not cause unacceptable impacts on Tamrookum Creek Road, in reliance of the traffic experts' opinions and having regard to a number of supporting factors which included:

- the council, as the authority which was responsible for Tamrookum Creek Road was in support of the amended proposal subject to the agreed conditions of approval;
- the safety record of Tamrookum Creek Road;
- traffic generated by the proposed development would not likely use the road at its busiest times and as such would not likely cause inconvenience or difficulty to the current users of Tamrookum Creek Road;
- a reasonable assumption that road users would obey the road rules and road signage.

The amended proposal based on the agreed conditions of approval will not have an unacceptable impact on the neighbourhood's amenity

Both Mr and Mrs Harris and the council called town planning experts who produced two joint expert reports, the second of which addressed the amended proposal.

Both parties' town planning experts agreed that the impacts associated with the amended proposal would be acceptable and could be addressed through the implementation of management plans and conditions of approval if various experts on other issues agreed that the amended proposal was acceptable. As such, after amendments were made to the development application, the only outstanding town planning issue was whether the traffic generated by the amended proposal would have unacceptable amenity issues.

As a consequence of the changed conditions of approval, which resulted in the traffic experts reaching agreement that the amended proposal would not generate unacceptable traffic or safety impacts, the town planning experts agreed that there would be no unacceptable amenity impacts.

The court, in reliance of the town planning experts' opinions and having regard to the reasonable expectations of residents of the neighbourhood, found that the amended proposal (which was of a lesser scale, less intensive and generated lesser traffic volumes than the original proposal) based upon the agreed conditions of approval would not have an unacceptable impact on the amenity of the neighbourhood.

Approval of the amended proposal subject to the agreed conditions of approval would not be in conflict with the council's planning scheme

The court noted that the alleged conflict with the relevant provisions of the council's planning scheme by the proposal arose from the unacceptable traffic impacts generated by the proposal and the unacceptable impact on the amenity of the neighbourhood.

Given its findings on those impacts, the court found that an approval of the amended proposal subject to the agreed conditions of approval would not be in conflict with the relevant provisions of the council's planning scheme.

Accordingly, the court determined to set aside the council's decision and replace it with a decision to approve the amended proposal subject to the agreed conditions of approval.

Court conditionally extended the operation period for a long standing quarry

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Holcim (Australia) Pty Ltd v Bundaberg Regional Council (No. 2)* [2014] QPEC 29 heard before Jones DCJ

July 2014

In brief

The case of *Holcim (Australia) Pty Ltd v Bundaberg Regional Council (No. 2)* [2014] QPEC 29 concerned an application made by Holcim (Australia) Pty Ltd in the Planning and Environment Court to conditionally extend the operation period for a long standing quarry located east of Bundaberg.

The court, with the support of the Bundaberg Regional Council, allowed the application and made an order that condition 1.2 of the town planning consent permit be amended to extend the operation period.

The court had to satisfy itself that the proposed extension of the operation period was a permissible change under section 367 of the Sustainable Planning Act 2009

CSR Limited, the previous operator of the quarry, obtained from the Planning and Environment Court a town planning consent permit for the operation of the quarry on the subject land. The permit included a condition which restricted the term of the operation to a 15 year period (condition 1.2). The quarrying operations on the subject land initially were to cease from 13 April 2009. However, following further proceedings in the court, condition 1.2 of the permit was amended to permit quarrying activities on the subject land to continue until 12 April 2014.

Holcim made an application to the court under section 369 (Request to change development approval) of the *Sustainable Planning Act 2009* (**SPA**) seeking a further extension of time for the quarrying operations. The extension was sought primarily due to a drop in production caused by the economic downturn over the past 4 years.

By an order of the court made on 1 April 2014, the operation of condition 1.2 of the permit was effectively extended until such time as Holcim's application was heard and finally determined by the court. The council supported Holcim's application.

The court observed that a successful application by Holcim would not create a new approval but result in a change to a condition of the permit. In determining whether the proposed change to the permit was a "permissible change" under section 367 (What is a *permissible change* for a development approval) of the SPA, the court had to be satisfied that the proposed change would not, because of the change:

- result in a substantially different development;
- require referral to additional concurrence agencies if the application for the permit was remade;
- be likely to cause a person to make a properly made submission objecting to the proposed change if the circumstances allowed;
- cause development to which the permit related to include any prohibited development.

The proposed extension of the operation period would not result in a substantially different development or involve any prohibited development

The court, by reference to the decisions in *Firefast Pty Ltd v Ipswich City Council & Ors* (2006) QPEC 076 and *Cemex Australia Pty Ltd v Bundaberg Regional Council* (2009) QPEC 20, was satisfied that the proposed change to condition 1.2 of the permit for the purpose of extending the operation period would not result in a substantially different development or involve any prohibited development.

The proposed extension of the operation period would not involve additional concurrence agencies

The court observed that there were no entities described as "concurrence agencies" at the time the permit was issued as those agencies were a creation under the repealed *Integrated Planning Act 1997*.

Having regard to the nature of the proposed change to condition 1.2 of the permit, the court was satisfied that no issue involving additional concurrence agencies arose.

The proposed extension of the operation period would not be likely to cause a person to make a properly made submission objecting to the proposed extension

The court noted that the need for an extension of time was not a result of any untoward conduct on the part of Holcim whilst the rate of excavation was dictated by Holcim's own commercial interests.

In considering whether the proposed change to condition 1.2 of the permit would likely cause a person to make a properly made submission objecting to the proposed change, the court had regard to the following facts and circumstances:

- the subject land was identified as a key resource area by the State;
- all extractive and processing activities would cease by 30 November 2014 and during that period, no blasting was to be undertaken and processing activities were to be conducted at a location away from existing and future residential development and in an area which would, to a material extent, be screened by large areas of stockpiling;
- the only significant activities that could be undertaken on the subject land from 30 November 2014 would be those associated with the transportation of material from the existing stockpiles and the ongoing rehabilitation of the subject land, and it would be in the public interest for those activities to be undertaken on the subject land;
- there was experts' evidence which suggested that the extractive and processing activities would only have minor negative impacts on amenity, given the location of the areas yet to be quarried and the relevant processing plant and equipment.

The court was overall satisfied that it was not likely that the proposed change would cause a person to make a properly made submission objecting to the proposed change.

The court also relevantly observed that in the event that Holcim's application were to fail, the council would likely grant a further development approval even if limited to only the removal of existing stockpiled material and site rehabilitation.

In the circumstances, the court allowed Holcim's application and ordered that condition 1.2 of the town planning consent permit be amended to read:

> *This permit shall be in force from the date of issue to 31 December 2016, provided that extraction of materials from the land to which the permit relates is authorised to continue only until 30 November 2014. From 1 December 2014 until 31 December 2016, the permitted use shall be limited to the stockpiling of extracted materials and the completion of rehabilitation of the land as required by condition 6 of this permit. From the date of issue all other permits or approvals over the site shall cease to have any force or effect.*

The importance of the planning and funding of development infrastructure to Queensland's economic model

Ian Wright

This article discusses the importance of the planning and funding of development infrastructure to Queensland's economic model and the poor policy decisions which have contributed to the breaking of Queensland's economic model. It suggests policy prescriptions for the planning and funding of development infrastructure which would assist in rebooting Queensland's economic model through a revived construction and property development sector[216]

September 2014

Infrastructure funding and planning

In our professional capacities as politicians, public servants, developers and advisors and in our personal capacities as citizens of Queensland, regional participants and rate payers in our various local government areas, we instinctively understand that the planning and funding of development infrastructure is critical to the design and construction of the places where we live, work and play.

This is particularly the case in regions such as South East Queensland and regional cities and towns which have a relatively low population density that are experiencing significant population growth and increasing demands for development infrastructure.

However despite our collective understanding of the importance of the planning and funding of development infrastructure, it is clear that the current state of policy and practice in Queensland proves that the German Philosopher, Georg Hegel, was right when he said:

> *Peoples and governments have never learned anything from history or acted on principles deducible from it*.

I therefore start from the premise that you have to understand the past to know the present and to plan for the future.

I would like to provide some broad policy recommendations for the future reform of the framework for the planning and funding of development infrastructure in the context of the development of urban and regional areas of Queensland over the next 20 years.

In doing so I will digress into the past to discuss Queensland's economic model and how it has been broken by those who were not aware of the lessons of the past and have gambled with the long term economic future of the State for short term economic gain.

Queensland's economic model

Queensland's current economic model was established in the 1970's by the Bjelke-Peterson Coalition government. The economic model was based on the simple principle of lower taxes and charges being funded by mining royalties.[217]

The economic model involved five elements:[218]

- First, mining royalties were distributed to the regions and cities and towns as State government grants for development infrastructure.
- Second, local governments used State government grants together with rates revenue to build development infrastructure for future development.
- Third, local governments levied future development with infrastructure charges to recover the rates revenue expended by local governments in building development infrastructure but not the State government grants.

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[216] This paper is based upon an earlier paper titled *Infrastructure charges, offsets and refunds – Missing the woods for the trees* presented at the Property Think Tank Brisbane, 19 March 2014.

[217] Knox, Michael, 27 March 2012, *Economic Strategy*, RBS Morgans.

[218] Eadie, Laura and Haymon, Michael, February 2014, *All Boom and No Benefit? Why Queensland needs a real economic strategy*,19.

- Fourth, the resulting cheap residential land and lower taxes attracted population growth resulting in Queensland experiencing an 88% increase in population over 20 years compared to the 50% Australian average.
- Fifth, many of the new Queenslanders brought retirement savings and set up small businesses which drove growth in urban and regional areas of Queensland.

Therefore Queensland's economic model at its core involved the use of State revenue from mining royalties to subsidise urban development and population growth in Queensland's regions.

The Beattie and Bligh State Labor governments subsequently utilised the economic model to fund increased expenditure on education and health services:

- Firstly, to address Queensland's lower productivity in the 1990's.
- Secondly, in the case of the Bligh government, to reflect the ideological position of the Left Faction of the Labor party.

This increased expenditure on education and health services (as opposed to economic infrastructure) was predicated on rising mining royalties, in particular from coal mining in Queensland's regions.

Challenges to the economic model

However by 2009 the Queensland economic model was coming under significant challenge from 2 areas:

- First, the Global Financial Crisis significantly reduced coal prices and exports.
- Second, a Labor Federal government introduced taxes, in particular the mining tax and the carbon tax which created significant uncertainty in mining investment, particularly in coal in Queensland.

The resulting damage to the Queensland budget in terms of reduced revenue from mining royalties was in the order of $400 million by 2011 and 2012 (see Table 1).

Table 1 Queensland's mining royalty gap – 2008 to 2012

Year	Budget coal royalties ($ million)	Actual coal royalties ($ million)	Gap ($ million)
2008	1,020	1,035	15
2009	3,213	3,103	**-110**
2010	1,433	1,786	353
2011	2,766	2,357	**-409**
2012	2,755	2,386	**-369**

Source: Eadie, Laura and Haymon, Michael, February 2014, *All Boom and No Benefit? Why Queensland needs a real economic strategy*, 35

Bligh government's policy response

The Bligh government was therefore confronted with increasing spending on education and health services (as opposed to productive economic infrastructure) with increasing deficits.

The Bligh government's policy response to the impending fiscal crisis was four fold:

- First, the privatisation of State government assets.
- Second, the cutting of State government grants to local governments to fund development infrastructure. For example, the average annual subsidy was reduced from $480 million in the period from 2002 to 2010 to $225 million in the period from 2011 to 2013.[219]
- Third, local governments were empowered to levy infrastructure charges under priority infrastructure plans from developers to recover the abolished capital subsidy program of the State government. In effect the State government's subsidy of up to 50% for development infrastructure was passed on to developers.

[219] Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, iii.

- Fourth, the resulting significant increases in infrastructure charges when combined with suppressed housing demand and reduced financing in the context of the Global Financial Crisis, adversely impacted on development feasibility and housing affordability. This resulted in the introduction of capped infrastructure charges and capped water charges for SEQ water businesses.

Queensland's economic model broken

The Bligh government's policy responses had the effect of breaking the Queensland economic model in 5 respects:

- First, State government per capita investment in development infrastructure dropped significantly below that of other Australian States (see Table 2).

Table 2 Per capita investment in development infrastructure

State	Investment per capita ($)
New South Wales	76.35
Victoria	9.25
Queensland	3.95

Source: Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, iii

- Second, the abolition of the capital subsidy program, capping of infrastructure charges and reduced income from SEQ water businesses is estimated to have reduced local government revenues by $800 million a year.[220]
- Third, the capping of infrastructure charges itself created a funding gap, particularly for high growth local governments, which is estimated by the Local Government Association of Queensland (**LGAQ**) to be some $480 million annually. This has caused local governments to:
  - increase rates to fund the gap – the $480 million annual funding gap is equivalent to $359 per rateable property;[221]
  - increase borrowings – local government borrowings have increased 50% from 2008 to 2012 to $6.3 billion;[222]
  - reduce the construction of development infrastructure to support property development.
- Fourth, capped charges were also utilised unwisely by some local governments particularly in rural and regional areas to increase their infrastructure charges beyond the short term marginal cost of the provision of that infrastructure, such that capped charges functioned as a tax on development.
- Fifth, the political fallout of privatisation killed the Bligh government in March 2012 whilst the combination of local taxation increases and reduced economic activity in the construction and property development sector killed 44 Mayors in the April 2012 elections – the largest turnover in local political leaders since World War 2.[223]

Newman government's challenges

The Newman LNP government, which replaced the Bligh government at the March 2012 election, confronted 5 significant challenges:

- First, Queensland did not have an integrated State and local government infrastructure planning model.
- Second, Queensland did not have an infrastructure funding model which was financially sustainable for local governments or financially feasible for property developers.
- Third, the residential property industry was dead as a result of poor public policy.

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220 Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, iii.

221 Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 10.

222 Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 4.

223 Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 2.

- Fourth, the Queensland economic model was consequently broken.
- Fifth, Queensland's fiscal position was unsustainable and urgent budget consolidation was required.

The Newman government's Queensland Commission of Audit made three fundamental recommendations:[224]

- First, fiscal consolidation – to be achieved by reducing expenditure (some $5.5 billion in the 2012/2013 budget) and secondly reducing debt (by some $25 - $30 billion) to regain the State's AAA credit rating.
- Second, reducing the role of government – to be achieved by privatising government assets and providing for greater private sector delivery of public services.
- Third, long term financial planning – to be achieved by improved budget, cash and asset management practices underpinned by an InterGenerational Report for the State with a 40 year perspective and 10 year State Infrastructure Plan.

The Queensland Commission of Audit also noted in the context of its recommendation for a 10 year State Infrastructure Plan that while there have been previous attempts at longer term strategic plans and infrastructure plans, their usefulness has been significantly diminished by the lack of any serious assessment of available financial capacity.[225]

Therefore in relation to the funding of development infrastructure, it was critical that the Newman government's ultimate policy response did not result in the infrastructure planning framework being divorced from the cost of the development infrastructure and the available financial capacity of local governments to fund that infrastructure.

Newman government's policy responses

Policy options considered

The Newman government considered 4 broad options in relation to the funding of development infrastructure:

- *Planned charges* – Infrastructure charges which reflect the planned cost of the trunk infrastructure to be provided by local government.
- *Maximum capped charges* – Infrastructure charges which remain capped in accordance with the policy position of the former Bligh government.
- *Reduced capped charges* – Infrastructure charges based on a reduced maximum cap of 25%.
- *Planned charges for reduced development infrastructure* – Infrastructure charges which reflect the planned cost of a reduced scope of development infrastructure to be provided by local government.

The LGAQ estimated that those policy options involving less than the planned charge would cause an annualised funding gap of between $480 million to $1 billion for Queensland local governments; although this is not accepted by the Newman government.[226]

The LGAQ also noted that the funding of this gap would either increase local government borrowings and as a result State government borrowings thereby making it more difficult to regain the State's AAA credit rating or it would increase local government rates by between $571 to $768 per rateable property (see Table 3).[227]

These outcomes are neither financially nor politically sustainable.

Table 3 Financial impacts of Newman government's reform options

Infrastructure charges	Funding gap (NPV total)	Annualised funding gap (NPV total)	Annualised cost per property
Maximum capped charge	$10 billion	$481 million	$359
Reduced capped charge (25%)	$16.4 billion	$759 million	$571
Planned charge for reduced development infrastructure	$22 billion	$1 billion	$768

Source: Local Government Association of Queensland, August 2013, *Submission - Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 10

[224] Queensland Commission of Audit, 2013, *Final Report - February 2013*, Queensland Government.

[225] Queensland Commission of Audit, 2013, *Final Report - February 2013*, Queensland Government, 1-17.

[226] Local Government Association of Queensland, August 2013, *Submission - Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 10.

[227] Local Government Association of Queensland, August 2013, *Submission - Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 10.

Policy option implemented

The Newman government implemented its policy position in relation to the review of Queensland's infrastructure planning and funding system on 4 July 2014 through amendments to the *Sustainable Planning Act 2009*.

The Newman government's policy response was to retain the Bligh government's infrastructure planning and funding frameworks for development infrastructure and to introduce a framework for local government offsets and refunds for the provision of trunk infrastructure by developers:

- *Infrastructure planning framework* – The infrastructure planning framework of the Bligh government involving a priority infrastructure plan which identifies a priority infrastructure area, planning assumptions and plans for trunk infrastructure was retained; albeit that the priority infrastructure plan has been renamed as a local government infrastructure plan.
- *Infrastructure funding framework* – The maximum capped charges framework of the Bligh government was also retained.
- *Offsets and refunds framework* – A framework was also introduced in relation to the provision of development infrastructure by developers under which developers can offset the cost of land and work contributions for trunk infrastructure against infrastructure charges and seek a refund from a local government where the value of the offsets exceeds the infrastructure charges.

Enduring policy issues remain

The Newman government's introduction of an offset and refunds framework does represent a net improvement on the Bligh government's policy position.

However the Newman government's adoption of the Bligh government's policy position in respect of infrastructure planning and funding gives rise to continuing issues in terms of a lack of integration, inequity and economic inefficiency.

Integration issues

The basic policy objective of any infrastructure planning and funding framework must be to ensure the integration of land use, infrastructure and funding such that infrastructure is funded in a manner that enables it to be constructed prior to, or current with, development. This will ensure that existing infrastructure networks are not overwhelmed by new demand.

The infrastructure funding framework does not achieve the primary goal of an infrastructure charge; namely to ensure cost recovery for the provision of infrastructure by a local government.

The LGAQ has estimated that the maximum capped framework results in an estimated shortfall between infrastructure charges and the cost of providing development infrastructure to future development of a minimum of $480 million annually.[228]

The infrastructure funding framework, by imposing capped infrastructure charges, has in essence, prioritised accountability (in particular certainty) over cost recovery.

However no cost benefit analysis has been released by either the Bligh or Newman governments to establish that the benefits arising from certainty exceed the $480 million annual costs for foregone infrastructure charges as well as the unquantified costs of social inequity and economic inefficiency associated with the infrastructure funding framework.

The infrastructure funding framework therefore does not integrate infrastructure and land use planning with infrastructure funding.

Equity issues

The Newman government's policy response also does not expressly or impliedly encourage the provision of infrastructure and serviced land in a manner which achieves or encourages equity.

In particular the infrastructure funding framework does not encourage the following:

- *Horizontal equity* – Those persons that benefit from development infrastructure should be the persons that pay for the infrastructure (benefits principle). This clearly is not the case given that capped infrastructure charges are calculated by means of an average cost approach rather than a marginal cost approach.
- *Vertical equity* – Those persons that have the greater ability to pay should contribute more towards the cost of providing development infrastructure than do those who have a lesser ability to pay (liability-to-pay principle).

[228] Local Government Association of Queensland, August 2013, *Submission – Discussion paper: Infrastructure planning and charging framework review*, Local Government Association of Queensland, 10.

In particular the infrastructure funding framework encourages the following inequities:

- *Inequity between developers* – The developers of low cost development fronts (generally infill development undertaken by smaller entrepreneurial developers) will subsidise higher cost development fronts (generally greenfield or brownfield development undertaken by larger institutional developers).
- *Inequity between landowners* – The landowners of lower cost development fronts (generally in infill locations) will subsidise the landowners of higher cost development fronts (generally in greenfield or brownfield locations).

The infrastructure funding framework, encouraging as it does horizontal and vertical inequities, is therefore likely to give rise to further issues of political unacceptability from landowners, smaller entrepreneurial developers and local governments.

Economic efficiency issues

The infrastructure funding framework, to the extent that it does not provide for full cost recovery, also does not encourage the provision of development infrastructure and serviced land which is economically efficient.

In particular the infrastructure funding framework does not encourage economic efficiency in the following respects:[229]

- *Productive efficiency* – The total average cost for development infrastructure and serviced land should be minimised by developing land where the total environmental, social and financial cost of providing additional development infrastructure and serviced land is the lowest. In general terms this is likely to be in locations near serviced land.
- *Allocative efficiency* – The price for development infrastructure and serviced land should accordingly reflect the costs incurred in its provision and should not be distorted by taxes, subsidies or other measures. The price for development infrastructure should therefore reflect its marginal cost; that is the cost of increasing the capacity of development infrastructure to produce one more unit of service to satisfy demand, rather than its average cost.
- *Dynamic efficiency* – The development infrastructure and serviced land to be provided in the short term should also impose over the long term, the least cost, whilst providing the maximum amount of choice for development.

The infrastructure funding framework encourages urban and regional settlement patterns which are not economically efficient and are likely to result in dead weight losses that will impose long term financial costs on State and local governments, smaller entrepreneurial developers and some landowners.

Suggested policy prescriptions

If we are to learn anything from Queensland's recent political history it is that good policy is good politics and that bad policy is death to politicians. But we continue to repeat the mistakes of the past over and over and over again.

If our policy goal is the rebooting of the Queensland economic model through a revived construction and property development sector which I believe it should be, then the following policies could be implemented to assist with the achievement of that goal:

1. First, the adoption of an integrated infrastructure planning model – As recommended by the Queensland Commission of Audit, a 10 year State Infrastructure Plan linked to the financial capacity of the State to fund State infrastructure should be complemented by a 10 year Local Infrastructure Plan which is also linked to the financial capacity of local governments to fund development infrastructure.
2. Second, the adoption of an integrated infrastructure funding model which is based on the following principles:
    - Development outside of the priority infrastructure area or in the priority infrastructure area but inconsistent with the planning assumptions of a local government infrastructure plan, should be subject to conditions of a development approval requiring development charges, that is financial contributions for a local government's additional trunk infrastructure costs.
    - Infrastructure charges should be linked to the funding of essential development infrastructure being water supply, sewerage, transport and local parks with community benefit infrastructure such as district and regional sport, recreational and community facilities being funded through local government rates.
    - Infrastructure charges should be calculated on the short run marginal cost that is the incremental cost of the provision of additional development infrastructure to fund future development.[230]
    - Infrastructure charges can be capped by the State government to achieve State economic objectives such as the promotion of the construction and property development sector or State social objectives such as housing affordability.

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229 Industry Commission (1993) *Taxation and Financial Policy Impacts of Urban Settlement Volume 1: Report* Australian Government Publishing Service Canberra, page 102.

230 Productivity Commission of Australia, 2014, *Public Infrastructure*, Final Report, Canberra, 143.

- State government subsidies through capped infrastructure charges should be funded by the State government through compensatory grants to local governments or as in the case of New South Wales, through a Priority Infrastructure Fund which is used to fund local development infrastructure.[231]

3. Third, the adoption of local government budgets which are based on the following principles:
   - A conservative capital works program which is limited to only essential trunk development infrastructure and the provision of trunk development infrastructure at a lower standard of service.
   - Increased revenue from rates and charges involving the following:
     - A review of the differential general rating system to remove cross subsidies.
     - Separate rates and charges to fund community benefit infrastructure such as the environment, parkland, open space, community facilities, pedestrian and bikeways and other local government facilities such as emergency services.
4. Fourth, the adoption of policies to fund trunk infrastructure through property development projects – A local government could review its land holdings to identify land in proximity to proposed development infrastructure which could be developed by the local government or a third party on behalf of the local government to fund the development infrastructure.

Conclusions

The Newman government's infrastructure planning and funding framework for development infrastructure, whilst an improvement on that of the previous Bligh government, has not resolved the policy issues identified by the Queensland Commission of Audit with the effect that enduring policy issues of a lack of integration, inequity and economic inefficiency remain.

As the Prime Minister has recently noted "*You can't spend what you haven't got. No country has ever taxed or subsidised its way to prosperity. You don't address debt and deficit with yet more debt and deficit*".[232]

It is therefore very unlikely that we have heard the end of infrastructure planning and funding reform in Queensland with the result that future reform of the infrastructure planning and funding framework for development infrastructure is inevitable.

If we are to reboot Queensland's economic model, future reform of the framework for the planning and funding of development infrastructure should heed the warning of Georg Hegel so that we are not destined to repeat the mistakes of the past.

[231] Productivity Commission of Australia, 2014, *Public Infrastructure*, Final Report, Canberra, 170.

[232] The Hon Tony Abbott MP, Prime Minister of Australia, Address to the World Economic Forum, Davos, Switzerland, 23 January 2014.

Significant fire safety issues in existing development – increased reporting obligations on building certifiers in NSW

Anthony Perkins | Salam Kaoutarani

This article discusses the impact of amendments to the *Environmental Planning and Assessment Regulation 2000* introduced in July 2014 in relation to increased reporting obligations on building certifiers in New South Wales with respect to significant fire safety issues

October 2014

In brief – Private building certifiers rightly concerned about amendments introduced in July 2014

The *Environmental Planning and Assessment Regulation 2000* now requires building certifiers formally to notify the relevant local council within two days of becoming aware of a "significant fire safety issue". With this comes greater potential liability, with certifiers risking becoming embroiled in strata scheme disputes involving fire safety defects in the years ahead.

Steadily increasing obligations of building certifiers in NSW

The obligations of building certifiers in NSW have steadily increased over recent years in a range of areas, including the introduction of further mandatory critical stage inspections, reporting obligations associated with non-complying development and contractual disclosure requirements.

The latest raft of amendments introduced by the EPA Regulation in July 2014 are set to increase those obligations dramatically, specifically in relation to the reporting of "significant fire safety issues" encountered in "existing development".

The amendments target development applications (**DAs**) and Complying Development Certificate (**CDC**) applications carried out within or forming part of existing development, with the object being to use the certification process to upgrade old and substandard buildings in terms of their fire safety.

The amendments are not likely to have any material application for developments that do not retain any building elements of the former development.

Obligations of building certifiers under former reporting regime

Under the former regime, building certifiers were required as part of a CDC application process to procure a report – prepared by a separate independent certifier – addressing, amongst other things, an assessment of whether it was appropriate to require the existing development to be brought into total or partial compliance with the current version of the Building Code of Australia (**BCA**).

These reporting obligations did not extend to development applications.

Significant fire safety issues in any part of the building

The EPA Regulation now requires a building certifier to notify the relevant council formally, at any time prior to issuing a complying development certificate, a construction certificate or an occupation certificate (**OC**), if the building certifier "becomes aware (when carrying out an inspection or otherwise) of a significant fire safety issue with any part of the building" (clause 129D and clause 162D of the EPA Regulation).

The EPA Regulation does not provide a definition of "significant fire safety issue". However, the associated Technical Guideline published by the NSW Department of Planning and Environment provides some guidance as to what, from the Department's perspective, constitutes a reportable "significant fire safety issue". The Technical Guideline provides that:

- issues considered to be "minor" do not need to be reported;
- issues that would warrant a fire safety order (order No. 6 under section 121B of the *Environmental Planning and Assessment Act 1979*) are "significant fire safety issues".

What is the difference between a "minor fire safety issue" and "significant fire safety issue"?

There is, however, a vast chasm between matters that might properly be characterised as "minor" on the one hand and matters that would warrant the issuing of a fire safety order on the other hand; therein lies the challenge for building certifiers.

The reality remains that the burden of determining what constitutes a significant fire safety issue in any particular set of circumstances will fall to the experience and discretion of the building certifier.

What parts of an existing building need to be inspected?

Clause 143B of the EPA Regulation mandates which parts of an existing building "must" be inspected for the purposes of satisfying the inspection obligations. These comprise:

- the parts of the building affected by the development, and
- the egress routes from those parts of the building.

It is not entirely clear from the regulations whether and to what extent other parts of an existing building might also need to be inspected for the purposes of satisfying the duty to inspect, including those parts of a building not directly "affected by the development" or which do not form part of an "egress route".

Many fire safety issues not obvious upon routine inspection

For example, the Technical Guideline states that "escape routes will not need to be inspected if the proposed development involves only external changes". However, the reference to "any part of the building" in clause 143B of the EPA Regulation would appear to raise the inference that other parts of a building should, in certain circumstances, be inspected.

Certainly, where an issue is "obvious" on any view in terms of fire safety, then that would almost certainly trigger the obligation to report.

Conversely, many fire safety issues are not immediately obvious upon routine inspection. For example, inadequate fire separation issues and unsealed penetrations between building elements typically only become obvious when inspections are carried out in ceiling voids and cavities. Suffice to say, the regulations do not elaborate on the term "obvious" or the extent of inspections required.

What if building certifier fails to notify council of significant fire safety issues?

With significantly expanded reporting obligations for certifiers comes potentially greater liability. For example, liability may potentially arise in circumstances where the certifier:

- failed to identify a significant fire safety issue during his or her inspections of the building and consequently failed to notify;
- identified a fire safety issue during his or her inspections of the building but incorrectly characterised the issue as "minor" and consequently failed to notify;
- identified a significant fire safety issue during his or her inspections of the building but incorrectly assumed that the DA (or CDC) would rectify the issue, otherwise failed to check compliance before issuing the OC and failed to notify.

A failure correctly to characterise a fire safety issue as "significant" will not necessarily result in a finding of negligence on the part of the certifier, but that is unlikely to prevent building certifiers from becoming embroiled in strata scheme disputes involving fire safety defects in the years ahead, whether as defendants or cross-defendants.

Building certifiers advised to be vigilant and err on the side of caution

Given the new obligations imposed on building certifiers, in effect, to identify and report on significant fire safety issues in existing development, coupled with the very general language of the obligations, certifiers would be well advised to adopt a vigilant approach to the new inspection protocols and, in every instance, err on the side of caution.

In short, if in doubt about whether a fire safety issue is or may be significant, the preferred course in most instances would be to report that issue to the relevant local council.

Councils will need to assess all notifications of significant fire safety issues carefully

The challenges faced by building certifiers will, in due course, become the challenge of local councils. Councils will be required to assess each and every notification received under clauses 129D or 162D of a significant fire safety issue and thereafter do one of the following:

- Decide that no action should be taken.
- Issue a fire safety order that specifies how the significant issue must be addressed.
- Issue a fire safety order that directs the owner to determine and specify how the significant issue will be addressed. This will result in a further fire safety order requiring that the agreed remedy be completed within a specified period of time.

Building certifiers understandably reluctant to accept increased potential liability

The public policy grounds underpinning the new amendments are well founded, insofar as there are limited options and limited resources available to local councils and the NSW Fire Brigade to identify physically and potentially remedy significant fire safety defects in existing development throughout NSW.

Being at the coal face of development, building certifiers are well placed to identify fire safety issues. However, what rightly concerns the certification community, particularly private certifiers, is the associated and potentially onerous liability that could flow from any failure to identify significant fire safety issues correctly.

The NSW Association of Accredited Certifiers has called on the Minister for Planning to repeal or amend these reforms to the EPA Regulation. Thus far, there is no indication from the Minister regarding whether the reforms will be revisited.

Tenfold increase in scale of penalties for environmental offences in NSW

Lucinda Morphett

This article discusses the increase in penalty notice amounts for environmental offences in New South Wales under the *Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation 2014 No. 564*

October 2014

In brief – Government tackles environmental crime with increase in scale of on-the-spot fines

NSW Environment Protection Authority (**EPA**) penalty notice amounts have increased tenfold to $7,500 for individuals and $15,000 for corporations, signalling the State government's determination to tackle environmental crime.

Changes particularly affect waste industry, manufacturers and holders of Environment Protection Licence (EPL)

The introduction of the *Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation 2014 No. 564* (NSW) on 29 August 2014 now gives local councils and the NSW EPA the ability to issue increased penalty notices for environmental offences in NSW. The increase arises as a result of a push by the NSW government to have greater regulatory powers to tackle environmental crime.

All Environment Protection Licence (**EPL**) holders and persons in the waste industry, in manufacturing and other industries should particularly take note of the changes.

Increase in penalties for a range of environmental offences

NSW EPA Penalty Notice amounts have been increased tenfold to $7,500 for individuals and $15,000 for corporations (up from $750 for individuals and $1,500 for corporations) for the following offences under the *Protection of the Environment Operations Act 1997* NSW (**POEO Act**):

- Occupiers of premises who carry out scheduled premises-based activities without an EPL.
- Persons who carry out scheduled non-premises based activities without an EPL.
- EPL holders who **contravene EPL conditions** (except by failing to submit annual returns, which attracts a lower penalty).
- Persons served with **clean up notices** who do not comply without a reasonable excuse, or persons who do not comply with **prevention notices**.
- Persons who pollute waters or land.
- Occupiers who **emit air impurities** in excess of prescribed concentrations.
- Persons who **transport asbestos waste or hazardous waste or any other waste** greater than one cubic metre in volume or two tonnes in weight, to a place that cannot be used as a waste facility.
- Owners or occupiers who use or cause or permit a place to be used as a **waste facility without lawful authority**.

Increase in scale of NSW Local Council Penalty Notice amounts

NSW Local Council Penalty Notice amounts are now $4,000 for individuals and $8,000 for corporations for the above offences.

Additionally, for the remaining 19 serious types of environmental offences under the POEO Act, NSW EPA Penalty Notice amounts are now $4,000 for individuals and $8,000 for corporations; Council Penalty Notice amounts are now $2,000 for individuals and $4,000 for corporations.

Expected increase in court appeals of penalty notices

As a result of the above, we expect to see an increase in appeals of penalty notices to the courts. If you are issued with a penalty notice or require further advice in relation to the above, please do not hesitate to contact us.

The pitfalls of commencing construction without a construction certificate

Anthony Perkins

This article discusses the issues arising from failing to obtain a construction certificate prior to commencing construction in New South Wales

October 2014

In brief – There are serious consequences for development carried out without a construction certificate

Difficulty in obtaining insurance, the possibility of sale contracts being rescinded and inferior marketability are among the problems that developers can face if they do not obtain a construction certificate prior to commencing construction.

Granting of development consent in NSW does not authorise commencement of construction

The Council of the City of Sydney's recent application to the NSW Land & Environment Court seeking to injunct the Meriton Group from continuing construction of its South Dowling Street development project in Sydney – on account of no construction certificate having been obtained – is a timely reminder of the pitfalls of failing to procure the necessary planning approvals prior to commencing construction.

It is also a timely reminder that the granting of development consent in NSW does not, as a general proposition, legally authorise the commencement of construction. In fact, it does not authorise anything other than the right to proceed to apply for a construction certificate. Once that certificate is issued, physical works may legally proceed.

Sydney City Council seeks to injunct developer from carrying out further work

In the case of *Council of the City of Sydney v Karimbla Properties (No. 24) Pty Ltd* [2014] NSWLEC 77, the council sought to injunct the developer, a subsidiary of the Meriton Group, from carrying out further work on the development.

The council contended that there had been a significant breach of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) by Meriton in failing to obtain a construction certificate prior to commencing the works. The extent of the unlawful works included, amongst other things, two buildings constructed to a height of nine storeys and a third building to a height of three storeys.

Developer argues that ordering work to stop would not be reasonable

Meriton admitted the non-compliance and tendered voluminous evidence on how the oversight occurred, but ultimately submitted that it was not reasonable in the circumstances to stop work on the $119 million residential development project. The arguments presented by Meriton included a submission on the dire consequences for the numerous contractors engaged on the project should a stop work order – of indefinite duration – be ordered by the court. As Justice Craig observed [at 18]:

> *While the Respondents do not rely upon hardship for themselves if work is stopped, it is apparent from the evidence, as it presently stands, that there is a real prospect of significant financial impact upon a large component of the present workforce. That is a fact relevant to the exercise of discretion when considering the balance of convenience.*

Equally significant was the submission that even though no construction certificate was issued, the building was built in accordance with the development application (**DA**) approved by the consent authority and was otherwise built in accordance with the Building Code of Australia.

The court ultimately dismissed the council's interlocutory application for injunctive relief, effectively permitting Meriton to proceed with the works, for the time being at least.

No statutory framework to obtain construction certificate retrospectively

The real difficulty associated with commencing development works without a construction certificate – including demolition and excavation works (both characterised as "development" under NSW law) – is the absence of any statutory framework available to obtain a construction certificate retrospectively for works already carried out.

The situation stands in contrast to an application seeking to "modify" a development consent (after a construction certificate has been issued) under section 96 of the EPA Act to take into account work already carried out; in those circumstances the Act permits retrospective approval.

The problem is compounded by the difficulty of obtaining an occupation certificate under section 109H of the EPA Act – which can only be issued where a construction certificate has been previously issued. Occupation of a development without an occupation certificate constitutes an offence under the EPA Act.

Applying to a consent authority to obtain a building certificate

Various steps can be taken to "regularise" unlawful works via an application to a consent authority to obtain a building certificate under section 149A of the EPA Act. The usual test here is whether the unlawful works would have or could have been approved under the relevant planning controls had due process been followed. If the answer to the hypothetical proposition is yes, then a building certificate will typically be issued.

However, the notion of regularising unlawful work under section 149A of the Act is an entirely different concept to that of approval. In summary, the granting of a building certificate prevents a consent authority – typically a local council – from issuing an order requiring the building or unlawful works to be repaired, demolished, altered or rebuilt, as the case may be, for a period of seven years.

The issuing of a building certificate does not:

- entitle the landowner to apply for an occupation certificate;
- preclude the consent authority from prosecuting the person or persons who carried out the unlawful works;
- provide certainty as to what steps, if any, the consent authority may take at the expiration of seven years.

Failure to obtain construction certificate creates problems which could have been avoided

On a practical level, consent authorities rarely seek orders requiring the demolition of buildings constructed without a construction certificate after the lapsing of a building certificate, particularly where the building or unlawful works were approved under a DA in the first instance.

But irrespectively, there are serious implications for development carried out without a construction certificate, relating to such matters as the difficulty in obtaining insurance for unapproved buildings, the prospect of sale contracts being rescinded on account of vendors being unable to deliver a product immune from future legal challenge and the general inferior marketability of buildings that exist in part or whole without an occupation certificate.

There have been a number of calls for reform in this area of the law, premised on the view that buildings otherwise constructed in accordance with the prevailing planning controls should be capable of unqualified retrospective approval in limited circumstances. Of course, such reforms do not countenance the weakening of penalties for those who wilfully transgress the process, but that is a different issue.

No doubt there is more to come for Meriton in navigating its way around the problems associated with major development being carried out without a construction certificate.

New powers and tougher penalties for breaches of NSW planning laws

Maysaa Parrino | Salam Kaoutarani

This article discusses the increase in penalties and New South Wales government enforcement powers in relation to breaches of New South Wales planning laws

November 2014

In brief – Substantial increase in penalties and government powers

The responsibility of companies and individuals in NSW engaging in development activities has increased as a result of reforms to strengthen the enforcement regime under the *Environmental Planning and Assessment Act 1979* (**Act**).

Environmental Planning and Assessment Amendment Bill increases maximum penalties

The introduction of the *Environmental Planning and Assessment Amendment Bill 2014* (**Bill**) amends the Act to increase substantially the maximum penalties for offences under the Act and the *Environmental Planning and Assessment Regulation 2000* (**Regulation**). The Bill was passed by both houses of Parliament and the date of assent was 19 November 2014.

Government's enforcement powers strengthened

The Bill introduces the following substantial changes to the Act which are aimed at strengthening the NSW government's enforcement powers under the Act:

- An **increase in the maximum penalties** for offences against the Act and the Regulation.
- New offences for providing false or misleading information in connection with planning matters.
- A **failure to comply with the Land and Environment Court's order** regarding a brothel closure, or an order to cease use of certain premises for such classes of residential, tourist or other development as are prescribed by the Regulation, **may result in the court making a "utilities order"**, directing that a provider of water, electricity, or gas to the particular premises stop providing those services.
- The **expansion of the investigative powers** of council and departmental officers for the enforcement of the Act.

Three-tiered offence regime introduced

The current planning provisions simply impose a maximum penalty of $1.1 million for all offences, regardless of whether the offender is a corporation or individual, or whether the offence was serious or minor.

The changes create a three-tiered offence regime, similar to the existing *Protection of the Environment Operations Act 1997* (see our recent article *Tenfold increase in scale of penalties for environmental offences in NSW*). This regime imposes different penalties on corporations compared to individuals and recognises the level of the severity of the offence.

Tier 1 offences

Tier 1 offences apply to serious offences which were committed intentionally and which caused, or were likely to cause, significant harm to the environment or the death or serious injury or illness of a person.

An example is a development which was intentionally carried out without development consent or not in accordance with the conditions regarding fire safety, and which causes or was likely to cause significant harm to the environment or the death or serious injury or illness of a person.

Maximum penalty for tier 1 offences

Corporations could be penalised up to $5 million and a further $50,000 each day for continuing offences. Individuals could be penalised up to $1 million and a further $10,000 each day for continuing offences.

Tier 2 offences

Tier 2 offences apply to offences that were unintentional or did not cause, or were not likely to cause, significant harm to the environment or the death or serious injury of a person.

An example is the accidental spilling of waste into a stream which was cleaned up quickly to minimise the effect on the environment.

Maximum penalty for tier 2 offences

Corporations could be penalised up to $2 million and a further $20,000 each day for continuing offences. Individuals could be penalised up to $50,000 and a further $5,000 each day for continuing offences.

Tier 3 offences

Tier 3 offences apply to lesser procedural or administrative offences. An example is a developer providing false or misleading information about the requirements of a condition of approval.

Maximum penalty for tier 3 offences

Corporations could be penalised up to $1 million and a further $10,000 each day for continuing offences. Individuals could be penalised up to $250,000 and a further $2,500 each day for continuing offences.

Regulation breaches carry further penalty

In addition, the Bill introduces a further maximum penalty of $110,000 for breaches of the Regulation.

COLIN BIGGERS & PAISLEY LAWYERS

Increased environmental penalties and enforcement powers in NSW

Maysaa Parrino | Lucinda Morphett

This article discusses the increase in maximum penalties and enforcement powers in New South Wales in relation to environmental offences

November 2014

In brief – Bill increases maximum penalties in Contaminated Land Management Act

A new Bill in NSW will strengthen environmental penalties, give greater powers to the Environment Protection Authority (**EPA**) and make other significant changes, particularly for environment protection licence (**EPL**) holders, those who cause contamination and the waste industry.

Higher contaminated land penalties

While NSW already has some of the highest penalties for environmental crime nationally, the State government is incrementally reforming environmental regulation in NSW to "give the Environment Protection Authority back its bite". Parliament assented to the *Protection of the Environment Legislation Amendment Bill 2014* on 28 October 2014.

The Bill increases the maximum penalties in the *Contaminated Land Management Act 1997* (NSW) (**CLM Act**) to be the same as penalties for similar environmental offences in other legislation and makes the following additional changes:

- There are significant increases in penalties for offences relating to the duty to report contamination and other offences. For example, the penalties have increased significantly for a person or corporation that does not comply with a Management Order (by over $800,000 for corporations).
- Where a deadline is missed for a notice issued under the CLM Act, parties are still obliged to comply.
- The EPA is now permitted to require financial assurance to secure funding for the carrying out of a Management Order.

Reform of penalties for environmental offences

The Bill introduces further sweeping reforms in relation to the CLM Act, the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and the *Radiation Control Act 1990* (NSW), such as:

- The EPA can now require waste transporters to be fitted with approved **GPS devices**.
- A **range of alternative sentencing options** for the court, including monetary benefit orders (allowing recovery of monetary benefits gained from an offence), publication orders, orders to provide financial assurance, to attend training courses and to restore or enhance the environment.
- Undertakings are now enforceable by the EPA and the courts.
- **Greater powers afforded to the EPA** to remedy or restrain statutory breaches of legislation and to revoke or suspend EPLs. Statutory notices of intention to suspend or revoke EPLs are no longer required.
- In addition to occupiers and contaminators, **owners and landlords may now be issued with clean up notices** under the POEO Act.
- Previously, pollution incidents involving the emission of odour were not required to be notified. **Pollution incidents involving material harm** must now be reported, even though odour may be the only indication that an offence has occurred.
- **Penalty notice amounts are now increased for repeat offenders**. The NSW government has also recently increased penalty notice amounts for individuals and corporations, as outlined in our earlier article *Tenfold increase in scale of penalties for environmental offences in NSW*.

EPA likely to pursue offenders vigorously and issue larger penalties

The Bill is yet to commence, but we expect that as a result of the reforms, we will see greater activity by the EPA in the detection and prosecution of environmental incidents, particularly the issuing of larger penalties.

The changes are also complementary to the reforms made in relation to higher penalties for planning offences in NSW. (Please see our article *New powers and tougher penalties for breaches of NSW planning laws*).

COLIN BIGGERS & PAISLEY LAWYERS

Should urban planning focus on creativity or amenity?

Ian Wright

This article discusses urban growth driven by amenities and social character

November 2014

In brief

The recent Local Government Association of Queensland (**LGAQ**) annual conference shed light on how councils can better serve and progress their communities. One of the issues examined was the role of creativity in driving urban growth.

Charles Landry addresses conference on the creative city concept

A keynote speaker at the LGAQ's annual conference was Charles Landry, a cultural planning consultant who developed the concept of the creative city in his 2000 book, *The Creative City: A Toolkit for Urban Innovators*. According to Landry, the creative city is a place which contains both the hardware (building, streets and areas) and software (thinkers, creators and implementers) that can generate innovation and growth.

Richard Florida argues that urban growth depends on attracting creative class

In *The Rise of the Creative Class* published in 2002, author Richard Florida subsequently called these people the creative class to distinguish them from the service class, which performs administrative and clerical roles, and the working class, which performs what is left of the industrial economy.

Florida argues that urban planning and governance policies intended to achieve growth should be focused on attracting the creative class (talent, technology and tolerance) through high-density development with a funky look and socially free areas, rather than mega cultural projects such as stadiums and entertainment centres.

Does the creative class make a city successful?

While Florida's ideas have been embraced in the United States by urban planners and developers, they are subject to strong criticism on the basis that the creative class does not make cities successful; cities that are successful attract the creative class.

Amenity and social character contribute to Australian urban growth

In the Australian context, the Bureau of Infrastructure, Transport and Regional Economics concluded in its 2014 report, *The evolution of Australian towns*, that amenity including services (housing, health, education and retailing), physical features (natural landscape and climate) and social character (demographic, cultural and entertainment facilities) have contributed to significant shifts in settlement patterns in the last 20 years.

Creativity develops social character

Florida's prescriptions for urban planning and governance, therefore, should not be seen as the silver bullet to growth. Rather, they are a set of tools to develop the social character of a town, city or region which will improve its amenity and attractiveness to an increasingly mobile and wealthy population.

Extension of operation period for a quarry – was it a permissible change?

Ronald Yuen | Monica Wilkie

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Boral Resources (Qld) Pty Ltd v Bundaberg Regional Council* [2014] QPEC 32 heard before Jones DCJ

December 2014

In brief

The case of *Boral Resources (Qld) Pty Ltd v Bundaberg Regional Council* [2014] QPEC 32 concerned an application made by Boral Resources (Qld) Pty Ltd in the Planning and Environment Court. This application sought approval under section 369 of the *Sustainable Planning Act 2009* to change a condition concerning the operation period permitted for well-established quarrying activities carried out by Boral, on the basis that the change constituted a "permissible change" for the purpose of section 367 of the *Sustainable Planning Act 2009*.

The court held that it was likely that a change which would enable the quarry to continue to operate at its current capacity and under its current operating regime, would cause a person to make a properly made submission objecting to the proposed change. Therefore, the court found that the proposed change was not a "permissible change". However, after having taken into account the effect of an outright refusal of Boral's application, the court decided not to dismiss the application without first giving the parties the opportunity to consider the reasons for its decision.

As such, the court adjourned the hearing and ordered that should neither party provide notice for relisting the matter by 4pm on 27 June 2014, Boral's application would be dismissed.

The court had to satisfy itself that the proposed extension of the operation period was a permissible change under section 367 of the Sustainable Planning Act 2009

Boral became the owner of the land and operator of the quarry in 2004. A town planning consent permit was given in respect of the land for the quarry operation by the Planning and Environment Court on 22 March 1999. The permit included a condition which restricted the term of the operation to a 15 year period (condition 1.2), meaning that quarrying would have had to cease on 23 March 2014.

Boral made an application to the court under section 369 of the *Sustainable Planning Act 2009* seeking an extension of time for the quarrying operations.

By an order of the court following an application on 13 March 2014, condition 1.2 of the permit was extended until such time as Boral's application was heard and finally determined by the court.

Initially, the Bundaberg Regional Council, as the relevant authority, opposed the relief sought by Boral as the council wanted to be satisfied about the mitigation of potential ongoing negative impacts on the amenity of nearby residents. However, sometime between its initial opposition and the hearing of Boral's application, the council changed its position and no longer opposed the relief sought.

The court observed that a successful application by Boral would not create a new approval but result in a change to a condition of the permit. In determining whether the proposed change to the permit was a "permissible change" under section 367 of the *Sustainable Planning Act 2009*, the court had to be satisfied that the proposed change would not, because of the change:

- result in a substantially different development;
- require referral to additional concurrence agencies if the application for the permit was remade;
- be likely to cause a person to make a properly made submission objecting to the proposed change if the circumstances allowed;
- cause development to which the permit related to include any prohibited development.

The proposed extension of the operation period would not result in a substantially different development or involve any prohibited development

The court, by reference to the decisions in *Firefast Pty Ltd v Ipswich City Council & Ors* (2006) QPEC 076 and *Cemex Australia Pty Ltd v Bundaberg Regional Council* (2009) QPEC 20, was satisfied that the proposed change to condition 1.2 of the permit for the purpose of extending the operation period would not result in a substantially different development or involve any prohibited development.

The proposed extension of the operation period would not involve additional concurrence agencies

The court observed that there were no entities described as "concurrence agencies" at the time the permit was issued as those agencies were created under the repealed *Integrated Planning Act 1997*.

Having regard to the nature of the proposed change to condition 1.2 of the permit, the court was satisfied that no issue involving additional concurrence agencies arose.

The proposed extension of the operation period would likely cause a person to make a properly made submission objecting to the proposed extension

In determining whether the proposed change to condition 1.2 of the permit would likely cause a person to make a properly made submission objecting to the proposed change, the court considered what the legislature's intention was when it chose to use the word "likely".

The court was of the view that what was intended by the legislature was for the responsible entity to decide whether a proposed change would be liable to or prone to provoke a submission. It should not be limited to circumstances only where the responsible entity was satisfied that it was "more likely than not" or "probable" such as better than 50% that a submission opposing the change would be made. The court adopted the construction applied by Justices Mason, Wilson and Deane in the High Court decision of *Boughey v R* (1986) 161 CLR 10 that the word "likely" should be construed "*to convey the notion of a substantial – a real and not remote chance regardless of whether it is more or less than 50%*".

Even if the proper test was that it had to be probable that a submission would be made, the court nonetheless found that it was more likely than not that the proposed extension of the operation period would cause a person to make a properly made submission, having regard to the following facts and circumstances:

- there was a significant number of submissions, given the location of the quarries and the proximity and densities of the surrounding residential areas;
- based on the submissions, quarrying was clearly a matter of real concern to a number of surrounding residents and in particular, a number of submitters raised expectations about the remaining operational period of the existing quarries;
- the quarrying operation would still have a negative impact on the amenity of the surrounding residential areas, despite there being minimal complaints and council's support of the proposed extension;
- although residents might not have complained about the existing operation which had a fixed end date, the situation could change where the operation and its associated impacts on the amenity would continue for a further 5 years.

Holcim (Australia) Pty Ltd, which was another quarry operator in the area, also made an application to the court seeking a conditional extension of the operation period in respect of its permit. In that case, Holcim successfully obtained the extension. The court remarked that Holcim's situation was significantly different to that of Boral as the term of Holcim's actual quarrying (with no blasting) and processing operations would cease by 30 November 2014, but Boral's operation would continue to, at or nearly, mid 2019 if the proposed extension was granted.

Case adjourned to allow parties to consider reasons for the court's decision

The court observed that an outright refusal of Boral's application would likely lead to a successful development application, which might not be limited to site rehabilitation only but might also permit the quarry operations to continue for a further period, up to 5 years. Accordingly, the court decided not to dismiss Boral's application outright but to first give the parties the opportunity to consider the reasons for its decision.

The court therefore adjourned the hearing and ordered that should neither party provide notice for relisting the matter by 4pm on 27 June 2014, Boral's application would be dismissed.

The ADR Registrar does have power to make a final order or judgment

Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *West v Brisbane City Council* [2014] QPEC 59 heard before Horneman-Wren SC DCJ

December 2014

In brief

The case of *West v Brisbane City Council* [2014] QPEC 59 concerned an application in the Planning and Environment Court commenced by the Brisbane City Council seeking a review of the decision of the Alternate Dispute Resolution Registrar under section 491B of the *Sustainable Planning Act 2009*.

The council asserted that the ADR Registrar lacked jurisdiction to allow the appeal commenced by Brett West against the decision of the council to refuse his development application given the operation of Practice Direction Number 6 of 2013 (Power of ADR Registrar to Make Orders or Issue Directions).

The court decided that the ADR Registrar had jurisdiction to make the order allowing the appeal.

Council asserted that Practice Direction Number 6 of 2013 was required to be complied with where the court directed the ADR Registrar to hear and decide a Planning and Environment Court appeal and that the Registrar may not make a final order or judgment

The council asserted that:

- by operation of section 492 of the *Sustainable Planning Act 2009*, Practice Direction Number 6 of 2013 was required to be complied with where the proceeding which the court directed under section 491B(2) of the *Sustainable Planning Act 2009* to be heard and decided by the ADR Registrar was a Planning and Environment Court appeal;
- according to the Practice Direction, the Registrar may not make a final order or judgment.

Mr West asserted that the court's direction to hear and decide a Planning and Environment Court appeal was not limited by the operation of section 491B(1) of the Sustainable Planning Act 2009 or Practice Direction Number 6 of 2013

Mr West asserted that the court's power to direct the ADR Registrar to hear and decide a proceeding in a particular manner was not limited by the operation of section 491B(1) of the *Sustainable Planning Act 2009* or Practice Direction Number 6 of 2013 issued under that section.

The court concluded that it was not the intention of the legislature to constrain or limit the power of the court under section 491B(2) of the Sustainable Planning Act 2009 by a direction issued under section 491B(1) of the Sustainable Planning Act 2009

The court observed that Practice Direction Number 6 of 2013 was issued by the Chief Judge of the District Court under section 491B(1) of the *Sustainable Planning Act 2009*. The court further observed that the orders and directions which may be made under the Practice Direction were those contemplated by rule 19 of the *Planning and Environment Court Rules 2010*, which were of an interlocutory or procedural nature.

The court accepted that the ADR Registrar was authorised by the Practice Direction to make orders and directions of an interlocutory or procedural nature about proceedings referred to the Registrar by the court for hearing and decision.

However, in circumstances where the ADR Registrar was directed by the court under section 491B(2) of the *Sustainable Planning Act 2009* to hear and decide a proceeding, the Registrar's authority to make orders and directions was conferred by the court's direction.

The court noted the effect of the council's assertion if accepted would be that:

- a direction issued by the Chief Judge could constrain or limit the power of the court conferred by section 491B(2) of the *Sustainable Planning Act 2009*;
- the ADR Registrar would not be able to comply with the court's direction, namely hear and decide the proceeding.

The court did not believe that would be the legislative intent of section 491B(1) of the *Sustainable Planning Act 2009*.

The court found that a final order or judgment of the ADR Registrar in an appeal referred to the Registrar was made under the authority conferred by the direction of the court under section 491B(2) of the *Sustainable Planning Act 2009*, rather than authority under the Practice Direction.

In the circumstances, it was held that the ADR Registrar had jurisdiction to make the order allowing the appeal.

Refusal of residential development in a flood plain

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Masonre Pty Ltd v Logan City Council* [2014] QPEC 51 heard before Everson DCJ

December 2014

In brief

The case of *Masonre Pty Ltd v Logan City Council* [2014] QPEC 51 concerned an appeal commenced by Masonre Pty Ltd as trustee against the Logan City Council's decision to refuse its development application for a material change of use for four houses in respect of land situated at Waterford West.

The council refused the development application as it was in conflict with specific outcomes of the flood plain management area code under the *Logan Planning Scheme 2006*.

Masonre asserted that the *Temporary Local Planning Instrument No. 1 (Logan Interim Flood Response) 2013* which commenced after the council's decision was given, justified an approval of the development application, and that there were sufficient grounds to justify approval despite conflicts with the flood plain management area code.

The court therefore had to determine the weight to be given to the council's temporary local planning instrument and whether there were sufficient grounds to justify an approval of the development application despite conflicts with the council's planning scheme.

The court concluded that the council's temporary local planning instrument should be given considerable weight, and that the proposed development was in significant conflict with specific outcomes concerning the mitigation of flood risk under the temporary local planning instrument.

The court also concluded that there were no sufficient grounds to justify an approval of the proposed development despite the major conflicts with the flood plain management area code under the council's planning scheme. As such, the court dismissed the appeal.

The court held that the Temporary Local Planning Instrument No. 1 (Logan Interim Flood Response) 2013 should be given considerable weight as it reflected the council's current position for development of land for the purpose of flood management in its local government area

The *Temporary Local Planning Instrument No. 1 (Logan Interim Flood Response) 2013* came into effect on 28 March 2014. It was submitted by the council that the temporary local planning instrument should be given significant weight as:

- it represented the council's current position for development of land for the purpose of flood management in its local government area;
- it would have been the regime which applied if the development application were made at present.

The court noted that the council's draft planning scheme, which had been placed on public notification, contained a flood hazard overlay code which relevantly included performance outcomes to the specific outcomes in the temporary local planning instrument.

Accordingly, the court considered it appropriate to give considerable weight to the temporary local planning instrument as it reflected the council's current position and future intent in respect of planning for flooding in its local government area.

The court believed the sound approach would be to avoid prospective residents being at risk from a natural disaster such as a major flood event and found that the proposed development was in significant conflict with the flood plain management area code under the Logan Planning Scheme 2006 and the Temporary Local Planning Instrument No. 1 (Logan Interim Flood Response) 2013

Both Masonre and the council called expert evidence from highly qualified hydrologists who agreed that "*… both access to the nominated lots and the lots themselves would … be considered to be subject to a high flood hazard.*"

The council's expert examined flood scenarios both for the 100 year ARI event and for the 1974 flood event. The findings of the council's expert indicated that "*flood depths at the front of all the relevant lots fail a low hazard test pursuant to TLPI2013 and that when the 1974 flood event is considered, the hazard increases substantially.*"

It was concluded by the council's expert that the proposed development was subject to very high levels of hazard in foreseeable flood events. The flood hazard analysis of the council's expert was accepted by the court.

On the other hand, Masonre, through its expert sought to manage the flooding impacts by way of an appropriate emergency response and proposed an emergency flood management plan. It contended that there would be sufficient time for prospective residents to evacuate in the event of a significant flood event and therefore, they would have evacuated long before the flood event eventuated.

The court acknowledged that the *Disaster Management Act 2003* provided a framework for emergency responses to a major flood event but observed that there was no power in the Act to require residents to evacuate their homes in the event of a disaster. It considered the sound approach would be to avoid prospective residents being at risk from a natural disaster such as a major flood event.

Based on the evidence before the court, it found that the proposed development was in significant conflict with the relevant specific outcomes of both the flood plain management area code under the *Logan Planning Scheme 2006* and the temporary local planning instrument.

The mere fact that the residential lots were appropriately located for residential development did not justify approval despite the significant conflicts as identified, particularly in circumstances where those conflicts related to minimising risks to human safety

Masonre submitted that it was in the public interest to not keep the residential lots vacant and undeveloped where they were located in an established residential neighbourhood and were in compliance with the current planning requirements, other than the flood management requirements. As such, it constituted sufficient grounds to justify approval of the proposed development despite the identified conflicts.

The court noted that an approval of the proposed development would put prospective residents at risk from a major flood event. Furthermore, it was significantly in conflict with planning provisions which were in place to ensure risks to human safety from flood events were minimised.

Having weighed up the foreseeable risk, the court found that "*where there can be no assurance that prospective residents will evacuate in a timely way, the desirability of utilising otherwise appropriate residential land is insufficient on balance to justify approving the development application, notwithstanding the significant conflicts which relate not just to desirable planning outcomes generally but to minimising risks to human safety in particular.*"

How tall is the proposed building?

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Body Corporate for the Village of Langler Drew Community Titles Scheme 16700 v Brisbane City Council & Ors* [2014] QPEC 54 heard before Wall QC DCJ

December 2014

In brief

The case of *The Body Corporate for the Village of Langler Drew Community Titles Scheme 16700 v Brisbane City Council & Ors* [2014] QPEC 54 involved an application in the Planning and Environment Court made by the Body Corporate for the Village of Langler Drew Community Titles Scheme 16700 concerning a building proposed to be built at 2-6 Maryvale Street, Toowong.

The Body Corporate contended that the proposed building was above 8 storeys and impact assessable. To the contrary, the developer and the Brisbane City Council contended that the proposed building was 8 storeys and therefore, code assessable.

The court found that the proposed building was 8 storeys in height for the purpose of the *Brisbane City Plan 2000* and therefore, the development application for the proposed building was a code assessable application. The court reserved the costs of the application.

The court found that the bottom area was an overland flow path for stormwater and was not a space within the proposed building between one floor level and the floor level next above it for the purposes of the definition of storey under the Brisbane City Plan 2000

It was proposed by the developer that the area between natural ground level and the underside of the ground floor or the slab of the level 1 carpark was to be used for stormwater management and to accommodate overland stormwater flows. The area contained no habitable spaces and it could not be used by pedestrians or vehicles.

The Body Corporate argued that the area constituted a storey within its meaning under the *Brisbane City Plan 2000* as it was a space within the proposed building commencing at natural ground level, and that level was a floor level with another floor level (being the level 1 carpark) next above it.

The council and the developer argued to the contrary that the area did not constitute a storey as the area was a space below and outside the proposed building and natural ground level was not a floor level.

The court gave consideration to the approach adopted by the court in *Cox v Maroochydore Shire Council* [2006] QPELR 628 at 634-635 when analysing the definition of storey. The definition of storey being considered in that case was similar to the one in the *Brisbane City Plan 2000*, whilst it did not include a reference to the commencement at ground level.

The court formed the view that the area was an overland flow path for stormwater and was not a space between one floor level and the floor level next above it. As such, the court accepted the submissions of the council and the developer that the area was not a space within the proposed building and therefore not a storey within its meaning under the *Brisbane City Plan 2000*.

The court found that the top area was an area on top and outside of the proposed building which had no floor level, ceiling or roof above it, and was not a space within the proposed building for the purposes of the definition of storey under the Brisbane City Plan 2000

Under the proposal, the area on the top of the building was to include the plant deck, communal area (or roof deck with a pergola) and the top of the lift shaft and stairwells. There was no roof directly above the communal area and plant deck. However, there was a roof on the lift shaft and stairwells.

The Body Corporate argued that the area constituted a storey within its meaning under the *Brisbane City Plan 2000* as the plant deck and communal area was a floor level which was next above the level 7 floor slab or in the alternative, there was a roof which capped the lift shaft and stairwells above, in the sense of being higher than, the plant deck and communal area.

The council and the developer argued to the contrary that the area did not constitute a storey as the area was on top of the proposed building (rather than within it) and it did not have a floor level or a roof above it.

The court noted that the communal area and plant deck had no relevant ceiling or roof above it. In the court's view, the roof of the lift shaft and stairwells did not constitute a "roof above" the communal area and plant deck. It further noted that the lift shaft and stairwells were expressly excluded from "space" considerations for the purposes of the definition of storey under the *Brisbane City Plan 2000*.

The court therefore found that the area on the top of the proposed building had no floor level, ceiling or roof above it and was not a space within the proposed building. The court accepted the submissions of the council and the developer that the area did not constitute a storey within its meaning under the *Brisbane City Plan 2000*.

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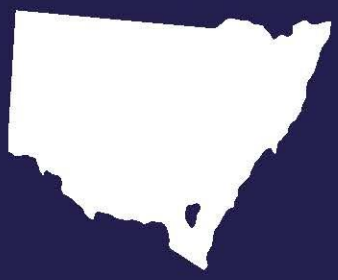

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