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COLIN BIGGERS & PAISLEY LAWYERS

JOURNAL OF LEGAL KNOWLEDGE MATTERS

Volume 20, 2022

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

COLIN BIGGERS & PAISLEY LAWYERS

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Supreme Court of Queensland determines whether a local government is required to refund special charges levied under invalid resolutions, including amounts already spent

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Kozik & Ors v Redland City Council* [2021] QSC 233 heard before Bradley J

February 2022

In brief

The case of *Kozik & Ors v Redland City Council* [2021] QSC 233 concerned issues arising from rates notices, which included special charges levied as a result of resolutions passed by the Redland City Council (**Council**) between June 2011 and July 2016 (**Resolutions**) which were not in compliance with the requirements under the now repealed *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (**LGR 2010**) and the *Local Government Regulation 2012* (Qld) (**LGR 2012**).

Background

Between June 2011 and July 2016, the Council passed the Resolutions to levy special charges in order to fund capital and operational expenditure on services relating to the Aquatic Paradise Canal Reserve, the Sovereign Waters Lake Reserve, and the Raby Bay Canal Reserve (**Services**), following which the Council issued rates notices in respect of the land and those rates notices included the amount of the special charges.

In or before March 2017, the Council identified that the Resolutions had not complied with the requirements under the LGR 2010 and LGR 2012. As a consequence, the Council refunded to the relevant landowners the same percentage of the amount of the special charges including interest other than for the portion which had been expended on the Services. However, the Council contended that it was not obliged to refund the portion of the special charges which was spent on the Services for the benefit of the ratepayers who paid the special charges.

Court determined whether section 32(1) of the LGR 2010 applies to the rates notices issued before 14 December 2012

In determining whether section 32(1) of the LGR 2010 was applicable to the rates notices, the Supreme Court of Queensland (**Court**) held that the Council had identified a document as the "*overall plan*" as required by section 28 of the LGR 2010 and found that it did not comply with the following requirements:

1. The overall plan did not state the estimated cost of and the estimated time for carrying out the overall plan as required by sections 28(4)(c) and (d) of the LGR 2010.
2. By reason of the defects identified in item 1 above, the Resolutions, which were made in 2011 and 2012, did not identify "*the overall plan for the service, facility or activity to which the special rates or charges apply*" as required by section 28(3)(b) of the LGR 2010, and the Council did not "*adopt the overall plan before, or at the same time as, the local government first resolves to levy the special rates or charges*" as required by section 28(5) of the LGR 2010.

The Court also held that due to the failure to comply with those requirements set out above, the Resolutions, which were made in 2011 and 2012, did not have legal effect to levy special charges. However, the rates notices issued before 14 December 2012 were not invalid by operation of section 32 of the LGR 2010, which relevantly stated as follows:

> ***32 Returning special rates or charges incorrectly levied***
>
> *(1) This section applies if a rate notice includes special rates or charges that were levied on land to which the special rates or charges do not apply.*
>
> *(2) The rate notice is not invalid, but the local government must as soon as practicable return the special rates or charges to the person who paid the special rates or charges.*

Court determined whether section 98(1) of the LGR 2012 applies to the rates notices issued after 14 December 2012

The LGR 2010 was repealed on 14 December 2012 by the commencement of the LGR 2012, and accordingly the Court considered the rates notices issued after 14 December 2012 in the context of the relevant provisions of the LGR 2012.

The Court considered section 94 and section 98 of the LGR 2012, which are equivalent to sections 28 and 32 of the LGR 2010, in the context of the Resolutions made between 2013 and 2016, and identified that a document identified as the "*overall plan*" did not comply with the following requirements:

- The document did not state the estimated cost of and the estimated time for carrying out the overall plan as required by sections 94(3)(c) and (d) of the LGR 2012.
- In making the Resolutions to make each of the special charges, the Council did not identify the overall plan for the service, facility, or activity to which the special rates or charges apply as required by section 94(2)(b) of the LGR 2012.

The Court made the same finding in respect of the Resolutions made between 2013 and 2016 as it did in respect of the Resolutions made in 2011 and 2012 above, and held that section 98(1) of the LGR 2012 applied to the rates notices issued after 14 December 2012 such that the rates notices were not invalid.

Court was satisfied that the Council was liable under a cause of action in debt

By operation of section 32(2) of the LGR 2010 and section 98(2) of the LGR 2012, the Court was satisfied that the Council was liable to the plaintiffs under a cause of action in debt as the Council did not refund the portion of the special charges that had been expended in circumstances where it was required to "*as soon as practicable return the special rates or charges to the person who paid the special rates or charges*".

Further, the Court held that "*[t]he Council cannot avoid or diminish its statutory obligation to return the amount of the Special Charges to each person who paid them, by a defence that the payers will be unjustly enriched by the return.*" (at [99]).

Conclusion

In light of its findings, the Court concluded that it will hear the parties in respect of further steps which ought to be taken to finalise the proceeding.

Development out of the dark as the Planning and Environment Court of Queensland allows an appeal against conditions requiring underground electrical infrastructure

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bridgeman Enterprises Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 25 heard before Cash KC DCJ

February 2022

In brief

The case of *Bridgeman Enterprises Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 25 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against conditions imposed by the Sunshine Coast Regional Council (**Council**) on a development approval for a development permit for a material change of use to expand an existing shopping centre, and to reconfigure seven lots into two lots on land in the Mooloolah Valley Township.

The Council approved the development application and included two conditions that would affect the installation and relocation of electricity infrastructure. Electricity in Mooloolah Valley was supplied by overhead poles and cables.

The Appellant lodged change representations seeking to have the conditions removed. The Council gave a negotiated decision notice which included conditions requiring the following:

- Remove an existing electrical transformer and replace it with a transformer mounted on a pad.
- Provide underground conduits below the footpath to facilitate underground electrical cables.
- Relocate the existing overhead electrical power lines to run underground.

The Appellant appealed to the Court, arguing that the conditions were not relevant or reasonably required under section 65 of the *Planning Act 2016* (Qld) (**Planning Act**).

The Court allowed the appeal and ordered that the first and second conditions be deleted and that the third condition be amended to give effect to the tensioning of the overhead wires on Hatten Street.

Undergrounding of electrical infrastructure was not reasonably required

The issue for the Court to determine was whether the conditions imposed on the development approval were relevant to or reasonably required for the proposed development.

Section 65(1) of the Planning Act relevantly states:

> *A development condition imposed on a development approval must—*
>
> *(a) be relevant to, but not an unreasonable imposition on, the development or the use of the premises as a consequence of the development; or*
>
> *(b) be reasonably required in relation to the development of the use of the premises as a consequence of the development.*

The Council argued that it had used its role as an assessment manager under section 45 and section 60(3) of the Planning Act to impose the development conditions. The Court made reference to the power of this role from the case of *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53 (see [24] to [25]):

> *… The power to impose lawful conditions on an approval is a broad residual discretion to be exercised for a proper planning purpose ...*
>
> *The planning purpose underlying the exercise of the conditions power in any given case is to be ascertained from the [Planning Act], and the documents to which regard must, or may be had, in the assessment of the application.*

The Court therefore had to determine the reasonableness and relevance of the imposed conditions in the context of the assessment benchmarks of the relevant planning scheme provisions of the *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**), which in general terms provided the following:

- The Planning Scheme encourages the undergrounding of electrical infrastructure.
- Scenic amenity and aesthetics are highly valued in relation to the subject land in Mooloolah Valley.
- The Planning Scheme draws a distinction between new or greenfield development and other development when encouraging the efficient use and extension of existing infrastructure.

The Court sought to balance these themes and their relevance to the proposed development.

Conditions were not reasonable as the subject land was well serviced by existing electrical infrastructure with no plans to change

The Court held that the scale of the required work was not reasonable when balanced against the benefit of securing underground electrical infrastructure for the following reasons:

- None of the work required by the conditions were necessary for the proper operation of the proposed development.
- The surrounding area was completely serviced by overhead electrical infrastructure and there was no evidence to suggest it would be undergrounded in the future.
- Any theoretical benefit from the undergrounding of the electrical infrastructure was outweighed by the expense of implementing the conditions.

Conditions were not relevant as the goals of the Planning Scheme could be achieved without the undergrounding of electrical infrastructure

The Court also held that any relevance the conditions had towards the goals of the Planning Scheme was so slight that it could not be said they met the requirements of section 65 of the Planning Act for the following reasons:

- The Court did not find any benefit to visual or scenic amenity by moving the transformer to a pad-mounted position.
- Whilst the Council had argued that the primary benefit from undergrounding the electrical wires in respect of scenic amenity was that the wires would not be seen, the Court held that the improvements to scenic amenity as required by the Planning Scheme could be achieved without the undergrounding of the electrical wires.
- The Court also held that any benefit to scenic amenity from the undergrounding of the electrical wires was insignificant and any substantive benefit would only come from removing the poles and wires, and that was not required by the conditions.
- The Court also found that the better approach is to impose a condition that the electrical wires be raised so as to facilitate the planting of vegetation, which provides scenic amenity benefits.

Conclusion

The Court allowed the appeal and held that the decision to impose the disputed conditions be set aside for the reasons that:

- The electrical infrastructure was not relevant because any contribution towards scenic amenity goals were "*… so slight as to deprive the conditions of the necessary relevance.*" (at [58]).
- Even if the Court's finding in respect of the relevance of the conditions was wrong, the conditions were in any event an unreasonable imposition when the slight benefit is weighed against the expense.

Planning and Environment Court of Queensland allows a minor change application, which varies the effect of the planning scheme to lock in minimum carparking for apartments

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dunland Property Pty Ltd v Brisbane City Council* [2021] QPEC 34 heard before Rackemann DCJ

February 2022

In brief

The case of *Dunland Property Pty Ltd v Brisbane City Council* [2021] QPEC 34 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the refusal by the Brisbane City Council (**Council**) of a change application to change a preliminary approval obtained under the now repealed *Sustainable Planning Act 2009* (Qld) for mixed use development (**Preliminary Approval**) to include an additional condition to fix the minimum rate of on-site carparking required for two apartment buildings (**Change Application**).

The Court considered the threshold issue of whether the proposed change could be made to the Preliminary Approval, which by virtue of section 286(6) of the *Planning Act 2016* (Qld) (**Planning Act**) is taken to be a variation approval. The Court was satisfied that the Change Application could be made because a variation approval is part of a preliminary approval (see schedule 2 of the Planning Act), a preliminary approval includes the conditions imposed on that approval (see section 49(5) of the Planning Act), and the change sought was to the conditions of the Preliminary Approval which gave effect to the variations.

The primary issue for the Court was whether the Change Application was for a minor change, which relevantly required the Court to consider whether the additional condition would result in substantially different development.

The Court found that the proposed changes would not result in substantially different development, and therefore allowed the appeal, set aside the Council's decision, and replaced the Council's decision with a decision making the changes.

Background

The Preliminary Approval approved a site master plan and precinct plan for the following mixed use development (see [2]), and relevantly set maximum building heights, minimum setback requirements, and nominated levels of assessment and associated assessment benchmarks for later development applications:

- *Residential (Terrace Home) Precinct* – 84 two or three storey units of varying lot sizes to be completed over five stages.
- *Mixed Use (Apartment Buildings) Precinct* – 131 units within two eight storey buildings (**Building A and Building B**) and 57 units within a six storey building.
- *Heritage Laundry and Convent Precincts* – Existing heritage buildings to be adapted for reuse.
- *Local Park Precinct* – A public park of 4,000m^2, internal private open space, and recreational areas.
- *Roads and access* – Internal roads, on-site carparking, and three access routes.

The Change Application sought to specify the rates of on-site carparking for Building A and Building B consistent with the rates stated in the Transport, Access, Parking and Servicing Planning Scheme Policy (**TAPS Policy**) of the *Brisbane City Plan 2014* (**Planning Scheme**) in existence at the time the Preliminary Approval was granted and the Change Application was made, and that were changed in later versions of the TAPS Policy.

The rates of on-site carparking referred to in the Transport, Access, Parking and Servicing Code (**TAPS Code**) are extracted below.

Table 9.4.11.3—Performance outcomes and acceptable outcomes	
PO13	Development outside of the City core and City frame as identified in Figure a provides on-site car parking spaces to accommodate the design peak parking demand without any overflow of car parking to an adjacent premises or adjacent street.
AO13	Development outside of the City core and City frame as identified in Figure a: a. provides on-site car parking spaces in compliance with the standards in the Transport, access, parking and servicing planning scheme policy; or b. for accepted development subject to compliance with identified requirements, does not result in on-street car parking if no parking standard is identified in the Transport, access, parking and servicing planning scheme policy. Note—For accepted development subject to compliance with identified requirements including an existing premises, no reduction to existing car parking is required to comply with a maximum car-parking rate in the Transport, access, parking and servicing planning scheme policy.

Court finds that the Change Application does not result in substantially different development and is therefore a minor change

The Court had regard to schedule 1 of the Development Assessment Rules and held that an assessment of whether the change is minor includes a comparative assessment of quantitative and qualitative data as relevant to the circumstances; that matters of scale and degree are often involved; that the context and circumstances of the case are important; and that the question is to be considered broadly and fairly rather than pedantically (at [14]).

The Court held that the Change Application would not result in substantially different development for the following reasons:

- The Planning Scheme allows compliance with a code to be achieved by complying with the purpose, overall outcomes, and performance outcomes or the acceptable outcomes. "*Compliance through meeting the performance outcome is just as much compliance as compliance through adoption of the acceptable outcome.*" (see [19] and [20]).
- Alternative solutions to Acceptable Outcome AO13 of the TAPS Code are able to be proposed in respect of "*… the specific characteristics of the site and the resultant carparking demand*", because the Planning Scheme provisions are performance based and are not mandatory requirements (see [9], [18] to [19], [31], and [36](b)(i)).
- All that is required to satisfy Performance Outcome PO13 of the TAPS Code is that "*… on site carparking spaces … accommodate the design peak parking demand without any overflow of carparking.*" (at [19]).
- The nature of a preliminary approval which includes a variation approval is to lock in assessment benchmarks to apply to later approvals sought, irrespective of the provisions of the relevant planning scheme (at [23]). The change seeks to add a condition which will provide clarification and certainty, which is a legitimate purpose (at [34](b)(iv)), and "*… will not change the built form or overall development intent of the subject matter of the preliminary approval*"; and "*… the change will have no practical effect on the nature, scale or operation of the development.*" (at [26]).
- The change does not remove something integral to the operation of the development (see [21], [24], and [26]), and would, based on the uncontested traffic engineering evidence, provide sufficient on-site carparking so as not to generate overflow carparking, and further was not likely to lead to a reduction in the number of on-site carparks required by the TAPS Code (see [28], [34], and [36](b)(i) to (iii)).

Court finds that submitters will not be prejudiced by allowing the Change Application

The Court held that the rights of the public to make a submission during public notification of a variation request were not affected by the approval of the Change Application because any further application in respect of the Preliminary Approval would be code assessable, the Applicant could choose to establish compliance with the TAPS Code in those future applications without adopting Acceptable Outcome AO13, the Planning Act permits minor changes to existing preliminary approvals without public notification, and the change is appropriate in the circumstances based on the uncontested expert traffic engineering evidence (see [37]).

Conclusion

The Court allowed the appeal, set aside the Council's decision, and replaced the Council's decision with a decision making the changes because the introduction of a condition specifying the rate of on-site carparking would not result in substantially different development, and the rate proposed was sufficient for the particular development in the circumstances.

Planning and Environment Court of Queensland dismisses a change application seeking to remove a stepped form frontage that was integral to the original approval

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matters of *Upan Company Pty Ltd v Gold Coast City Council* [2021] QPEC 37 and *Upan Company Pty Ltd v Gold Coast City Council (No. 2)* [2021] QPEC 50 heard before Jones DCJ

February 2022

In brief

The case of *Upan Company Pty Ltd v Gold Coast City Council* [2021] QPEC 37 (***Upan (No. 1)***) and *Upan Company Pty Ltd v Gold Coast City Council (No. 2)* [2021] QPEC 50 (***Upan (No. 2)***) concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the refusal by the Gold Coast City Council (**Council**) of a change application made under section 82 of the *Planning Act 2016* (Qld) to change a development approval for residential apartments in Main Beach (**Change Application**).

The Change Application proposed a number of changes, including, most relevantly, a change to the external façade treatments and design to remove a stepped form of development.

The Court considered whether the proposed changes complied with the *Gold Coast City Plan 2014* (**City Plan**), and if there was non-compliance, whether there were sufficient relevant or discretionary matters to warrant approval of the Change Application despite the non-compliance (see [17] *Upan (No. 1)*).

The Court dismissed the appeal for the reason that it was critical to the development approval that the development incorporate a stepped form and the changes to the external features would result in an unacceptable bulk and scale outcome (at [63] *Upan (No. 1)* and [13] *Upan (No. 2)*).

Background

The development approval was for a mix of two and three bedroom apartments over 20 storeys.

The Change Application sought the following changes:

- *Storeys and height* – A reduction from 20 storeys to 19 storeys, with an increase in the overall building height by 3.75 metres.
- *Apartments* – A reduction from 55 to 50 apartments, the introduction of four and five bedroom apartments, and an increase in the residential density.
- *External façade and design* – The removal of a stepped form to the façade of the building.
- *Carparking, floor plan, and setbacks* – An increase in carparking from 107 to 113 carparks, an alteration to the floor plans to incorporate larger living and balcony areas, and a variance to the building setbacks for each level.

The parties submitted a number of provisions of the City Plan were relevant to the proceeding. Of most relevance to the Court were Overall Outcome OO2(d)(v) of the Medium Density Residential Zone Code and Overall Outcome and OO3(e)(i)(B) of the Light Rail Urban Renewal Area Overlay Code, which were concerned with building dominance and a clearly defined tower and podium form (at [65] *Upan (No. 1)*).

The Court observed that "*parties should limit references to a planning scheme within the issues in dispute to only the most relevant and important parts of that scheme and not plead every provision that might possibly be offended. Even the most cursory review of the provisions set out [by the parties], would reveal an extensive level of overlapping and repetition of planning themes and philosophies.*" (at [22] *Upan (No. 1)*).

Most changes were not significant to the outcome of the appeal

The Court relevantly held the changes relating to the number of storeys and increase in carparks were not significant to the outcome of the appeal (at [19] *Upan (No. 1)*).

The Court also held that the following changes did not warrant the refusal of the Change Application:

- The loss of opportunity for planting on the stepped form of the approved development (at [27] *Upan (No. 1)*).
- Any shadow to be created by the proposed development and any minor difference in privacy impacts because the site is located within a precinct with no height limits (see [29] and [35] *Upan (No. 1)*).
- The change in height, reduction in floor area, and shape of the top level of the building (see [46] and [47]) of *Upan (No. 1)*).

Stepped form or podium was critical to the development

The development approval included a nine-storey stepped form of development, which despite not complying with the City Plan's requirement for a tower and podium form, the Court held was clearly important to the development approval decision (see [20] and [52] *Upan (No. 1)*).

The Court observed that the Change Application was code assessable, and "*the more important the assessment benchmark, the more likely it is that non-compliance will be determinative against approval.*" (at [12] of *Upan (No. 1)* citing *Traspunt No. 14 Pty Ltd v Moreton Bay Regional Council* [2021] QPEC 4).

Despite the Court's finding that the proposed development "*… is more reflective of the Gold Coast character, permits a better interaction with the beach and beyond by pedestrians and that the approved development has a more commercial office space appearance when compared to that now proposed*", the Court held that without a podium or stepped form the proposed development would result in a number of unacceptable planning outcomes because it would crowd or dominate the streetscape (see [63] *Upan (No. 1)* and [3] *Upan (No. 2)*).

The Court did not put much weight on the "*softening*" in the Council's current City Plan of the requirements for a podium because recent approvals suggested that the force and effect of the amendments may take time before they are implemented on the ground (at [70] *Upan (No. 1)*).

Applicant allowed opportunity to further change proposal

Although compliance with the City Plan's requirement for a podium form could have been achieved by the imposition of a condition, the parties did not propose that to the Court.

The Court provided the parties with its reasons in the case of *Upan (No. 1)* and reserved making an order until it heard further from the parties, because the Court considered that features of the Change Application would result in a superior outcome than the approved development and most of the amenity issues against the Change Application were dismissed (see [3] *Upan (No. 2)*).

In the case of *Upan (No. 2)*, the Applicant submitted revised plans for the Change Application in an attempt to address the Court's concerns expressed in *Upan (No. 1)*.

The Court was not satisfied that the revised plans addressed the Court's concerns, nor that they established sufficient compliance with the City Plan. The Court was not minded to conduct a further merits review in respect of the revised plans (at [12] *Upan (No. 2)*).

Conclusion

The Change Application did not comply with the assessment benchmarks which would minimise the proposed development from dominating the streetscape. The Court dismissed the appeal.

Limits of existing use rights are reiterated by the New South Wales Land and Environment Court

Annie Dong | Mollie Matthews | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Blues Point Hotel Property Pty Ltd v North Sydney Council* [2021] NSWLEC 27 heard before Duggan J

February 2022

In brief

The case of *Blues Point Hotel Property Pty Ltd v North Sydney Council* [2021] NSWLEC 27 concerned Class 4 proceedings in the New South Wales Land and Environment Court (**Court**) in which the Applicant sought a declaration that the use of an outdoor first-floor terrace (**Outdoor Terrace**) involved a continuance of an existing use so as to render invalid, void, and of no effect a development control order issued by the North Sydney Council (**Council**) ordering the Applicant to stop providing food, alcohol, and entertainment on the Outdoor Terrace.

The Court ultimately held that the Applicant was not entitled to a declaration as it had failed to establish that its current use of the Outdoor Terrace was a continuation of an existing use under section 4.65 and section 4.66 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

Background

The Applicant was the owner and operator of the Blues Point Hotel (**Premises**), a local pub in Sydney's lower north shore, which had been used as a hotel/pub since its construction in 1938.

In 1963, upon the commencement of the *North Sydney Planning Scheme Ordinance 1963* (**NSPSO**), hotels became prohibited in the relevant residential zone. However, existing uses were authorised to continue.

The use of the Premises as a hotel continued to be prohibited, unless it was an existing use, under the various planning schemes as adopted from time-to-time.

Whole Premises benefits from an existing use right

The Court firstly considered whether the Premises benefitted from an existing use right.

The Court held that because "*hotel*" was defined by reference to the *Liquor Act 1912* (NSW) (**Liquor Act**), the question was whether relevantly the Premises (ie the building as a whole) met the definition of "*hotel*" being "*any premises specified in a publican's license issued under the Liquor Act 1912, as amended by subsequent Acts*" (see [13] and [56]).

The Court held based on the ordinary dictionary meaning of "*premises*", which was consistent with the provisions of the Liquor Act and the form of the license, that an inference could be drawn from the evidence that the "*premises specified in [the] publican's license*" comprised the whole of the land and building that is at the address specified in the license (see [56] to [64]).

The Court also held that the Premises was not being used for two separate and independent uses of hotel and accommodation and that the accommodation use either fell within the hotel use or was ancillary to it, as the uses were physically integrated within a single facility which was evidenced by factors including that there was no separate entrance for the accommodation or reception or booking area for accommodation guests (at [65]).

Use of the Outdoor Terrace was not part of the existing use

The continuance of an existing use is limited by section 4.66(2) of the EP&A Act, which relevantly states [emphasis added]:

> *(2) Nothing in subsection (1) authorises—*
>
> *(a) any alteration or extension to or rebuilding of a building or work, or*
>
> *(b) any **increase in the area of the use** made of a building, work or land from the area **actually physically and lawfully used** immediately before the coming into operation of the instrument therein mentioned, or*
>
> *(c) without affecting paragraph (a) or (b), any **enlargement or expansion or intensification** of an existing use, or*

> *(d) the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 4.17(1)(b), or(e) the continuance of the use therein mentioned where that use is abandoned.*

The Court stated at [77] that subsection (b) [emphasis added]:

> *… operates to limit the use of the building work or land to those areas **actually lawfully used in a physical sense, notwithstanding** that the use, prior to the date it became prohibited have **anticipated that at some point in the future** other areas of the building work or land would be physically used for the same purpose.*

For the Outdoor Terrace to form part of the existing use of the Premises, it therefore needed to have been actually physically used for a purpose other than a roof enclosing the areas below it at the date immediately before the use became prohibited.

The roof was marked on historical plans as a "*flat roof or sun deck*". Several factors suggested its use and accessibility went beyond merely being a roof, including the existence of a door, concrete awning, and parapet which prevented people from falling off the area. However, the Court held that a mere intention and capacity for the roof to be used for more than just a roof did not constitute an existing use right. This is because "*capacity and intention*" are concepts which are directly opposed to the statutory language of "*actual physical use*" (see [80] to [84]).

As there was no evidence that the roof was actually being used for any purpose other than as a roof immediately before the NSPSO commenced, the Court held that the Applicant "*failed to establish that the contended existing use rights are enjoyed for the Outdoor Terrace as a floor and air space for hotel uses*" (see [86] and [88]).

The reliance on an existing use right is therefore limited in a physical sense, even if the expansion or intensification had been anticipated before the prohibition of the use. It is therefore important that landowners maintain clear documentary evidence showing the precise use and areas of the use.

Use of the Outdoor Terrace was an unauthorised enlargement, expansion, or intensification of the existing use

The Council contended that the Outdoor Terrace comprised an unauthorised "*enlargement, expansion or intensification of existing use*" under section 4.66(2)(c) of the EP&A Act.

The Court determined this issue for completeness, although it was not strictly necessary since it had already concluded that the Outdoor Terrace did not benefit from an existing use right (at [90]).

The Court compared the use of the Premises immediately before the commencement in 1986 of the NSPSO with the use after that date, and determined whether "*any change in that use can be properly characterised as an enlargement, expansion or intensification*" (at [97]).

An adjoining neighbour and a prior employee each gave uncontested evidence that the Outdoor Terrace area was not being used by patrons or for food and alcohol consumption until about 2016 (see [101] to [103]).

Therefore, the Court held that the current use of the Outdoor Terrace constituted either or both an enlargement or expansion of the use in 1986.

Conclusion

The Court dismissed the summons for a declaration that the use of the Outdoor Terrace involved the continuance of an existing use because there was no evidence of the actual physical use of the Outdoor Terrace as at the relevant date in 1986.

Whilst an existing use may be continued after it becomes prohibited, there are limits to this right. This case demonstrates the complexities involved in properly characterising the use at the relevant date, and the importance of historical evidence of the actual physical use, of the relevant part of the premises subject to the existing use. The absence of documentary evidence proving the actual physical use of the relevant part of the premises will prove fatal to the application of an existing use right to the relevant part of the premises. Landowners should therefore ensure they have documentary evidence of the actual physical use when seeking to rely on an existing use right.

Importantly, development applications can be lodged to change an existing use such as enlarging, expanding, intensifying, extending, or altering the use (see section 4.66(2) of the EP&A Act and Part 5 of the *Environmental Planning and Assessment Regulation 2000* (NSW)). If consent is granted, it provides protection for the alteration of the existing use. Records of any such consent should also be carefully maintained by landowners.

High Court of Australia finds that the certification functions of a representative body under the Native Title Act 1993 (Cth) are able to be performed by a representative body's chief executive officer

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *Northern Land Council v Quall* [2020] HCA 33 heard before Kiefel CJ, Gageler, Keane, Nettle, and Edelman JJ

March 2022

In brief

The case of *Northern Land Council v Quall* [2020] HCA 33 concerned an appeal to the High Court of Australia (**High Court**) against the orders of the Full Court of the Federal Court of Australia (**Full Court**) in the case of *Northern Land Council v Quall (No. 2)* [2019] FCAFC 101, in which the Full Court relevantly held as follows with respect to indigenous land use agreements (**ILUAs**):

- The Respondents' cross-appeal be allowed because the Full Court was satisfied that the function of a representative body under section 203BE(1)(b) of the *Native Title Act 1993* (Cth) (**NT Act**) to certify an application for registration of an ILUA (**Certification Function**) could not be delegated to the chief executive officer (**CEO**) of the representative body (**Issue 1**).
- The Northern Land Council's (**NLC**) interlocutory application seeking that the Full Court exercise its discretion under section 27 of the *Federal Court of Australia Act 1976* (Cth) to admit further evidence in respect of the NLC's delegation of the certification functions to its CEO, and the appeal seeking a declaration that the NLC's delegation to its CEO was effective be dismissed because the Full Court held that the issues did not need to be considered based on its finding in respect of Issue 1 above (**Issue 2 and Issue 3**).

The Full Court's reasoning in respect of Issue 1, Issue 2, and Issue 3 was provided in *Northern Land Council v Quall* [2019] FCAFC 77, which was summarised in our June 2019 article.

The High Court held that the Certification Function could be delegated by the NLC under section 27(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALR Act**), and where effectively delegated, sections 34A and 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth) (**AI Act**) attributed the CEO's opinion formed under section 203BE(5) of the NT Act to the NLC.

Their Honours Justice Nettle and Justice Edelman disagreed with the reasoning of the majority and held that the Certification Function could be performed by the CEO as an agent of NLC.

The High Court set aside the Full Court's decision in respect of Issue 1, Issue 2, and Issue 3, and remitted to the Full Court Issue 2 and Issue 3 for determination.

Background

In 2016, the Northern Territory of Australia and NLC agreed upon an ILUA (**Kenbi ILUA**) which was varied in 2017. After the variation, the CEO of NLC, purporting to act as a delegate of NLC, signed the certificate for the Kenbi ILUA to be registered under the NT Act (**Registration Certificate**).

The Respondents commenced judicial review proceedings in the Federal Court of Australia (**Federal Court**) seeking orders that the Registration Certificate was invalid because the Certification Function could not be delegated or the particular instrument of delegation was not a valid delegation to the CEO.

Federal Court's and Full Court's decisions

The Federal Court in *Quall v Northern Land Council* [2018] FCA 989 relevantly held that section 203BK(1) of the NT Act, which authorised a representative body to "*do all things necessary or convenient*", was broad enough to include the power to delegate the Certification Function. The Federal Court held, however, that the instruments of delegation of the Certification Function to the CEO were ineffective.

The Full Court held that the Certification Function was non-delegable because the Certification Function required a representative body to first form an opinion under section 203BE(5) of the NT Act that all reasonable efforts had been made to ensure that those persons who may or do hold native title in an ILUA have been identified and agree to the making of the agreement.

The Full Court therefore did not consider in respect of Issue 2 whether NLC's further evidence demonstrated the effectiveness of the instruments of delegation.

Certification Function is delegable

The High Court considered the legislative context of the functions of a representative body under the NT Act and the power under section 27(1) of the ALR Act of a land council to do all things necessary or convenient to be done or in connection with the performance of its functions.

The High Court held that the legislative framework, in particular section 203B(3) of the NT Act, supports a representative body using persons or groups of persons within its organisational structure and administrative processes established by or under the relevant constating statute to perform its functions, unless the function has a special feature which confines the performance of it to the members or governing body of the representative body (see [30], [34], and [37]).

The High Court held there was not any special feature of the Certification Function which would confine the performance of it to the membership or governing body of the representative body (at [52]), and that section 27(1) of the ALR Act permits the delegation of a function conferred by or under another Commonwealth Act if the delegation of that function can be characterised as something "*'necessary or convenient [ie ancillary, subsidiary, or incidental] to be done for or in connexion with the performance' of that function or other functions …*" (see [63] to [66]).

By virtue of section 34AB(1)(c) of the AI Act, a CEO's performance of the Certification Function is deemed to be performed by the representative body and the opinion of the CEO formed under section 203BE(5) of the NT Act is authorised to be their own (at [70]).

CEO performs functions as an "agent" rather than "delegate"

Their Honours Justice Nettle's and Justice Edelman's reasoning differed from that of the majority.

Their Honours agreed that the NLC's functions conferred on it as a representative body under section 203BE(1)(b) of the NT Act can be performed by its CEO (at [76]). Their Honours, however, made a distinction between an "*agent*" and a "*delegate*". An agent's acts are attributed to the other, whereas a delegate, in the strict or precise sense, acts on their own behalf and generally in their own name. A non-delegable duty or function must only be performed by the nominated person or their agent (see [77] and [81] to [86]).

When dealing with the powers of a body corporate, which can only act through natural persons, issues of agency ought to be considered before issues of delegation (at [86]).

Their Honours held that the functions of a representative body under the NT Act are "*almost textbook examples*" of functions that would be non-delegable by implication. However, given that the functions are a substantial undertaking, the representative body must act through natural persons as agents (at [78], [89] to [91], and [99]).

Justice Nettle and Justice Edelman disagreed with the majority that section 27(1) of the ALR Act authorised the delegation of the Certification Function to the CEO but found that the Certification Function could be performed through the CEO as an agent of NLC and sections 27 and 28 of the ALR Act related to powers under the ALR Act and not the NT Act.

Their Honours held that the unresolved question for the Full Court should be whether the NLC's constitutive statutes and instruments permitted the CEO to exercise the Certification Function as an agent rather than a delegate, which was clearly the imprecise way the term "*delegate*" was being used by the parties in this case (at [104]).

Conclusion

The High Court set aside the orders of the Full Court and remitted Issue 2 and Issue 3 for redetermination.

District Court of Queensland finds in favour of a landowner and grants an injunction requiring a local government to fix a broken stormwater pipe and awards general and special damages

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Davies & Ors v Gold Coast City Council* [2021] QDC 135 heard before Jarro DCJ

March 2022

In brief

The case of *Davies & Ors v Gold Coast City Council* [2021] QDC 135 concerned a claim in private nuisance to the District Court of Queensland (**Court**) by property owners (**Plaintiffs**) against the Gold Coast City Council (**Council**) in respect of subsidence allegedly caused by the Council's stormwater pipe in an easement in favour of the Council that is over part of the Plaintiffs' property (**Subject Land**).

The Council argued that the Plaintiffs had constructed a retaining wall which had caused the stormwater pipe to break and that was in breach of the terms of the easement.

The Court firstly determined if the Plaintiffs were in breach of the terms of the easement, and if not, how the damage to the Subject Land was caused and the party responsible for the damage.

The Court held that the Council was liable in private nuisance for the following reasons:

- The Plaintiffs did not breach the terms of the easement by constructing the retaining wall.
- The Council was responsible for fixing the broken stormwater pipe, and it was the broken stormwater pipe that caused the subsidence to the Subject Land.
- The Council's failure to repair the broken stormwater pipe and the resultant subsidence was a material interference with the Plaintiffs' reasonable enjoyment of the Subject Land and amounted to liability in private nuisance.

Background

The stormwater pipe conveys stormwater into a canal next to the Subject Land. The stormwater pipe exits through a retaining wall inclusive of a headwall, cut-off wall underneath the stormwater pipe outlet, two concrete wings around the stormwater pipe outlet, and a concrete apron underneath the stormwater pipe outlet wings. The retaining wall was constructed by the Plaintiffs and is adjacent to a larger revetment wall bordering the entire width of the Subject Land that faces the canal.

Plaintiffs' retaining wall was approved by the Council and its construction does not breach the terms of the easement

The Council argued that the construction of the retaining wall caused the stormwater pipe to break, and the Plaintiffs constructed the retaining wall without the Council's approval.

The Plaintiffs did not produce any approved plans for the construction of the retaining wall. Instead, the Plaintiffs relied upon the evidence of the tradesman who constructed the retaining wall to establish that the Council approved its construction.

The Court held that the absence of approved plans at trial did not preclude a finding that the retaining wall was approved for the following reasons:

- The evidence provided by the tradesman was clear and persuasive about his recollection of events and, in particular, he was able to recollect the names of the relevant Council inspectors.
- The original building approval for the dwelling showed the retaining wall.
- The Council's records were inconclusive, and a reasonable inference could be drawn that the approval of the retaining wall was misplaced or lost.

The Court was therefore satisfied that the Council had approved the construction of the retaining wall.

The Council argued that the retaining wall was in breach of the terms of the easement because it did not allow "*… full and free right and liberty to enter upon the easement land for all purposes incidental to maintenance of the drainage …*" (at [86]).

The Court considered the following principle in *Brown v Jackson* [2015] QSC 355 (at [16]) in respect of construing an easement dealing with a situation where obstructing the easement in any way was prohibited:

> *Generally, unless there is a provision to the contrary, a right of way easement which is sufficiently wide to permit its purpose will not prevent the servient owner from fencing the easement, with the dominant owner accessing the right of way by means of gates at such points as reasonably meet his or her requirements.*

The Court distinguished the facts and circumstances in *Brown v Jackson* [2015] QSC 355 from the drainage easement in this case by finding that the entirely underground stormwater drain in this case was not comparable to a gate that interfered with access to a driveway. The Court held that the retaining wall did not prevent the Council from using the easement for the intended drainage and maintenance purposes.

The Court held that the Plaintiffs were not in breach of the terms of the easement for the following reasons:

- The terms of the drainage easement did not prohibit the construction of a retaining wall.
- Since the Court found the retaining wall was approved by the Council, the Plaintiffs could not be in breach of the terms of the easement.

Council was responsible for the subsidence on the Subject Land

The Court considered what had caused the subsidence of the Subject Land. The Court heard expert opinion evidence from the Plaintiffs' structural and geotechnical engineering experts, which demonstrated that a loss of sand backfills in and around the stormwater pipe and stormwater pipe outlet structure was the main cause of the subsidence.

The Council conceded that it was responsible for the stormwater pipe, but not for the stormwater pipe outlet structure in the Plaintiffs' retaining wall.

The Court held that the Council was as responsible for the stormwater pipe outlet structure as it was for the stormwater pipe itself. As a question of fact, the stormwater pipe could not be separated from the stormwater pipe outlet structure. The stormwater pipe outlet structure performs the essential tasks of facilitating the stormwater in the stormwater pipe to disgorge into the canal and retains the engineering bedding of the stormwater pipe.

Because the stormwater pipe and stormwater pipe outlet structure are inseparable, the Court concluded the following:

- The stormwater pipe outlet structure was an essential element of the Council's stormwater system within the easement.
- The Council was responsible for the matters causing the loss of sand backfill.
- The Plaintiffs bear no responsibility for the causation of the subsidence of the Subject Land despite the infrastructure being located on the Plaintiffs' property.

Council liable in private nuisance as the subsidence materially interfered with the Plaintiffs' ordinary comfort

The Court relied on the following principle in *Turner v Kubiak* [2020] QDC 223 to determine what amounts to a private nuisance (see [60] to [63]):

> *A mere interference that causes damage does not constitute a nuisance. A balance has to be achieved between the right of an occupier to do as they desire with their own land and the right of their neighbour not to be interfered with … However, to be actionable as a nuisance, the interference … must be both substantial and unreasonable …*
>
> *[What is] unreasonable involves weighing the respective rights of the parties in the use of their properties.*

The Plaintiffs submitted that whether there had been a private nuisance depended on the authority granted by the terms of the easement to interfere with the Plaintiffs' enjoyment of the Subject Land. The Court agreed and found that the terms of the easement granted the authority for the Council to use and maintain the stormwater pipe, but it did not authorise the Council to either:

- unreasonably interfere with the Plaintiffs' use and occupancy of the Subject Land; or
- cause, create, or contribute to any physical damage to the Subject Land.

Therefore, the Court was satisfied that the Council's actions amounted to private nuisance for the following reasons:

- The loss of backfill in and around the stormwater pipe and stormwater pipe outlet structure was the fault of the Council and it had caused the subsidence on the Subject Land.
- The subsidence on the Subject Land was a substantial and an unreasonable interference with the use of the Subject Land.
- Even though the Council did not install the stormwater pipe outlet structure, the Council had failed to take reasonable steps to remedy the nuisance since it became aware of the existence of the nuisance in November 2012.

Conclusion

The Court gave judgment for the Plaintiffs and held that the Council was liable in private nuisance. The Court made the following orders:

- An injunction requiring the Council to remove or replace the stormwater pipe or alternatively requiring the Council to carry out remediation work.
- An order that the Council pay to the Plaintiffs general damages of $50,000 for the loss of use and enjoyment of the Subject Land.
- An order that the Council pay to the Plaintiffs special damages of $110,108 for the repairs to the Plaintiffs' retaining wall.

Planning and Environment Court of Queensland approves the redevelopment of premises to establish a hotel despite the non-compliances with the planning scheme because of the unusual circumstances and "real world factors"

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *I.B. Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36 heard before Williamson KC DCJ

March 2022

In brief

The case of *I.B. Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Sunshine Coast Regional Council (**Council**) to refuse a development application for a material change of use of land (**Development Application**).

The Development Application involved the renovation and extension of an existing licensed restaurant and caretaker's residence to a "paddock-to-plate" style hotel and an associated bottle shop. The Council contended that the proposal was the "*… antithesis of good planning as it involves an inappropriate use of flood affected land …*" (at [2]).

The Court considered the following issues:

- *Land use* – Whether the proposed development was an unacceptable use of the land when assessed against the *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**)?
- *Flooding risk* – Whether the proposed development resulted in unacceptable risks from flooding?
- *Need* – Whether there was an economic, community, or planning need for the proposed development?

The Court found that the proposed development did not comply with the Planning Scheme in a number of respects, which would ordinarily carry considerable weight in the exercise of its planning discretion. However, the Court found that the potency of the non-compliances was diminished by the circumstances of the case to the extent that the Court was satisfied they would not result in unacceptable town planning consequences that warranted refusal. Furthermore, the Court found that there was a planning need for the proposed development and that it would result in improved flood outcomes compared to the previous use.

Court found that the "real world factors" and unusual circumstances materially diminished the weight of the non-compliances with the Planning Scheme

The Court considered the relevant provisions of the Planning Scheme and found three key areas of non-compliance:

- *Rural Residential Zone* – "*Hotel*" is an inconsistent use in the zone.
- *Sunshine Coast Activity Centre Network* – The proposed development did not support the pattern of development expressed in the Planning Scheme and may undermine the Activity Centre Network Strategy because it involves a centre activity outside of the Centre Zone.
- *Local growth management boundary and rural residential growth boundary* – The proposed development involved urban development outside of the urban growth management boundary and within the rural residential growth boundary.

The Court stated that these departures from the Planning Scheme's planning strategies would usually attract considerable weight. However, the Court held that there were the following unusual circumstances and "*real world factors*" that materially diminished the potency of the non-compliances:

- The current approved use for the land, and a number of other local uses, were already inconsistent with the Planning Scheme's planning strategies.
- Despite being characterised differently under the Planning Scheme, the proposed use shared some important characteristics with the approved use, namely they were commercial in nature and involved the provision of dining and entertainment for patrons.
- The proposed development was compatible with the existing character and amenity of the locality.
- The evidence established that "*hard*" amenity impacts such as traffic, visual amenity, and noise could be conditioned to achieve compliance.
- The proposed development would not result in unacceptable economic outcomes or compromise the Activity Centre Network Strategy as the existing centre at Eumundi was too well established to fail and an out of centre use had already been conducted on the subject land.

Court found that the proposed development could be conditioned to comply with the flood risk components of the Planning Scheme and would result in improved flood outcomes compared to the approved use

The subject land is flood affected because of its proximity to Doonan Creek. The Council argued that the proposed development ought to be refused because it did not comply with assessment benchmarks with respect to flooding, in particular Performance Outcomes PO3 and PO4 in Table 8.2.7.3.2 of the Flood Overlay Code.

The Court agreed with the evidence of the Appellant's flood expert, which established that the proposed development represented a superior response to flood risk than the current approved use. In particular, the Appellant proposed the imposition of a condition requiring compliance with a Flood Evacuation Management Plan which the Court determined would ensure the safety of people and minimise the risk of harm to property and the natural environment from flooding. The Court was therefore satisfied that the development could be conditioned to ensure compliance with the Planning Scheme as it related to flood risk.

Court found that the proposed development would meet a demand not adequately provided for by the Planning Scheme

The Court found that the evidence established that there is a sufficient population in the trade area to support the proposed development and that there is an under provision of commercial hotel licenses and packaged liquor outlets on the Sunshine Coast.

While the Court acknowledged that residents living in the Rural Residential Zone should expect to travel further to access services when compared to urban residents, the Court determined that the travel distances required for residents in the trade area to access the services proposed by the development were unreasonable. The Court therefore held that the proposed development was well situated to meet a latent unsatisfied demand that is not being met.

Conclusion

The Court allowed the appeal and set aside the Council's decision. The Court made orders with respect to the preparation of a suite of conditions.

Planning and Environment Court of Queensland dismisses an appeal against a proposed residential apartment building in New Farm, Brisbane

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor* [2021] QPEC 42 heard before Kefford DCJ

March 2022

In brief

The case of *McKay v Brisbane City Council & Anor; Panozzo v Brisbane City Council & Anor; Jensen v Brisbane City Council & Anor* [2021] QPEC 42 concerned a submitter appeal (**Appellants**) to the Planning and Environment Court of Queensland (**Court**) against a decision of the Brisbane City Council (**Council**) to approve a development permit for a material change of use of land for a six-storey apartment building in New Farm in Brisbane.

Background

The Appellants appealed against the Council's decision on the grounds that the proposed development did not comply with the relevant assessment benchmarks in the *Brisbane City Plan 2014* (**City Plan**), in particular the overall outcomes of the Medium Density Residential Zone Code, the overall outcomes and performance outcomes in the New Farm and Teneriffe Hill Neighbourhood Plan Code, and the overall outcomes and performance outcomes in the Multiple Dwelling Code.

The Court assessed "*… the proposed development's compliance with the relevant assessment benchmarks by addressing the extent to which it achieves the planning goals with respect to:*

(a) the height, bulk and scale of development;

(b) the amenity impacts of development;

(c) landscaping; and

(d) the Medium density living precinct in the New Farm and Teneriffe Hill neighbourhood plan." (at [17]).

The Court ultimately dismissed the appeal and found the proposed development to be consistent with all the relevant assessment benchmarks.

Court found that the height, bulk, and scale of the proposed development was well designed and responsive to the location

The Appellants argued that the proposed development was not compliant with sections 6.2.1.3 4.a. and 5.b of the Medium Density Residential Code, which encouraged development of up to five storeys in height whereas the proposed development was six storeys in height. However, the Court found that the Medium Density Residential Code did not mandate a five-storey limit, and instead was merely a guide to be considered in conjunction with other provisions of the City Plan.

The Appellants submitted that the proposed development was not compliant with performance outcomes PO1, PO6, PO11, and PO14 of the New Farm and Teneriffe Hill Neighbourhood Code as it did not contribute to a cohesive streetscape. The Court considered expert evidence regarding the surrounding streetscape, which is generally comprised of one-storey to two-storey houses and residential apartment blocks ranging from two to nine storeys, with two exceptions of an 11-storey and 14-storey block. The Court found that the proposed six-storey development was "well-designed" and "location-responsive" and that it complied with the City Plan (at [135]).

Court found that there would be no unacceptable amenity impacts

The Appellants argued that the proposed development would result in an unacceptable loss of views, privacy impacts, and overshadowing.

With respect to the loss of views, the Court considered performance outcome PO7 of the New Farm and Teneriffe Hill Neighbourhood Code, which required "*[d]evelopment ensures new buildings maintain views to and from the river …*". The Council's visual amenity impact expert gave evidence that that the Appellants would maintain "*expansive river views*", although one of the Appellants' apartments would be somewhat impacted by the proposed development (at [168] and [171]). Ultimately the Court found that the Appellants' views would not be inhibited by the proposed development, with the exception of one of the Appellants, whose views would be impacted whether the proposed development was limited to the recommended five storeys and 15 meters in height or not.

With respect to privacy impacts, the Appellants submitted that the proposed development contravened the overall outcomes in sections 9.3.14.2 2.a., i., j., l., and q, as well as performance outcomes PO5, PO7, PO8, PO11, and PO14 of the Multiple Dwelling Code, which required residences to protect the visual privacy and prevent impacts on residential amenity. The Appellants' expert architect gave evidence that from certain windows of the proposed development, the Appellants' private tennis court and outdoor recreation area would be visible. The Court noted that there was a "*… substantial building separation of between 17 meters and 25 meters*" (at [183]) between the Appellants' building and the proposed development, and also that the tennis court was already visible from the public Merthyr Park. The Court found that there was no unacceptable privacy impact.

With respect to overshadowing, the Court again considered the overall outcomes in sections 9.3.14.2 2.a., i., j., l., and q, as well as performance outcomes PO5, PO7, PO8, PO11, and PO14 of the Multiple Dwelling Code. The Court considered the evidence given by the Applicants' architect that the shadow cast by the proposed development would be "*… unlikely to have any significant impact on the amenity of residents of adjoining buildings, for users of the tennis court on Kirribilli, or for members of the public enjoying Merthyr Park.*" (at [193]). The Court held that the proposed development complied with all the relevant assessment benchmarks relating to overshadowing.

Court found that there was appropriate landscaping

The Appellants also argued that the proposed development would not provide opportunities for deep planting and other landscaping. In this respect, the Appellants argued that there was non-compliance with acceptable outcome AO7.2(b)(iii) of the Multiple Dwelling Code, which required the inclusion of a deep planting area. The proposed development, however, included landscaping plans and planter boxes at each level of the building. These included 1.5 metre deep planter boxes within the front setback, which would allow for the planting of medium sized trees. The Court was therefore satisfied that the proposed development included plans for appropriate landscaping that would make an appropriate contribution to the streetscape.

Conclusion

The Court held that the proposed development was consistent with the relevant assessment benchmarks of the City Plan, and dismissed the Appellants' appeal.

Statutory interest in compulsory acquisition proceedings in New South Wales: latest Court update

Annie Dong | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Antonio Gaudioso v Transport for New South Wales* [2022] NSWLEC 4 heard before Duggan J

March 2022

In brief

The case of *Antonio Gaudioso v Transport for New South Wales* [2022] NSWLEC 4 concerned Class 3 proceedings in the New South Wales Land and Environment Court (**Court**) commenced by Transport for New South Wales (**TfNSW**) against the Applicants' entitlement to statutory interest on the compensation amount determined in the substantive Court proceedings in the case of *Antonio Gaudioso v Transport for New South Wales* [2021] NSWLEC 91 (**Substantive Proceedings**), and an advance payment made by TfNSW under section 68 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**).

The Court considered the following two key issues:

- Did the Court have power to make the orders sought in the Notice of Motion?
- What is the correct interpretation of the Court's discretion under section 66(4) of the Just Terms Act, which allows the Court to cancel or reduce interest on the compensation in certain circumstances?

The Court relevantly held the following:

- It did not have the power to cancel or reduce the interest payable on the compensation amount because TfNSW had not made any such application in the Substantive Proceedings.
- Section 66(4) of the Just Terms Act requires something more than the amount of compensation awarded by the Court to not exceed more than 10% the amount of compensation offered by the Valuer-General. Therefore, even if the Court did have the power in this case to cancel or reduce the interest payable, importantly, it would not have exercised its discretion to do so.
- The Notice of Motion be dismissed, and TfNSW pay the Applicants' costs of the Notice of Motion.

Background

In the Substantive Proceedings, the Court awarded compensation under the Just Terms Act in the amount of $10,781,707.60 plus statutory interest. The amount determined by the Valuer-General was $10,392,626.

By Notice of Motion, TfNSW sought orders to cancel or reduce under section 66(4) of the Just Terms Act the accrued statutory interest payable, and orders for the Applicants to pay the costs of the Notice of Motion.

Under section 49 and section 50 of the Just Terms Act, an acquiring authority must pay interest on any amount of compensation from the date of the acquisition of land until the payment of that sum is made. This interest is calculated at a rate determined by the Treasurer from time to time, and is added to the total amount of compensation payable.

As at 12 January 2022, the applicable rate of interest payable was 2.5% per annum for sums below $50,000, and 2.68% per annum for sums above $50,000.

Under section 66(4) of the Just Term Act, the Court has a discretion to cancel or reduce the interest payable by the acquiring authority if the compensation amount awarded is within 10% of the amount determined by the Valuer-General in the statutory offer of compensation.

TfNSW's submissions

TfNSW argued that section 66(4) of the Just Terms Act granted the Court broad discretionary powers which ought to be exercised, and that the designation of a 10% threshold (at [14]):

> *… [evinced] a legislative intention to identify a threshold below which the legislature has recognised that it is or may be appropriate or just not to require the payment of interest that has accrued during the proceedings.*

TfNSW referred to the objects of the Just Terms Act in section 3(1) and argued that section 66(4) was a direct legislative encouragement to an applicant not to pursue claims that are marginal.

Importantly, however, TfNSW did not contend that the Applicants had acted unreasonably in the conduct of the Substantive Proceedings.

Applicants' submissions

The Applicants argued that the Court had already exercised the discretion to award statutory interest, and there was no other available power to permit the subject order to be amended (see [20] to [21]).

The Applicants submitted that even if the Court did have the power to vary the orders, it should not be exercised in this case (at [22]).

The Court's power under section 66(4) of the Just Terms Act to cancel or reduce the interest payable was discretionary. Therefore, there was no automatic disentitlement to interest, nor was it mandatory that interest be either cancelled or reduced where the threshold was satisfied.

TfNSW had not identified any reason to cancel or reduce the statutory interest other than the failure to achieve more than 10% of the amount offered by the Valuer-General.

Issue 1 – Court did not have power to cancel or reduce the interest payable, as TfNSW did not contest the issue of interest in the Substantive Proceedings

Although the Court-ordered compensation amount exceeded the amount offered by the Valuer-General by only 3.74%, the Court held that the decision in the Substantive Proceedings made it clear that compensation was determined to include a requirement to pay interest (see [28] and [162] of the decision in the Substantive Proceedings).

The Court stated that the order could only be varied in accordance with a relevant power identified in the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) (at [28]).

Since no application had been made by TfNSW under the UCPR, the Court did not have the power to make the orders sought. The Court observed that TfNSW might have overcome this issue if it had requested in the Substantive Proceedings that the issue of interest be reserved until the publication of the reasons for the decision.

Issue 2 – Even if the Court did have the power to cancel or reduce the interest payable, it would not have been exercised in the present case

The Court agreed with the Applicants' submissions, and reaffirmed that merely satisfying the 10% threshold in section 66(4) of the Just Terms Act is insufficient to alone justify the making of a discretionary order to cancel or reduce an award of statutory interest.

The Court held that the discretion under section 66(4) of the Just Terms Act is broad and unconfined, which indicates that there must be something more than the 10% threshold to justify an order of the kind sought, otherwise the legislature would have provided for a mandatory reduction in interest. The Court held that when interpreting section 66(4) it would be inappropriate to refer to the payment of interest as a "*windfall*" or an exercise of its discretion as a "*penalty*" (at [33]), as was suggested by both parties based upon their reading of the honourable Sheahan J's decision in *Ray Fitzpatrick Pty Limited v Minister for Planning (No. 5)* [2008] NSWLEC 183.

The Court at [33] explained in what circumstances the discretion might be utilised:

> *Having regard to the legislative context that has as one of its objects (as confirmed by s 54) that a disposed owner be justly compensated, the discretion conferred by s 66(4) must relate to some circumstance in the context of the bringing or maintaining of proceedings that would indicate that the achievement of such just compensation would not include the payment of interest determined at the usual rate or the payment of interest at all.*

The Court was not satisfied that TfNSW had identified any matter of substance that would justify the exercise of its discretion under section 66(4) of the Just Terms Act to cancel or reduce the accrued interest payable.

Conclusion

The Court's decision will provide some limited comfort to applicants pursuing their compensation claims in Class 3 proceedings. The decision clarifies that the power under section 66(4) of the Just Terms Act to cancel or reduce statutory interest is discretionary; it does not automatically apply when the determination by the Court of compensation is less than 10% of the statutory offer. This is of particular importance for claims where issues between the applicant and an acquiring authority go to the heart of the valuation, including, for example, a dispute over the highest and best use of land.

The outcome in this case also sits harmoniously with the established case law on costs in Class 3 proceedings, which provide that a dispossessed landowner is entitled to access the Court and present an arguable and well-organised case without being deterred by the prospect of having to pay costs if the case proves unpersuasive (see for example, *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2010] NSWLEC 27 [35]). As the case makes clear, an applicant may still receive interest on the compensation amount even when the compensation determined in Court is less than 10% of the statutory offer. Cancelling or reducing the statutory interest requires something more than simply being unsuccessful at obtaining more than 10% of the statutory offer.

Striking a balance between principles and prescription in NSW planning law

Mollie Matthews | Todd Neal

This article discusses the move towards a principles-based approach in relation to the New South Wales planning system

March 2022

In brief

Recent comments from the NSW Government suggest that the NSW planning system is moving towards a system "based on principles rather than prescription". However, the recent introduction of "9 new planning principles", the consolidation of the State Environmental Planning Policies, and the new *Environmental Planning and Assessment Regulation 2021*, require considerably more work to achieve this aim.

This article looks at the move towards a principles-based approach in light of these three new changes.

Moving towards a principles-based approach in NSW planning law

Since the introduction of the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**), there has been a proliferation in both "hard law" and "soft law" governing planning and environmental issues.

The length of complexity of the Act itself has grown, as well as the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation 2000**). Numerous environmental planning instruments sit beneath the Act. And beyond legislation, various guidance documents of specialist agencies and government departments also play a significant role in this area of law (well-known examples are the Apartment Design Guide, and Planning for Bushfire Protection).

The former Minister for Planning and Public Spaces, Rob Stokes MP, commented in September 2020 that:

> *Over the past five years, we have been focussed on reforming the planning system to be more strategic and **one based on principles rather than prescription**; one that encourages a far more collaborative approach with all layers of government contributing to more positive outcomes for the community.* [emphasis added].

The above comments also echo similar extra-curial statements of the retiring Chief Justice Bathurst in 2015 who in answering the question why is Australia plagued with long and complex legislation answered that it was because of the use of prescriptive, rather than principled drafting techniques.

In 2018, the Chief Judge of the Federal Court, Justice Allsop, expressed it this way:

> *[there] comes a point where the human character of the narrative fails, where its moral purpose is lost in a thicket of definitions, exceptions and inclusions*

In commenting on the "*need for the law to be accessible in its coherence and writing*", Allsop CJ also stated:

> *We live, at least with much Commonwealth legislation, in an age of detailed deconstructionism, of rampant reductionism. The elemental particularisation of modern day legislation – its deconstructionist form, sometimes arranged more like a computer program than a narrative in language to be read from beginning to end – reflects a modern cast of mind intent on particularity, definition and taxonomical structure, that is scientific only in a mechanical Newtonian sense.*

Like these other areas of law, the trend since the introduction of the EP&A Act in 1979 has been towards the more "Newtonian" particularisation of legislation rather than a principles-based approach. These increasing particularised rules cut across the aim of making law accessible, which has problems in planning and environmental law given the impact this system has on the everyday lives of the NSW community, from individuals and families, through to large businesses. It is the planning system that leads to basic questions such as: can I use my land in a particular way; during what hours or days; under what conditions?

Additional complexity is also created through the mix of "hard" and "soft" law in the NSW planning system. There are numerous examples of soft law (eg guidelines, local government policies, and standards) "hardening" to have the character of legislation in the NSW planning system, often because due to the legislation making these documents mandatory relevant considerations in planning decisions.[1]

The overlap and volume of hard and soft law creates difficulties for ordinary people, but also sophisticated developers and businesses, and often benefits public authorities,[2] leading to not so irregular appeals to the NSW Court of Appeal, special leave applications to the High Court, and even High Court cases.

Three new reforms in NSW planning law

Aiming to "to make the system simpler", three announcements were made just before Minister Stokes' period as the Minister for Planning ended last year:

1. The Minister's Planning Principles: A Plan for Sustainable Development was released.
2. The consolidation and review of the existing State Environmental Planning Policies (**SEPPs**).
3. The replacement of the EP&A Regulation 2000 with the *Environmental Planning and Assessment Regulation 2021* (**EP&A Regulation 2021**), set to commence on 1 March 2022.

However, the consolidation of SEPPs and the replacement of the EP&A Regulation when properly considered has done little to reduce the current complexity, and the creation of new Planning Principles has the potential to confound the structure of rules that have developed.

New NSW planning principles

It is possible that the nine new planning principles released by the former Minister for Planning in late 2021 will create new ambiguities for those interfacing with the relevant planning authorities. The principles are:

1. *Planning systems* – A strategic and inclusive planning system for the community and the environment.
2. *Design and place* – Delivering well-designed places that enhance quality of life, the environment and the economy.
3. *Biodiversity and conservation* – Preserving, conserving and managing NSW's natural environment and heritage.
4. *Resilience and hazards* – Managing risks and building resilience in the face of hazards.
5. *Transport and infrastructure* – Providing well-designed and located transport and infrastructure integrated with land use.
6. *Housing* – Delivering a sufficient supply of safe, diverse and affordable housing.
7. *Industry and employment* – Growing a competitive and resilient economy that is adaptive, innovative and delivers jobs.
8. *Resources and energy* – Promoting the sustainable use of NSW's resources and transitioning to renewable energy.
9. *Primary production* – Protecting and supporting agricultural lands and opportunities for primary production.

These Planning Principles will have legal effect as a result of Direction 1.1 of the Local Planning Directions due to commence on 1 March 2022. Planning authorities will be required to consider these Planning Principles in Part 3 rezoning processes. However, it would also not be surprising to see these Planning Principles being given a de facto role in the assessment process of development applications by assessment officers within consent authorities, adding another layer of considerations to what is already an arduous process.[3]

There are risks to efficiency and certainty if the principles are used by planning authorities in an opaque and subjective manner, slowing momentum. As Allsop CJ's 2018 paper noted:

> *There is an important balance to be struck in this respect. Legal systems and societies cannot be built or sustained by reference only to generally expressed values. Neither, however, can they be built upon a myriad of strict, textually expressed rules alone … The balance must also recognise the need for a coherent structure of rules, the absence of which may confound law by a drift into a formless void of sentiment and intuition.*

Whilst the aims behind the Planning Principles are laudable, these principles need to be coupled with cultural change across the various authorities overseeing and implementing the EP&A Act to improve the community's navigation through the planning system and to avoid any drift into a "void of sentiment and intuition".

Other reforms commencing on 1 March 2022 – consolidation of SEPPs and replacement of the EP&A Regulation

Commencing on 1 March 2022, 43 existing SEPPs will be consolidated into 11 new SEPPs:

1. State Environmental Planning Policy (Biodiversity and Conservation) 2021;
2. State Environmental Planning Policy (Industry and Employment) 2021;
3. State Environmental Planning Policy (Planning Systems) 2021;
4. State Environmental Planning Policy (Precincts—Central River City) 2021;
5. State Environmental Planning Policy (Precincts—Eastern Harbour City) 2021;
6. State Environmental Planning Policy (Precincts—Regional) 2021;

7. State Environmental Planning Policy (Precincts—Western Parkland City) 2021;
8. State Environmental Planning Policy (Primary Production) 2021;
9. State Environmental Planning Policy (Resilience and Hazards) 2021;
10. State Environmental Planning Policy (Resources and Energy) 2021; and
11. State Environmental Planning Policy (Transport and Infrastructure) 2021.

The much used *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* will remain as a standalone SEPP.

However, despite the much cited mantra of change being needed to support a "simpler, better and more transparent" planning system, the consolidation of SEPPs in and of itself does nothing to reduce the complexity and volume of law governing development. The existing 43 SEPPs have simply been rationalised into 11 new SEPPs. Another significant change is the removal of some savings and transitional provisions.

In relation to the new EP&A Regulation 2021 set to commence on 1 March 2022, whilst the changes are mostly modest, there are also some substantive changes to the process for amending development applications and modification applications, deemed refusal and stop the clock calculations, which in turn impact appeal rights to the Land and Environment Court NSW.

Whilst it may seem trivial, the clause numbering will also change meaning the language and common understandings that has developed over the last 20 years will need to be retrained for those who deal with the EP&A Regulation on a day-to-day basis, eg clause 55 (amendment to a development application) will now be contained in clause 37 in relation to development applications, and clause 113 for modification applications. If the experience with the decimalisation of the EP&A Act on 1 March 2018 is anything to go by, the loss of corporate knowledge built up based on particular clauses will continue to cause frustration for the foreseeable future.

It remains to be seen whether these reforms will achieve their aims, one of which was to "*[reduce] administrative burden and complexity in development assessment processes*". However, we anticipate there will be teething problems at the very least.

Where to for NSW?

Inefficient and uncertain planning and assessment processes are a barrier to development within the State and therefore economic development and productivity. Capital is lazy and the competition for money means it will be invested in jurisdictions where there is less resistance.

Whilst the NSW planning reforms over the last five years have been built on a philosophy of "evolution not revolution" (in contradistinction to the failed 2013 reforms), sometimes a step change is needed where assessment processes become protracted or where there are difficulties in consent authorities balancing the competing aims of economic development and local environmental outcomes.

The system needs to balance the State's imperatives, community expectations, the local and sometimes very parochial impacts of development, the environment, the voice of Indigenous Australians, transparency, commercial confidence and development. A different balance will apply to different development projects and the system needs to be agile to accommodate that.

Overall our day-to-day experience suggests the system needs further refinement to create the above. Whilst the new Minister for Planning and Homes, Anthony Roberts MP, has tackled substantive new strata development reforms in the past, it is too soon to say whether more substantive reforms will be tackled to improve NSW's standings as the NSW economy re-emerges following the pandemic.

End notes

1. One example of this is section 89(1)(b) of the *Local Government Act 1993* (NSW) which provides: "*In determining an application, a council— … must take into consideration any criteria in a **local policy** adopted under Part 3 by the council which are relevant to the subject-matter of the application*" [emphasis added].
2. See page 21, Weeks, G and Pearson, L, *Planning and Soft Law* (2017) 24 Australian Journal of Administrative Law, at: https://ssrn.com/abstract=3059492
3. This might occur through the mandatory consideration in section 4.15(1)(e) of the EP&A Act, requiring consideration of the "public interest", which can involve the consideration of a wide range of policies.

Pollution Incident Response Management Plans: Is yours compliant?

Katherine Pickerd | Todd Neal

This article discusses the legislative requirements regulating the preparation, implementation, testing, keeping, and publication of a Pollution Incident Response Management Plan to manage risks of non-compliance

March 2022

In brief

Holders of environment protection licences should be aware of legislative requirements regulating the preparation, implementation, testing, keeping, and publication of a PIRMP to manage risks of non-compliance.

In 2021, a number of waste operators who hold environment protection licences (**EPLs**) were subject to an audit carried out by the NSW Environment Protection Authority (**NSW EPA**) that included an examination of their Pollution Incident Response Management Plans (**PIRMPs**).

While that audit process provided an opportunity for PIRMPs to be amended without penalty, those responsible for the preparation and implementation of PIRMPs need to be aware of the statutory requirements relating to such plans, because non-compliance can give rise to criminal offences.

Takeaway messages

- Those who hold EPLs are required to prepare and maintain a PIRMP that complies with the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and the *Protection of the Environment Operations (General) Regulation 2021* (NSW) (**POEO General Regulation**).
- The relevant legislation regulates the preparation, implementation, content, keeping, testing and publication of PIRMPs.
- While it is a relatively untested area of case law, there are criminal offences for EPL holders and corporate executives where there is non-compliance with the legislative requirements relating to PIRMPs.

Management plans

There are usually a number of management plans prepared for facilities which are regulated by EPLs. For example, air quality management plans, ground water management plans and noise management plans to name but a few. Management plans generally contain information about how a facility is to operate to reduce environmental impacts on the surrounding community.

A PIRMP is another type of management plan. But unlike other types of management plans, there are a number of legislative requirements regulating the preparation, implementation, testing, keeping, and publication of a PIRMP. We have briefly identified some of these requirements in this article.

Requirement to prepare a Pollution Incident Response Management Plan

Firstly, holders of EPLs have a duty to prepare a written PIRMP under section 153A of the POEO Act. It is a criminal offence for a corporate or individual EPL holder to fail to comply with the duty to prepare a PIRMP.

It is also an offence that attracts executive liability which can be charged in addition to an offence against a corporation. The executive liability offence provisions are found under section 169A of the POEO Act.

An executive who could be held criminally liable for an executive liability offence is:

- a director of the corporation; or
- an individual involved in the management of a corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the offence.

An executive liability offence occurs where the executive:

- knows or ought reasonably to know that the executive liability offence would be or is being committed; and
- fails to take all "reasonable steps" to prevent or stop the commission of that offence.

Definition of "reasonable steps" under the Protection of the Environment Operations Act

"Reasonable steps" is defined (although not exhaustively) to include taking action towards:

- assessing the corporation's compliance and ensuring regular professional assessments of compliance;
- ensuring relevant persons are trained, instructed and supervised appropriately; and
- creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with an executive liability offence.

To assist EPL holders and executives, the NSW EPA's website provides a template PIRMP which can be amended to suit individual operations.

What must be included in a PIRMP?

The POEO Act and the POEO General Regulation set out what must be contained in a PIRMP.

Information that needs to be included in a PIRMP includes:

- Procedures to be followed to notify a pollution incident to owners and occupiers in the vicinity of the facility and any authority that needs to be notified.
- The actions that are to be taken immediately after a pollution incident.
- The likelihood of hazards occurring.
- An inventory of potential pollutants on the premises, including the maximum quantity likely to be stored.
- The names, positions and 24-hour contact details of key individuals who are:
  - responsible for activating the plan;
  - authorised to notify relevant authorities; and
  - responsible for managing the response to a pollution incident.
- A detailed map of the facility and surrounding area which also shows the location of potential pollutants and any stormwater drains.

The above list is not exhaustive, and reference should be given to the legislation when preparing or reviewing a PIRMP to ensure that all the necessary information is included.

Requirement to implement the PIRMP

If a pollution incident occurs in the course of an activity so that material harm to the environment is caused or threatened, the person carrying on the activity must immediately implement any PIRMP: section 153F of the POEO Act.

Section 147 of the POEO Act provides that harm to the environment is material if:

- it involves actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial; or
- it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding $10,000 (or such other amount as is prescribed by the regulations).

The obligation on the person carrying out the activity is to "immediately" implement any PIRMP. There is no legislative definition of "immediately". However, in the context of the duty to "immediately" notify a pollution incident which arises under section 148 of the POEO Act, the NSW EPA's website says that "immediately" means "promptly and without delay". To avoid any assertion that a PIMRP has not been immediately implemented, best practice would be to ensure that the plan is operationally understood by all relevant employees through training and to ensure through policies and communications that it is to be followed in case of a pollution incident. It goes without saying, but it also means the PIRMP should be followed as soon as any incident is identified.

It is a criminal offence to fail to comply with the duty to implement a PIRMP.

This is not an area that has been widely litigated and so there are limited examples of how the obligation has arisen and been applied in the common law.

Keeping and testing a PIRMP

EPL holders must also keep the PIRMP at the premises to which the relevant EPL relates and ensure that it is tested in accordance with the POEO General Regulation: sections 153D and 153E of the POEO Act. Best practice is to ensure it is physically printed and stored safely in a known location to all employees at the relevant site.

Clause 133 of the POEO General Regulation requires a PIRMP to be tested:

- routinely at least once every 12 months; and
- within one month of any pollution incident occurring.

Failure to comply with the above requirements is also a criminal offence.

Records of the testing of a PIRMP (including the date and name of the person responsible for the testing) are required to be included in a PIRMP. Annual reminders should be diarised to ensure the test date does not pass unnoticed.

Requirement to publish a PIRMP

There also exists a requirement for specific parts of the PIRMP to be made publicly available.

Clause 132 of the POEO General Regulation identifies the parts of a PIRMP that must be made publicly available within 14 days after it is prepared. Those parts of the PIRMP must either be:

- placed in a prominent position on a publicly accessible website of the person required to prepare the plan; or
- in the event where there is no such website, the PIRMP must be provided, without charge, to any person who makes a written request for a copy.

Personal information is not required to be included in the publicly available part of the PIRMP, except if an authorised officer requests a copy. Accordingly, redactions to remove personal information may be necessary for the publicly available copy.

NSW EPA's Guidelines

In March 2020, the NSW EPA published 'Guideline: Pollution Incident Response Management Plans' to assist holders of EPLs to comply with their PIRMP obligations. In addition to the legislation, the guideline may be useful to EPL holders who are required to prepare and implement PIRMPs in avoiding any enforcement action being taken, which includes the issue of penalty notices.

EPL holders must manage risk by keeping and testing their Pollution Incident Response Management Plan in accordance with the Protection of the Environment Operations Act

There is information readily available to assist EPL holders to prepare PIRMPs that comply with the legislative requirements which are not overly burdensome.

Generally, once prepared, where EPL holders can become exposed is where administrative measures fail and PIRMPs are not properly kept or tested in accordance with the POEO Act. These are executive liability offences and so individual and corporate EPL holders, as well as those executives responsible for the conduct of the business, must ensure compliance.

While it may be tempting to focus on the practical side of business operations, it is equally important to stay on top of the administrative side of business operations so that in the event an incident does occur, there are up-to-date procedures in place ready to be actioned, and this can be demonstrated to the relevant authorities to avoid any allegation of non-compliance.

Environmental Mitigation Levy introduced in Victoria under the Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020 (Vic)

Amar Singh | Beth Barbour | David Passarella

This article discusses the application of the Environmental Mitigation Levy under the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act* 2020 (Vic)

March 2022

In brief

The *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020* (Vic) (**Act**) commenced on 1 July 2020 and established a new legislative framework to impose the Environmental Mitigation Levy (**Levy**) to fund mitigation measures for impacts on biodiversity caused by this type of development. Given the time which has passed since the Act's commencement, landowners and developers of land are now triggering the Levy and accordingly we provide below a summary of the Levy and how it applies.

Affected land

The Act applies to areas declared by the Secretary of the Department of Environment, Land, Water and Planning (**DELWP**) to be a 'Levy Area' under section 10 of the Act. At present, key growth corridors in Melbourne's north, west and southeast have been declared to be Levy Areas, including Cardinia, Casey, Hume, Melton, Mitchell, Whittlesea and Wyndham.

A full description of the current Levy Areas established on 25 June 2020 by a declaration of the Secretary of DELWP can be found here.

Where land is affected by the Act and liable for the Levy, the Secretary of DELWP will register a notice on the land title. This is designed to ensure compliance with the Act, but it will not affect a landowner's ability to deal with the land until the Levy is triggered.

Levy and Levy rates

The amount of the Levy is calculated according to the type of vegetation (**Levy Rate**) on the land and the size of the land in hectares (**Habitat Area**). The product of the Levy Rate and the Habitat Area is the sum that will become payable when the Levy is triggered.

A Levy Rate is assessed each financial year and adjusted according to a composite index comprised of the consumer price index and wage price index.

The current Levy Rate for the 2021/2022 financial year are set out in the below table:

Levy type	Rate per hectare from 1 July 2021 (Levy Rate)
Native Vegetation patch	$136,688
Scattered tree (per tree)	$18,999
Golden Sun Moth	$12,773
Growling Grass Frog	$8,257
Matted Flax-lily	$11,625
Southern Brown Bandicoot	$4,309
Spiny Rice-flower	$9,244

Triggers

The Levy will be triggered on the occurrence of any of the following 'Levy Events', which are set out in section 21 of the Act:

- The issue of a Statement of Compliance for a plan of subdivision.
- An application for a building permit.
- An approval of a work plan or variation of a work plan under the *Mineral Resources (Sustainable Development) Act 1990* (Vic).
- The construction of utility infrastructure on Crown land.
- The construction of a road on Crown land.

Once the Levy has been paid, subsequent Levy Events in respect of the same land will not trigger a further liability.

Exclusions

The Act excludes a number of events from triggering a liability to pay the Levy. These events generally relate to activities that are minor in nature, or do not involve the type of substantial urban expansion that the Act is designed to offset.

Sections 5 to 7 of the Act define what constitutes an 'Excluded Event' that will not incur the Levy. This includes, but is not limited to, the following activities:

- A subdivision that is solely to realign the common boundary between two lots, and the area of either lot is reduced by no more that 5% of its original area.
- A subdivision that is solely to create a lot not exceeding two hectares for the purpose of excising an existing dwelling on the land.
- A subdivision along a Levy Area boundary to create two lots, one wholly within the Levy Area and the other not within the Levy Area.
- The demolition of a building or part of a building.
- The construction of a single dwelling.
- The repair or reinstatement of an existing building.
- An addition or alteration to an existing building that does not change or increase the floor area of the building.

Queensland Court of Appeal confirms that a local government's decision in respect of a 99-year lease was required to have regard to the decision-making process prescribed by legislation

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Torres Strait Island Regional Council v Ahwang* [2022] QCA 39 heard before Mullins JA, Boddice, and Crow JJ

April 2022

In brief

The case of *Torres Strait Island Regional Council v Ahwang* [2022] QCA 39 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the decision of the Supreme Court of Queensland (**Supreme Court**) in the case of *Ahwang v Torres Strait Island Regional Council* [2021] 26 QLR; [2021] QSC 147 (***Ahwang No. 1***), which relevantly held that the decision of the Torres Strait Island Regional Council (**Council**) under section 85 of the *Torres Strait Islander Land Act 1991* (Qld) (**TSI Land Act**) to grant a 99-year lease of residential land at St Pauls, Moa Island was not subject to a "*process of decision-making*" under section 135(2) of TSI Land Act.

The Council relevantly submitted that section 135 of the TSI Land Act was not applicable to a decision of the Council made under section 85 of the TSI Land Act to grant a lease.

The Supreme Court's decision in the judicial review proceedings was summarised in our August 2021 article.

The Court of Appeal upheld the Supreme Court's decision that section 135 of the TSI Land Act required the Council, as a trustee, to make the decision having regard to the matters set out in section 135(2) of the TSI Land Act.

Legislative matrix

Section 85 (Grant of lease by trustee of Torres Strait Islander land) of the TSI Land Act relevantly states as follows:

> *(1) The trustee of Torres Strait Islander land may grant a lease over all or a part of the land for not more than 99 years.*
>
> *(2) Without limiting subsection (1), the trustee of Torres Strait Islander land may grant a lease (a **home ownership lease**) over all or a part of the land for 99 years to any of the following for residential use—*
>
> *(a) a Torres Strait Islander;*
>
> *(b) a person who is not a Torres Strait Islander if—*
>
> *(i) the person is the spouse or former spouse of—*
>
> *(A) a person mentioned in paragraph (a); or*
>
> *(B) a person mentioned in paragraph (a) who is deceased; or*
>
> *(ii) the lease supports another part 8 lease granted to the person ...*

Section 135 (Decision-making by trustee) of the TSI Land Act states as follows:

> *(1) This section applies if this Act provides that the trustee of Torres Strait Islander land is required to make a decision about the land, including, for example, a decision about any of the following—*
>
> *(a) the way in which the trustee will consult about the making of a freehold instrument for the land;*
>
> *(b) whether to grant an interest in the land;*

(c) whether to consent to the creation of a mining interest in the land;

(d) whether to enter into an agreement about the land.

(2) The trustee must—

(a) have regard to—

(i) if the Torres Strait Islanders for whom the trustee holds the land have agreed on a decision-making process for decisions of that kind—the process; or

(ii) if subparagraph (i) does not apply—any Island custom, for decisions of that kind, of the Torres Strait Islanders for whom the trustee holds the land; or

(b) if there is no decision-making process mentioned in paragraph (a)(i) or relevant Island custom—make the decision under a process of decision-making agreed to and adopted by the trustee for the decision or for decisions of that kind.

Supreme Court's decision in respect of the application of section 135 of the TSI Land Act

The Supreme Court disagreed with the Council's submission that the term "*required*" in section 135(1) of the TSI Land Act related to the positive obligation to make a decision.

The Supreme Court held that it was "*plainly open on the ordinary meaning of the section's language … that the requirement in s 135(1) goes to the identity of the decision maker, that is the necessity it is the trustee which is the entity which makes the decision …*" (at [23] of *Ahwang No. 1*); "*[t]hus, the section applies when a decision which falls to be made about land is a decision which it is for the trustee to make.*" (at [25] of *Ahwang No. 1*).

The Supreme Court held that the requirements of section 135 of the TSI Land Act are not particularly onerous, and stated "*[all] it requires is that regard be had to the Islanders' agreed procedure or custom for the decision and in the absence of either, that there be compliance with a process of decision making agreed to and adopted by the trustee.*" (at [28] of *Ahwang No. 1*).

Court of Appeal agreed section 135 of the TSI Land Act applied to a decision under section 85 of the TSI Land Act

The Court of Appeal considered the context of the provisions of the TSI Land Act (see [6] to [16]), including amendments made to the TSI Land Act since the Council's decision in 2019 to grant the 99-year lease, the history of the TSI Land Act (see [23] to [28]), and the Council's misplaced reliance on Explanatory Notes (see [32] to [35]).

The Court of Appeal held that a decision of a trustee to grant a 99-year lease was discretionary, whereas "*to the extent the trustee is required to decide whether to exercise that discretion, it is bound to make the decision, having regard to the matters that are set out in s 135(2).*" (see [36] to [37]).

The Court of Appeal observed that section 135 of the TSI Land Act ensures that a decision by a trustee of Torres Strait Islander land makes a decision about the land in compliance with the process agreed by the Torres Strait Islanders for whom the land is held on trust or by reference to Island custom where there is no agreed decision-making process (at [38]).

Conclusion

The Court of Appeal held that the Supreme Court's interpretation of section 135 of the TSI Land Act was in accordance with the section's ordinary meaning and purpose. Therefore, there was no error in the judgment that warranted allowing the appeal.

Planning and Environment Court of Queensland determines whether a development approval granted by the Chief Executive administering the Environmental Protection Act 1994 (Qld) in respect of the construction of Surfers South Oceanway was legally unreasonable

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Surfers Beachfront Protection Association Inc. (IA 39544) v Council of the City of Gold Coast & Anor (No. 2)* [2022] QPEC 3 heard before Rackemann DCJ

April 2022

In brief

The case of *Surfers Beachfront Protection Association Inc. (IA 39544) v Council of the City of Gold Coast & Anor (No. 2)* [2022] QPEC 3 concerned a declaratory proceeding in relation to an approval granted by the Chief Executive administering the *Environmental Protection Act 1994* (Qld) for a development application which was made by the Council of the City of Gold Coast (**Council**) for a development permit for operational work to construct a four metre wide and 16 kilometre long shared public-use path (and associated works) along Northcliffe Terrace, Garfield Terrace and Old Burleigh Road (**Development Application**).

Background

The proposed development the subject of the declaratory proceeding is for operational work to effect the construction of a pathway called the "Surfers South Oceanway". The pathway is proposed to be constructed of new fibre-reinforced concrete atop a heavily bound base material, and is to include lighting and construction/relocation of park facilities such as showers, seating, bins, and viewing platforms (**Proposed Development**).

As the Proposed Development would be carried out within a Coastal Management District, the Chief Executive is the assessment manager for the Development Application and the Development Application is assessed against the State Development Assessment Provisions.

The relevant code in the State Development Assessment Provisions is State Code 8: Coastal Development and Tidal Works (**State Code 8**), in particular Performance Outcomes (**PO**) 1 to 5 and 23.

The Applicant in the declaratory proceeding argued that the Chief Executive's decision to approve the Development Application on the basis of compliance with the relevant performance outcomes was so unreasonable that no decision-maker could have reasonably made it.

The Chief Executive's delegate (who made the decision), carried out an assessment having regard to a positive assessment of State Code 8 undertaken by the Council's consultants (**SMEC Assessment**) as well as a further positive assessment contained in a technical agency advice prepared by the Department of Environment and Science upon referral of the Development Application (**TA Advice**).

Court held that the Applicant failed to demonstrate that it was beyond the bounds of reasonableness to conclude that there was compliance with sub-paragraph 2 of PO1

Sub-paragraph 2 of PO1 in State Code 8 relevantly provides as follows:

> ***PO1*** *Development does not occur in the **erosion prone area** unless the development:*
>
> *…*
>
> *2. cannot feasibly be located elsewhere.*

The Court held that the Applicant's contention in relation to sub-paragraph 2 was misconceived in that the word "*elsewhere*" means elsewhere than in the erosion prone area; however, the alternative feasible location of the proposed pathway identified by the Applicant was also in the erosion prone area. Further, it would not be unreasonable to conclude that a pathway connecting to other sections of pathway "*… could not feasibly be located elsewhere than in the erosion prone area when the entirety of the beach, the houses fronting the beach and the road they front are all within that erosion prone area.*" (at [19](iv)).

Additionally, the SMEC Assessment, which was endorsed by the TA Advice, concluded on a reasonable basis that the proposed alignment of the pathway "*… is as far as landward as is feasible, within the erosion prone area, having regard to the constraint of leaving what was thought to be an appropriate clearance to existing private properties.*" (at [20]).

Court did not accept that it was beyond the boundaries of reasonableness to conclude that there was compliance with PO2

PO2 in State Code 8 relevantly provides as follows:

> ***PO2*** *Development other than* ***coastal protection work****:*
>
> *1.* *avoids impacting on* ***coastal processes****; and*
>
> *2.* *ensures that the protective function of landform and vegetation is maintained.*

In determining that it was not beyond the boundaries of reasonableness to conclude that there was compliance with PO2, the Court observed that the term "*avoids*" in sub-paragraph 1 was not to be read such that it must be demonstrated that the Proposed Development would cause "*… no impact whatsoever even at a trivial, immaterial or insignificant level …*" (at [37]), and that the focus of sub-paragraph 1 was the impact on "coastal processes" and was not simply any impact on the dune.

Further, the Court held that contrary to the Applicant's contention, sub-paragraph 2 did not require that there would be no impact on landform or vegetation.

Conclusion

The Court concluded that the Applicant failed to demonstrate that the decision of the Chief Executive was legally unreasonable and that it will hear the parties in respect of a draft order to finalise the proceeding.

Planning and Environment Court of Queensland upholds Council's decision to refuse a development application to reconfigure a single lot into eight lots for a residential care facility

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Infinite Aged Care (Cornubia) Pty Ltd v Logan City Council* [2021] QPEC 58 heard before Kent KC DCJ

April 2022

In brief

The case of *Infinite Aged Care (Cornubia) Pty Ltd v Logan City Council* [2021] QPEC 58 concerned a developer appeal to the Planning and Environment Court of Queensland (**Court**) against a decision of the Logan City Council (**Council**) to refuse a development application to reconfigure a lot to create eight lots for a residential care facility.

The land is zoned as low density residential and is within the Small Acreage Precinct under the *Logan Planning Scheme 2015* (Version 6) (**Planning Scheme**). The Court dismissed the Appeal, finding that the proposed development would be an overdevelopment and would not comply with the relevant provisions of the Planning Scheme relating to density, local amenity, and character. Further, the Court found that non-compliance with the Planning Scheme would undermine the ability for the Small Acreage Precinct to be properly consolidated, and that a mere lack of adverse impacts caused by the proposed development was not determinative.

Court found that the proposed development would result in overdevelopment

The Court referred to the relevant sections of the Planning Scheme and found that the development would:

- be inconsistent with the character and amenity of the Small Acreage Precinct under the purpose statement found in section 6.2.5.2(3) of the Low Density Residential Zone Code, and Performance Outcomes PO18 and PO19 of that Code;
- not meet the requirements for lot sizes, boundary clearances, and density in the area under the purpose statement found in section 6.2.5.2 of the Low Density Residential Zone Code, and Performance Outcome PO4 and Acceptable Outcome AO4 of that Code; and
- undermine the ability for the Small Acreage Precinct to be properly consolidated.

The Court relied upon the evidence given by the Council's town planning expert that the proposed development would result in lot sizes being 50 per cent to 34 per cent smaller than the prescribed minimum lot size (at [29]).

The Council's town planning expert also gave evidence that the landscape character would dominate the built environment in the area under Performance Outcome PO18 of the Low Density Residential Zone Code, and that the reduced lot sizes would compromise the achievement of the intended character of the precinct (at [34] to [37]). The Court agreed and found that the proposed development would result in an "*overdevelopment*" and would be "*… inconsistent with the character amenity intended for the small acreage precinct.*" (at [118]).

Court found that a mere lack of adverse impacts was not determinative

The Appellant argued that the proposed development should be approved as it would not cause any adverse impacts on traffic, flooding, bushfire or geotechnical matters, ecology, acoustics, air quality, odour, or lighting that are typical of overdevelopment. The Appellant therefore submitted that refusing the proposed development would be too inflexible, treating a technicality of the Planning Scheme as "*… an end in itself.*" (at [97]).

However, the Court disagreed, instead agreeing with the Council that residential density is an important factor in and of itself. The Court considered a mere lack of adverse impacts to not be determinative (at [120]).

Court found that major Planning Scheme amendment would not impact the outcome

The Court also considered amendments to the Planning Scheme, which at the time of the Appeal had been submitted to the State for a State-Interest Check before the public notification stage.

The Court found that as the amendment was at an early stage, it ought not be given significant weight when considering the proposed development. If the amendment were to end up not being adopted, the Court considered that this "*… would tend to entrench a non-complaint development cutting across the existing planning intent for the land and the locality under the scheme.*" (at [127]).

Conclusion

The Court found that the proposed development would result in an overdevelopment of the area that would not be consistent with the local character and amenity. The Court therefore dismissed the Appeal.

Planning and Environment Court of Queensland dismisses an appeal against the refusal of a relocatable home facility

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Boyneglade Property Developments Pty Ltd v Gladstone Regional Council & Ors* [2021] QPEC 48 heard before Everson DCJ

April 2022

In brief

The case of *Boyneglade Property Developments Pty Ltd v Gladstone Regional Council & Ors* [2021] QPEC 48 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against a decision of the Gladstone Regional Council (**Council**) to refuse a development application for a preliminary approval, including a variation request for a material change of use for a relocatable home facility described as an "*integrated retirement lifestyle development*" on land at Benaraby (**Subject Land**).

The Court dismissed the appeal, finding that there was no need that justified the proposed development on the Subject Land which was zoned as rural. The Court also found that there were issues relevant to accessibility, noise, and reverse amenity which supported dismissing the appeal and upholding the Council's decision.

Background

The Subject Land is bordered by the Bruce Highway and Tannum Sands Road, and is located near the Council's regional landfill facility, as well as the Benaraby Motor Sport precinct. The closest supermarkets and public transport services are 6.6km from the Subject Land at the Tannum Sands Centre, and the Gladstone Hospital is 28km from the Subject Land.

The development application sought an approval for a material change of use for a relocatable home facility, residential care facility, and sport and recreation centre, and sought a preliminary approval varying the *Gladstone Regional Council Planning Scheme* (Version 2) (**Planning Scheme**) in respect of the levels of assessment for those uses. The proposed development involved 362 proposed relocatable home sites, however the size of the proposed residential care facility was unclear.

Court finds that there is no need for the proposed development

The land is within the Rural Zone. The Council contended that the proposed development was in conflict with numerous provisions of the Planning Scheme, in particular the provisions of the Rural Zone Code which states that opportunities for non-rural uses that are compatible with agricultural and rural activities and landscape character are contemplated where they do not compromise the long-term use of the land for rural purposes, and that urban and rural residential expansion is not to occur on land in the Rural Zone. The Council also relied upon performance outcomes in the Rural Zone Code which seek to preserve the rural character of the locality (at [21]).

The Court disagreed and found that the proposed development would not have any meaningful impact on the rural land, and that it therefore would not disrupt the preservation of the locality's character or long-term rural use.

The Appellant relied on relevant matters in support of approving the proposed development, in particular, that there is an economic, community, and planning need for the proposed development including the proposed sport and recreation uses such as an 18-hole golf course.

The Court held that the supply and demand for retirement housing in the area was found to be "*roughly in equilibrium*" when the area of Agnes Water was included in an analysis of the local housing demand (at [26]). However, the Appellant failed to demonstrate a need for the proposed golf course. The Appellant could not specify the capacity of the existing four golf courses in the Gladstone region to take on new members and there was also evidence that there has been a decline in demand for golf courses since 1998 in Australia.

The Court therefore held that the Appellant had not demonstrated the existence of an economic, community, or planning need for the proposed development (at [29]).

Court finds that the proposed development does not comply with the Planning Scheme's provisions in respect of accessibility

The Council argued that the proposed development did not comply with the Planning Scheme in a number of ways, and the Council's town planning expert relevantly stated as follows (at [30]):

> *… the site is isolated and is not a logical or planned extension of the settlement pattern. It does not integrate at all with existing or future urban development. It is not identified under the structure plan for … Boyne Island and Tannum Sands as a growth area nor is it part of the priority infrastructure area. It is remote from infrastructure and services. It is reliant on private transport and makes no provision for, nor is it capable of providing convenient pedestrian, cyclist or public transport networks external to the site. It does not create a walkable community.*

The Court relevantly found that "*[t]he likely consequences of the proposed development from a traffic and accessibility perspective are concerning*" (at [34]). The Court went on to find that future residents would be completely reliant on a private vehicle, and that this issue is worsened by the inaccessibility of nearby shopping precincts, pharmacies, and hospitals etc. The Court therefore found that the proposed development was inconsistent with the performance and strategic outcomes of the Planning Scheme which, in particular, required that residents be within close proximity to services, particularly older generations as it allows them to age in place.

Court finds that that proposed development would give rise to reverse amenity issues

The Council argued that the proposed development would result in reverse amenity issues as a consequence of potential noise issues arising from the nearby facilities, particularly the Benaraby Motor Sport precinct.

Despite the Appellant's attempt to mitigate potential noise impacts by proposing earth mounds to block the sound, the Court held that "*[i]t is a bad planning outcome to place 352 dwelling sites in proximity to uses which the respondent has deliberately sought to keep well away from residents because of their impacts.*" (at [37]).

Conclusion

The Court held that the "*proposed development is inconsistent with planning strategies of the respondent evidenced in the Planning Scheme*", that "*it is not appropriately located*" and that "*if approved it is likely to give rise to reverse amenity issues*" (at [39]). The Court found that there was no demonstrated need for the proposed development. The Court therefore dismissed the appeal.

Lack of impact on character and amenity sees the Planning and Environment Court of Queensland approve multiple dwelling units despite some inconsistency with the relevant planning scheme

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hill & Ors v Sunshine Coast Regional Council* [2021] QPEC 59 heard before Cash KC DCJ

April 2022

In brief

The case of *Hill & Ors v Sunshine Coast Regional Council* [2021] QPEC 59 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Sunshine Coast Regional Council (**Council**) to refuse a development application for a material change of use for multiple dwelling units of land located at Bli Bli (**Subject Land**).

The primary issues for the Court relevantly concerned the consistency with and any unacceptable negative impact of the proposed development on the character of the locality (at [2]).

The Court observed that an inconsistency with an important provision of a planning scheme was not determinative of the appeal. The significance of an inconsistency "*… is to be determined by understanding the context of the provision …*" within the relevant planning scheme (at [20]).

The Court allowed the appeal despite some inconsistency with the *Sunshine Coast Planning Scheme 2014* (Version 16) (**Planning Scheme**) because the design of proposed development was well-suited for the unique layout of the Subject Land, which would see any effects on the character and amenity of the locality reduced to a "*negligible level*" (at [42]).

Subject Land and proposed development

The Subject Land is a battle-axed 3,107m^2 lot. The developable area of the Subject Land is 1,978m^2 because it is burdened by the following easements (at [4]):

- A 1,129m^2 easement for the benefit of Telstra that has on it a Telstra exchange building, which resembles a detached dwelling, and a shipping container.
- An easement over the remaining 1,978m^2 for the purpose of light and air.
- An unregistered easement along the south-east boundary.

The Subject Land is serviced by telecommunications, water, sewerage, electricity, and stormwater drainage. The surrounding locality comprise detached houses on varying lot sizes (at [5]).

The proposed development was for five dwelling units in three separate buildings of a "*dwelling house scale*", with two dwellings to be located each within a single building and separated by a common wall and for the fifth dwelling to be located in a single building.

Planning Scheme

The Subject Land is located within the Urban Growth Management Boundary and Low Density Residential Zone of the Planning Scheme. The Low Density Residential Zone Code (**LDRZ Code**) and Multi-Unit Residential Units Code (**MURU Code**) were applicable to the Court's assessment of the development application.

The multiple dwelling use proposed by the development application was not a use contemplated by the LDRZ Code and was therefore an inconsistent use (at [17]).

The proposed development was also inconsistent with Acceptable Outcome AO2.2 of the MURU Code, which stated that a multi-unit residential use was not to be located on a "*hatchet/battle axe lot*" (see [18] to [19]).

Proposed development would maintain local character and would not have an unacceptable impact on amenity

The Court held that the proposed development, despite the inconsistencies with the Planning Scheme, would maintain the local character and was appropriate for the Subject Land for the following reasons:

- The approval of the proposed development would not have a significant impact on the character of the locality (at [22]), which the Planning Scheme required be predominantly of detached dwelling houses.
- The proposed development was for low-rise and low-density development as required by the LDRZ Code (see [23] to [26]).
- The proposed development was consistent with Performance Outcome PO2 of the MURU Code, which reduced the Court's concerns in respect of the Subject Land being a battle-axed lot (see [27] to [29]).
- The Subject Land has unique qualities, including good vehicular and pedestrian access, a buffer to the south comprising an old sugar cane railway and cutting, and is largely screened to the north by mature vegetation, which reduce any negative effect on the local amenity to almost a "*negligible degree*" (at [29]).
- The proposed development, including the construction of an 1.8 metre fence that would divide the Subject Land from a neighbouring property, would not have an unacceptable impact on the amenity of the locality (see [33] to [37]).

Conclusion

The Court held that the proposed development warranted approval given the lack of adverse impacts on character and amenity and any other negative impacts.

Another storey: Queensland Court of Appeal upholds the Queensland's Planning and Environment Court's interpretation of "storey" and affirms a local government's decision to approve a code assessable development application for multiple dwellings

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Robertson v Brisbane City Council & Ors* [2022] QCA 45 heard before Fraser and McMurdo JJA and Freeburn J

May 2022

In brief

The case of *Robertson v Brisbane City Council & Ors* [2022] QCA 45 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) in respect of the decision of the Planning and Environment Court of Queensland (**Planning and Environment Court**) in the case of *Robertson & Ors v Brisbane City Council & Ors* [2021] QPEC 44 in respect of the definition of "*storey*" under the *Brisbane City Plan 2014* (**City Plan**).

The reasoning of the Planning and Environment Court was summarised in our December 2021 article.

The Applicants applied for leave to appeal on the grounds that the Planning and Environment Court erred by finding that a development application for a material change of use for a multiple dwelling (three units) (**Development Application**) was for three storeys and not for four storeys.

The main issue for the Court of Appeal to consider was what is meant by the word "*storey*" as defined in the City Plan.

The Court of Appeal dismissed the appeal and held that the Development Application was for only three storeys because there was no distinct feature of the proposed development that satisfied the definition of "*storey*" in the City Plan.

Background

The Council assessed the Development Application as code assessable because the Council regarded the proposed development to be for three storeys and less than 11.5 metres in height.

The Applicants, as owners and occupiers of the neighbouring property, applied to the Planning and Environment Court and argued that the Council erred in its decision to treat the Development Application as code assessable. The Applicants argued that the Development Application sought approval for four storeys because a 14x16m^2 fully enclosed structure external to the lift shaft and stairway on the roof (**Subject Area**) constituted a "*storey*" and that the Council should have treated the Development Application as impact assessable under section 45(5) of the *Planning Act 2016* (Qld).

The Planning and Environment Court held that the Applicants' argument was "*entirely misconceived*" (at [24]) because the Subject Area was required for the use of the lift and stairs. The Planning and Environment Court held that the Subject Area was excluded from the definition of "*storey*" because it was within the scope of paragraph (a)(iii) of the definition of storey.

Court of Appeal upholds the Planning and Environment Court's findings in respect of the definition of "storey"

The Court of Appeal had to determine whether, upon the facts as determined by the Planning and Environment Court, the Subject Area was a storey as defined in City Plan.

A "*storey*" is relevantly defined in the City Plan as follows:

> *a. means a space within a building between 2 floor levels, or a floor level and a ceiling or roof, other than–*
>
> *i. a space containing only a lift shaft, stairwell or meter room; or*
>
> *ii. a space containing only a bathroom, shower room, laundry, toilet or other sanitary compartment; or*
>
> *iii. a space containing only a combination of things stated in subparagraph (i) or (ii); or*
>
> *…*
>
> *b. includes–*
>
> *i. a mezzanine; and*
>
> *ii. a roofed structure that is on, or part of, a rooftop, if the structure does not only accommodate building plant and equipment.*

The Applicants' argument in the Planning and Environment Court was that the Subject Area was a storey as defined in paragraph (a) of the definition of "*storey*" in the City Plan. The Applicants' argument in the Court of Appeal was different in that the Applicants argued that the Planning and Environment Court should have held that the Subject Area was a roofed structure and an additional storey as defined in paragraph (b)(ii) of the definition of "*storey*" in the City Plan.

The Respondents argued that the application for leave to appeal should be refused because the Applicants had raised a different argument, which would require a new determination of facts. The Court of Appeal held that the Respondents' submissions were not grounds for refusing the application for leave to appeal. However, that the Applicants' new argument would determine the same legal question as decided in the Planning and Environment Court.

The Court rejected the Applicants' description that the Subject Area was a roofed structure as described in paragraph (b)(ii) of the definition of "*storey*" in the City Plan. The Court held that the Subject Area was part of the building and not a distinct structure constituting a further storey for the following reasons:

- It was not a sensible interpretation of the definition that a lift shaft or stairway adds one storey for each storey of the building that it serves.
- The Subject Area was inseparably connected to the interior of the building by the lift shaft and stairs that it served.

The Court agreed with the findings of the Planning and Environment Court that the Subject Area was within the exception to a "*storey*" in paragraph (a)(i) of the definition of "*storey*" in the City Plan. The Court held that the intent of the City Plan was not that the same Subject Area could then amount to a "*storey*" under paragraph (b) of the definition.

Conclusion

The Court granted the application for leave to appeal and dismissed the appeal.

Planning and Environment Court of Queensland dismisses appeal in respect of proposed accommodation activities and prefers to preserve the industrial land

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Southway Services No. 2 Pty Ltd v Brisbane City Council & Ors* [2022] QPEC 8 heard before Kefford DCJ

May 2022

In brief

The case of *Southway Services No. 2 Pty Ltd v Brisbane City Council & Ors* [2022] QPEC 8 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Southway Services No. 2 Pty Ltd (**Appellant**) against the decision of the Brisbane City Council (**Council**) to refuse the Appellant's development application.

The development application was made in 2017 under the *Sustainable Planning Act 2009* (Qld) (**SPA**), but was not decided before the SPA was repealed. As such, under section 288 of the *Planning Act 2016* (Qld) (**PA**), the Council assessed and decided the development application under the SPA. The resultant decision notice was taken to have been given under the PA and the appeal was brought under the PA in accordance with sections 229 and 311(4) of the PA.

The development application related to a 68,910 square metre parcel of land that was used for a quarry (**Subject Land**). The development application was for the following:

- A preliminary approval under section 241 of the SPA for a material change of use for accommodation activities, being dual occupancy, dwelling house, multiple dwelling, residential care facility, retirement facility, and rooming accommodation (**Preliminary Approval**).
- A preliminary approval under section 242 of the SPA to vary the effect of the *Brisbane City Plan 2014* (Version 6) (**City Plan**) by changing the level of assessment for future development applications for accommodation activities such that public notification would not be required, being a variation request under the PA (**Variation Request**) the approval of which would be a variation approval (**Variation Approval**).

The development application was met with resistance from local residents, and the Council refused the development application on the ground that industrial land was to be preserved.

Because both parties disagreed over the characterisation of the development application, the Court firstly determined the nature of the proposed development and how the development application ought to be characterised.

The main issue for the Court to consider was whether "accommodation activities" was an appropriate use on the Subject Land. The Court held that "accommodation activities" was not appropriate for the Subject Land and refused the appeal for the following reasons:

- The proposed development was contrary to the planning intentions of the City Plan.
- There was a need for the Subject Land to be retained for low impact industry uses.
- The absence of substantive detail available to submitters meant that any justifiable need for the proposed development was outweighed by the proposed development's material non-compliance with the City Plan.

Nature and characterisation of the proposed development could not be viewed as providing a range of accommodation

The Appellant submitted that the proposed development would create five precincts across the Subject Land, including townhomes, apartments for students, a residential aged care facility, a retirement facility and a recreational area. The Appellant argued that the proposed development would provide a wide range of accommodation.

The Court rejected the Appellant's characterisation of the proposed development and agreed with the Council's characterisation that the proposed development had no commitment to building footprints, layouts, uses, development intensity or density, or the arrangement of buildings for the following reasons:

- The information available to submitters did not guarantee a range of accommodation.
- The Variation Request could be interpreted as facilitating the development of a range of accommodation, but also equally facilitating the development of only multiple dwellings with no provisions for aged care, retirees, or students.

The Court relied on the information that was available to submitters, with some keys statements within the information being as follows (emphasis omitted):

- "*'… [A] preliminary approval' does not mean that all will be applied for or constructed onsite.*"
- "*[The development application] does not include the approval of any specific buildings or locations of buildings ...*".
- "*[A] mix of residential uses potentially comprising retirement, or apartment living options, with the anticipated mix yet to be refined.*"

The Court held that there was no guarantee that the proposed development would incorporate any residential care facility or retirement facility and therefore the development application could not be characterised as including a residential care facility or retirement facility.

An approval of the Variation Request would not reflect the strategic framework goals if used to assess future proposed development

The Court had to determine whether to approve or refuse the Variation Request.

Section 61(2) of the PA relevantly states as follows:

> *When assessing the variation request, the assessment manager must consider—*
>
> - *the result of the assessment of that part of the development application that is not the variation request; and*
> - *the consistency of the variations sought with the rest of the local planning instrument that is sought to be varied; and*
> - *the effect the variations would have on submission rights for later development applications, particularly considering the amount and detail of information included in, attached to, or given with the application and available to submitters; and*
> - *any other matter prescribed by regulation.*

The Court considered each element under section 61(2) of the PA in turn.

In its consideration of section 61(2)(a) of the PA, the Court held that the proposed range of residential uses on the Subject Land was contrary to the City Plan for the following reasons:

- The proposed development could not be reliably assessed against the assessment benchmarks of the City Plan that focus on the potential impacts of a proposed development.
- The acceptability of the proposed land use did not satisfy Overall Outcomes 3(a) and 3(b) of the Low Impact Industry Zone Code because the proposed development would not preserve the opportunities for low impact industry uses.

In its consideration of section 61(2)(b) of the PA, the Court held that the proposed variations sought in the Variation Request were inconsistent with the strategic framework in the City Plan for the following reasons:

- The location of the proposed residential land use was not located near an identified Growth Node or Selected Transport Corridor where residential growth is expected to occur. Instead, the Subject Land was mapped as part of the Suburban Living Area, which was planned to experience minimal change.
- The proposed variations were inconsistent with the intention to preserve opportunities for low impact industrial uses throughout the city on land in the Low Impact Industry Zone.
- The Variation Request sought to make uses code assessable against the Low-Medium Density Residential Zone Code and the Medium Density Residential Zone Code. The Court held that the use of Subject Land was inconsistent with these codes because it does not provide a transition to low density residential areas.

The Court was not satisfied that it was in the public interest to preclude the community from making submissions with respect to future development applications under section 61(2)(c) of the PA because the lack of detail in the development application meant that there was no certainty as to the range of uses or the form and scale of the future potential development, and that there could have been no meaningful consideration by the public as to the potential impacts of the future potential development.

The Court refused the Variation Request since all considerations under section 61(2) of the PA weighed against approval.

Court was not satisfied that the proposed development would be constructed to respond to any identifiable need

The Appellant submitted that there was a need for residential development on the Subject Land for the following reasons:

- The City Plan inherently acknowledged the need for the type of proposed residential uses.
- There was a need for all of the proposed residential uses in the locality.

The Court held that there was a need for the proposed residential uses for the following reasons:

- The proposed development would add to the choice of accommodation available and address the demand for residential aged care.
- The characteristics and locational features of the Subject Land were appropriate for residential development.
- The built form of the proposed development may create density that is greater than what is encouraged in a low-density residential area, but would remain acceptable.

However, the Court held that an approval would not result in the proposed development contended for by the Appellant and would not satisfy the need contended for by its experts for the following reasons:

- It was not certain that residential aged care facilities would be constructed.
- Expert opinion evidence from economists from both parties rejected a need for student accommodation.
- The Preliminary Approval would have a life span of 10 years during which other developments in that time may fulfil the need for residential aged care.

Court refuses the Preliminary Approval and the Variation Request because of material non-compliance with the City Plan

The Court held that the proposed development had material non-compliance with the City Plan regarding its amenity impacts and use of industrial land.

The Appellant submitted that future development applications under a Variation Approval would not have any adverse character or amenity impacts. The Court rejected these submissions because the Appellant's town planner conceded that it was not possible to assess the proposed development against the provisions in the City Plan that regulate design and built form parameters because of an absence of design detail. Further, the Court held that the final design of the proposed development could not be taken to meet each requirement of the strategic framework because future development applications would only be assessed against nominated codes stated in a Variation Approval.

The Court agreed with the Council's submission that a decisive matter in the exercise of planning discretion was that the proposed development was contrary to the planning intention of the City Plan to facilitate and maintain the viability of industrial uses on land in the Low Impact Industry Zone. The Court held that there was a need to maintain the Subject Land as industrial land for the following reasons:

- The Court did not accept the relevance of the Appellant's evidence that the types of industrial uses that could be located on the Subject Land was limited because of amenity restrictions. The Court reasoned that those restrictions were consistent with the inclusion of the Subject Land in the Low Impact Industry Zone.
- The Court agreed with the evidence of the Council's town planner that the Subject Land was suitable for the types of uses encouraged in the Low Impact Industry Zone.
- Economists retained by both parties agreed that it is difficult to find new land for industrial development and that the strategic framework encourages the retention of industrial land.

The Court held that the planning strategy to preserve industrial land was important and that the ongoing need to maintain the Subject Land for such uses outweighed the proposed need for residential development.

Conclusion

The appeal was dismissed.

Non-compliances with an enforcement order result in the Planning and Environment Court of Queensland finding contempt and ordering costs on the standard basis

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Dwyer* [2021] QPEC 53 heard before Cash KC DCJ

May 2022

In brief

The case of *Sunshine Coast Regional Council v Dwyer* [2021] QPEC 53 (**Enforcement Proceedings**) concerned an application to the Planning and Environment Court of Queensland (**Court**) by the Sunshine Coast Regional Council (**Council**) in respect of the alleged non-compliance by the respondents with an enforcement order made by the Court on 10 November 2020 for removal or demolition works (**Enforcement Order**).

In the Enforcement Proceedings the Court also considered an application by the respondents seeking to extend the time for compliance with the Enforcement Order (**Extension Application**).

The Court was satisfied beyond reasonable doubt that the second respondent was without a lawful excuse in contempt of the Enforcement Order, and did not grant the Extension Application.

The Court later heard from the parties as to the appropriate orders to be made in respect of the contempt and held in the case of *Sunshine Coast Regional Council v Dwyer (No. 2)* [2022] QPEC 1 that the second respondent be fined $5,000 and pay the Council's costs on a standard basis.

Factual matrix

The second respondent built on the roof of his home located at Minyama a tennis court, a mechanical perimeter fence, lighting fixtures, stairs, a lift, and a partially enclosed structure on the roof enclosing the lift overrun (**Building Works**).

The Building Works "*considerably exceeded*" an approval that had been given by a private building certifier which approved the construction of a new roof not exceeding a height of 8.5 metres above natural ground level (at [4]).

After having received an enforcement notice from the Council in respect of the Building Works, the respondents lodged a development application seeking an approval for the Building Works, which the Council refused. The Court confirmed the Council's decision to refuse the development application in the case of *Dwyer & Dwyer v Sunshine Coast Regional Council* [2020] QPEC 45.

Prior to the commencement of the Enforcement Proceedings, the Court made the following orders that were consented to by the parties:

- A declaration under section 11(1)(a) (General declaratory jurisdiction) of the *Planning and Environment Court Act 2016* (Qld) (**PEC Act**) that the Building Works were assessable development that were carried out without all necessary permits, which was a development offence contrary to section 163 of the *Planning Act 2016* (Qld) (**Planning Act**).
- The Enforcement Order under section 180 (Enforcement orders) of the Planning Act, which required by 10 February 2021 the Building Works to be removed or demolished and the rooftop to be put into a state that complied with the building approval given by the building certifier.

Since the Enforcement Order, the respondents had changed the material comprising, and the height of, the perimeter fence, removed some lighting, and removed parts of the stairs but retained the lift and the lift overrun structure. The respondents had lodged with the Council a development application for an approval of the lift and lift overrun structure, a recreation room, and landscaping and planting for screening (**Lift Development Application**).

Court refused the Extension Application

The Court considered each of the following grounds submitted in support of the Extension Application and relevantly held as follows:

- *Steps had been taken to comply with the Enforcement Order* – Although some steps had been taken to comply with the order, the respondents had neither removed nor demolished the Building Works, had not restored the roof to a state that complied with the building approval, and the changed fence was not accepted development as alleged by the respondents (see [29] to [38]).
- *An approval may be granted in respect of the remaining non-compliance with the Enforcement Order* – The Court held that the Lift Development Application did not have great prospects of success for reasons including that the lift and lift overrun structure had already been refused by both the Council and the Court and the significant difficulties the second respondent had in finding a town planning expert to support the Lift Development Application (see [20] to [26] and [39]).
- *The respondents ought to be given the opportunity to get an approval rather than being put to the cost of removing the remaining Building Works* – The Lift Development Application did not have great prospects of success, and the costs associated with complying with an enforcement order was not a sufficient reason to defer or delay the time for that compliance (see [40]).

Legal requirements for contempt

The Court has the power under section 36 (Contempt) of the PEC Act to punish a person for contempt in the same way that a District Court judge may punish a person for contempt under section 129 (Contempt) of the *District Court of Queensland Act 1967* (Qld) (**DC Act**).

To find contempt, the Court was relevantly required under section 129(1)(a) of the DC Act to be satisfied beyond reasonable doubt that the second respondent had failed to comply with the Enforcement Order, and that he did so without a lawful excuse.

The power of a District Court judge, and accordingly a judge of the Court, to punish for contempt is the same as a Supreme Court Judge (see section 129(2) of the DC Act and rule 930 (Punishment) and rule 931 (Imprisonment) of the *Uniform Civil Procedure Rules 1999* (Qld)).

Second respondent was in contempt of the Enforcement Order

In respect of the first limb for contempt, the Court relevantly held, and the second respondent agreed, that the second respondent did not comply with the Enforcement Order (see [50] and [51]).

In respect of the second limb for contempt, the Court relevantly held that the second respondent did not have a lawful excuse for the failure to comply with the Enforcement Order in circumstances where the Lift Development Application had virtually no prospects of success and it was open to the second respondent to apply to the Court to vary the Enforcement Order before the date for compliance (see [52] to [56]).

Conclusion

The Court dismissed the Extension Application and held that the second respondent was, without a lawful excuse, in contempt of the Enforcement Order. Accordingly, the second respondent was fined $5,000, provided a new deadline to comply with the Enforcement Order, and ordered to pay on the standard basis the Council's costs in respect of the Enforcement Proceedings.

Planning and Environment Court of Queensland digs deep into a regional town's capacity to provide accommodation for miners in rejecting a development application for a permanent works camp

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *QCoal Pty Ltd & Anor v Isaac Regional Council* [2021] QPEC 60 heard before Everson DCJ

May 2022

In brief

The case of *QCoal Pty Ltd & Anor v Isaac Regional Council* [2021] QPEC 60 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by the developers of the Byerwen Coal Mine Project (**Appellants**) against the decision of the Isaac Regional Council (**Council**) to refuse a development application for a material change of use for a works camp (**Proposed Development**).

The Byerwen coal mine (**Mine**) was approved having regard to an environmental impact statement which assumed that 30 per cent of workers would live in Glenden, 30 kilometres east of the Mine. A temporary works camp had been approved for a maximum of four years from the commencement of the use or the completion of the construction phase of the Mine, whichever occurred first. The Proposed Development was impact assessable and sought to make the temporary works camp permanent and expand the works camp to 650 rooms for up to 600 persons. As a consequence, two per cent of the workers would reside in Glenden, and 98 per cent would reside at the Proposed Development.

The Appellants submitted that the Proposed Development complied with the relevant assessment benchmarks, and argued that there was a strong need for the Proposed Development. The Court held that the Proposed Development did not comply with the relevant assessment benchmarks and dismissed the appeal for the following reasons:

- The Proposed Development was not the preferred accommodation model.
- There was suitable land and infrastructure in Glenden to satisfy the accommodation needs of the workers.

Proposed Development was not the preferred accommodation model because there was no demonstrated need and was inconsistent with planning themes

The development application was properly made when the *Mackay, Isaac and Whitsunday Regional Plan* (**Regional Plan**) and *Nebo Shire Planning Scheme* were in effect. Prior to the determination of the appeal, the Nebo Shire Planning Scheme had been replaced with the *Isaac Regional Planning Scheme 2021* (**Isaac Planning Scheme**). The Appellants relied on the provisions of the Isaac Planning Scheme to support the Proposed Development.

The Appellants argued that existing and prospective workers would prefer to reside at the Proposed Development rather than in Glenden and that the Proposed Development complied with, in particular, the assessment benchmarks in section 3.3.1.3 of the Isaac Planning Scheme in that it responded to a "*legitimate demonstrated need*".

The Court rejected the Appellants' reliance on section 3.3.1.3 because the Isaac Planning Scheme was not in effect when the development application was properly made. The Court held that the Proposed Development was to be assessed against the Regional Plan and Nebo Planning Scheme. The only weight given by the Court to the Isaac Planning Scheme was that it supported the planning themes of the Regional Plan and the Nebo Planning Scheme to:

- Promote existing infrastructure and the integration of non-residential accommodation within the community.
- Locate a use such as the Proposed Development in an urban locality.

Because the Proposed Development did not engage with Glenden under these planning themes, the Proposed Development "*… would be detrimental to the ongoing utilisation of the significant social and administrative infrastructure …*" in Glenden (at [45]).

The Court further rejected the Appellants' argument in respect of the application of section 3.3.1.3 of the Isaac Planning Scheme and held that the Appellants did not demonstrate any need for the Proposed Development for the following reasons:

- The evidence from the Appellants' social planner and Executive General Manager of Planning and Operations to demonstrate the need was only sampled from existing employees at the Mine and did not include prospective workers. The Court held that because the evidence was from a small sample, it was not representative of the needs of 98 per cent of the existing and prospective workers.
- The Proposed Development was inconsistent with the social planners' joint report which provided that residing on-site can negatively impact the social, mental, and physical wellbeing of non-residential workers.
- The Proposed Development would deny workers and families a choice of accommodation.

Court finds that Glenden is suitable to accommodate workers

The Appellants argued that there was no suitably zoned land in Glenden available to accommodate the workers' accommodation. For workers who do reside in Glenden, the Appellant submitted that the length of an average worker's shift would cause occupational health and safety issues for workers returning to Glenden and leave no time to utilise the local facilities. The Appellants also argued that they would suffer a loss of infrastructure from dismantling the temporary workers' accommodation.

The Court considered the Appellants' arguments against the relevant assessment benchmarks that were given the most weight, in particular section 2.2.3 of the Nebo Planning Scheme which relevantly stated:

> *Glenden is the primary residential accommodation area for the coal mining industry …*
>
> *Isolated workers camps … are not envisaged within the Shire unless located adjacent to mines in locations not able to be conveniently serviced by accommodation within an urban locality …*

The Court dismissed the Appellants' arguments and held that Glenden was suitable to accommodate workers. The Court's reasons were as follows:

- The Appellants had not attempted to acquire residential housing or appropriate freehold land in Glenden.
- The Appellants had failed to act on development approvals in respect of three lots that they own, which could have provided permanent accommodation to 170 workers and had since lapsed.
- The occupational health and safety issues could be appropriately managed.
- A loss of infrastructure was not a relevant matter for consideration because it is a natural consequence of a temporary development approval.

Conclusion

The Court dismissed the appeal.

Planning and Environment Court of Queensland approves proposed multiple dwellings after finding the loss of residents' city views was within reasonable expectations

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cheung & Ors v Brisbane City Council & Ors* [2021] QPEC 39 heard before Muir DCJ

May 2022

In brief

The case of *Cheung & Ors v Brisbane City Council & Ors* [2021] QPEC 39 concerned a determination of consolidated submitter appeals to the Planning and Environment Court of Queensland (**Court**) against a decision by the Brisbane City Council (**Council**) to approve a development application for a material change of use for multiple dwellings on land located at Ascot.

The submitter appeals by a number of residents of Albion and Ascot (**Appellants**) contended that the proposed development was not acceptable when assessed against the relevant assessment benchmarks of the *Brisbane City Plan 2014* (Version 8) (**City Plan**) and other relevant matters under section 45(5) to section 45(8) of the *Planning Act 2016* (Qld).

The issues for the Court to determine were as follows:

- Whether the proposed development complied with the relevant assessment benchmarks.
- Whether there were relevant matters in support of approving the proposed development.
- Whether in the exercise of the Court's planning discretion the development application for the proposed development should be approved.

The Court dismissed the appeal and upheld the Council's decision to approve the proposed development.

Background

The subject land is in the Low-Medium Density Residential Zone under the City Plan.

The proposed development was for multiple dwellings in three buildings of two to three storeys. The proposed buildings included balconies on the northern and southern sides. The northern side of the proposed development interfaces with Highlands Street, where the Appellants either reside or have commercial interests. The spacing between buildings one and two, and two and three, was three and five metres respectively.

The subject land is steeply sloped, falling 25 metres across its diameter with steep escarpments. The heights of proposed buildings one, two, and three were 9.7 metres, 14.5 metres, and 16 metres respectively. The subject land is adjacent to an industrial development of seven storeys in height. The surrounding area does not have a uniform street pattern as it includes improvements of mixed purposes such as residential, industrial, and commercial development. These developments vary greatly in scale and lot size.

The proposed development is impact assessable and was therefore required to be assessed against the provisions of the City Plan as a whole.

The Appellants argued that the proposed development did not comply with the assessment benchmarks in the City Plan with respect to bulk, scale, form, intensity, height, amenity, and overdevelopment.

Bulk, scale, form, and intensity

Whether the proposed development results in appropriate bulk, scale, form, and intensity was assessed by the Court against Overall Outcome 2(e) and Performance Outcomes PO5, PO8, and PO15 of the Multiple Dwelling Code. The general focus of these assessment benchmarks was whether the proposed development "*fits in*" with the existing and intended character of the area.

The Appellants argued that the proposed development did not comply with Overall Outcome 2(e) and Performance Outcomes PO5, PO8, and PO15 for the following reasons:

- The proposed development did not satisfy the purpose of the Multiple Dwelling Code because it did not satisfy Overall Outcome 2(e) in that the bulk, scale, form, and intensity of the proposed development was inconsistent with the intended neighbourhood structure.
- The form and character of the proposed development did not satisfy Performance Outcomes PO5 and PO15 because it was not consistent with the local area and had insufficient articulation between the proposed buildings.
- The scale of the proposed development would impede the visual amenity of the Appellants' enjoyment of land and privacy and did not satisfy Performance Outcome PO8.

The Court did not accept the Appellants' arguments for the following reasons:

- The purpose of the Multiple Dwelling Code was achieved through its Overall Outcomes. Whether the Overall Outcomes were satisfied required an "*evaluative judgment*" (at [69]) and was one on which reasonable minds might differ.
- Despite some non-compliance with the relevant Acceptable Outcomes, the proposed development satisfied the Performance Outcomes in the context of the surrounding character and topology of the subject land.

Height

The issue of height overlapped with the issues of bulk, scale, form, and intensity. The specific issue for the Court's determination was whether the height of the proposed development was appropriate when assessed against the Albion Neighbourhood Plan Code, Low-Medium Residential Zone Code, and the Multiple Dwelling Code.

The Appellants argued that the height of the proposed development was substantially over what was acceptable and the design of the proposed development was not supported by the City Plan.

The Court did not accept the Appellants' argument for the following reasons:

- The height of the proposed development was mostly 9.5 metres when measured above ground, and only 8 per cent of the site cover was higher than 9.5 metres.
- Where the height of the proposed development exceeded 9.5 metres, it was in response to the angled topography of the subject land and not a vertical stepping of the buildings.
- The undercroft of the proposed buildings was similar in character to two of the nearby developments. The areas adjacent to the undercroft of the buildings with a height exceedance were to be screened by mature vegetation.

The Court stated that the community expectations of the development of the subject land were to be informed relevantly by the City Plan and existing developments "*there on the ground*" (at [87]). The Court found that the proposed development satisfied the relevant assessment benchmarks in respect of community expectations because the City Plan contemplated developments of the height proposed, which was evidenced by the existing developments and the City Plan provisions themselves.

Amenity

The amenity impacts of the proposed development were assessed against the provisions of the Multiple Dwelling Code and the Low-Medium Density Residential Zone Code. The loss of visual amenity was the most significant concern to the Appellants. The Co-Respondent conceded that the proposed development would "*… substantially, if not entirely, obstruct views from properties [of the Appellants] to the north*" (at [125]).

The Appellants argued that the relevant provisions of the Multiple Dwelling Code and the Low-Medium Density Residential Zone Code placed a high level of importance on amenity concerns for the local area. The Appellants' described their amenity concerns for the local area as being as follows:

- Impacts on privacy.
- Interference with access to sunlight or overshadowing and breezes.
- Noise, emissions, and odours from the communal outdoor area, the car park, the plant and equipment, and the transformer.
- Lighting from the communal outdoor area and vehicles.

The Court was sympathetic to the concerns of the Appellants and that the concept of amenity was inclusive of tangible and intangible factors. However, the Court held that a determination in respect of amenity was to be made in the context of reasonable expectations and not the abstract. In assessing the amenity impacts, the Court found as follows:

- The issue of amenity cannot be elevated or given greater importance over other considerations. Instead, the City Plan must be considered as a whole and the context in which it appears.

- The Court could not give weight to any evidence that was not expert opinion evidence and held that no common law right to preserve a view exists. The claims by the Appellants were to be assessed against the reasonable expectations of the community, which required a determination of whether the proposed development was within "*[the] system of planning controls*" (at [121]).
- The Court was only to assess what was proposed and was not to determine if an alternative proposal was more appropriate.
- All uses of land would have an impact on neighbouring amenity and it was not a question of whether the amenity was degraded, but whether that degradation was unreasonable. The Court accepted that the proposed development had taken satisfactory measures to reduce the amenity impacts and was not otherwise out of character for the area.

The Court concluded that the amenity impacts were within reasonable expectations and that the relevant assessment benchmarks in the City Plan were satisfied.

Overdevelopment

The issue of any overdevelopment was assessed by the Court against Overall Outcome 5 of the Low-Medium Residential Zone Code, and Overall Outcome 2 and Performance Outcomes PO5, PO8, and PO27 of the Multiple Dwelling Code. The Court preferred the expert evidence from the Council over that of the Appellants for the following reasons:

- The Appellants' expert evidence did not correlate with any relevant consideration under the City Plan and was not assessed against the corresponding Performance Outcomes.
- The Council's expert evidence focused on the relevant assessment benchmarks identified by the parties.

In finding that the proposed development did not represent an overdevelopment when assessed against the Overall Outcomes of the Low-Medium Residential Zone Code and the Multiple Dwelling Code, the Court found that:

- The height exceedance of the proposed development was in response to the topographical constraints and was a feature of other developments in the area.
- The proposed development had sufficient spacing from neighbouring buildings with no material consequences from non-compliant setbacks.
- Deep planting would soften the bulk appearance of the proposed development and screen the undercrofts.
- The proposed development adequately complied with the Acceptable Outcomes related to site cover, landscaping, and open spaces.

Court finds that relevant matters supported the approval of the proposed development and exercises its planning discretion

The Appellants did not raise any adverse matters in the public interest other than the material non-compliance of the proposed development with the assessment benchmarks. The Co-Respondent and Co-Respondent by Election identified 10 relevant matters that were summarised by the Court by answering three questions.

Is the land an appropriate location for multiple dwellings?

The Court agreed with the town planners that the subject land is an appropriate site for multiple dwellings.

Is the proposed development an appropriate design outcome for the subject land?

The Court rejected the Appellants' argument that the relevant matters were not made out because of the proposed development's non-compliance with the assessment benchmarks of the City Plan. Instead, the Court held that because the Court had determined that the proposed development had met the relevant assessment benchmarks under the City Plan, the answer to this question is "yes".

Is there an economic need for the proposed development?

Under section 45(5)(b) of the *Planning Act 2016* (Qld), need is an example of a relevant matter. The Court agreed with the uncontested evidence submitted by the Co-Respondent and Co-Respondent by Election that there was a planning, community, and economic need for the proposed development and answered "yes" to this question.

Conclusion

The consolidated submitter appeals were dismissed and the Council's decision to approve the proposed development was upheld.

Local government to pay over one million dollars in damages after Supreme Court of Queensland decides workers' compensation claim for psychiatric injury in favour of former payroll supervisor

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Ackers v Cairns Regional Council* [2021] QSC 342 heard before Henry J

May 2022

In brief

The case of *Ackers v Cairns Regional Council* [2021] QSC 342 concerned a workers' compensation claim to the Supreme Court of Queensland (**Court**) for psychological injury suffered while the plaintiff was employed as the supervisor in the payroll unit of the Cairns Regional Council (**Council**).

The plaintiff suffered from a long-standing depressive illness which worsened in connection with a number of events that occurred during the year the plaintiff worked for the Council. In September 2015, the plaintiff was stood down for medical reasons and has not since returned to work. The plaintiff alleged that the Council breached its duty to take reasonable care to avoid unnecessarily exposing the plaintiff to a foreseeable risk of psychiatric injury in three main ways:

- the Council's investigation of a union complaint against the plaintiff;
- the plaintiff's allegedly excessive hours of work; and
- the Council's imposition of a Performance Improvement Action Plan (**PIAP**) on the plaintiff.

The Court found that the Council's actions with respect to the union complaint and the plaintiff's hours of work did not constitute a breach. The Court found, however, that the Council did breach its duty of care when it unreasonably targeted the plaintiff with a PIAP in circumstances where the plaintiff was not a person of normal fortitude and the Council had corporate knowledge that the plaintiff had been displaying signs of psychological distress.

Court finds that the Council owed the plaintiff a greater degree of care

The Court considered the scope of the duty of care owed to the plaintiff in this case and observed at [8] that "*[a] greater degree of care may be required where the employer imposes a workload upon an employee which, by its nature, will be abnormally stressful or where an employee is exhibiting signs of psychological distress.*"

The Court found that there were a number of stressors which would have indicated to a reasonable person in the Council's position that the plaintiff required a greater degree of care, including the following:

- The exceptional stress that the plaintiff and the plaintiff's team were under as a result of an ongoing staff shortage in the Council's payroll unit.
- The plaintiff worked additional hours to accommodate the increased workload, including two overnight shifts.
- The plaintiff was emotionally impacted by a union complaint made against the plaintiff.
- On 9 July 2015, the plaintiff disclosed to the plaintiff's supervisor that the plaintiff suffered depression and was taking anti-depressant medication.
- The plaintiff was observed on multiple occasions to be withdrawn and displaying obvious signs of psychological distress such as shaking and crying.

Court finds that the Council did not breach its duty of care with respect to investigating a union complaint against the plaintiff or the plaintiff's "excessive" work hours

In May 2015, the Council received two letters from the Services Union complaining about serious workplace health and safety concerns in the payroll unit and specifically, the behaviour of the plaintiff. After conducting an investigation, the relevant Council officers advised the plaintiff that three complaints against the plaintiff had been substantiated and issued the plaintiff with a written warning.

The plaintiff alleged that the Council had breached its duty by not investigating the complaints in a manner consistent with its usual processes or in a way that affords employees natural justice and procedural fairness. The Court found that while the Council did owe the plaintiff a duty in connection with its handling of the union complaint, there was no breach of that duty as proper process was followed.

The Court also considered whether there had been a breach with respect to the quantity of hours that the plaintiff worked. This quantity was contested and the Court found that the plaintiff did work a substantial additional amount of hours for the period of 25 March 2015 to 30 June 2015, which averaged at 12 hours a week outside of ordinary working hours.

Nevertheless, the Court did not consider that the volume of extra working hours was enough to, in and of itself, cause psychiatric injury to a person of normal fortitude.

Ultimately, the Court concluded that the real significance of the Council's handling of the union complaint and the plaintiff's additional working hours was the Council's knowledge of the emotional impact those circumstances had on the plaintiff.

Court finds that the Council breached its duty of care by imposing a PIAP on the plaintiff in circumstances where it was reasonably foreseeable that the imposition would cause the plaintiff psychiatric harm

The plaintiff alleged that one of the plaintiff's supervisors began targeting the plaintiff with the imposition of a PIAP after the discovery of a number of errors in the payroll unit, only some of which were made by the plaintiff personally.

The Council advanced an argument to the effect that liability in negligence for a breach of the duty of care to avoid foreseeable risk of psychiatric injury is incompatible with the existence of the right to require competent job performance. The Court rejected this argument, finding that an employer can be liable for a breach of its duty of care to avoid a foreseeable risk of injury when the breach involves a purported correction of job performance which is carried out in bad faith or contrary to the employer's own processes and procedures.

The Court strongly disapproved of the Council's decision to personally hold the plaintiff responsible for the payroll unit's inadequate performance when the most obvious likely cause was its sustained inadequate staffing. The Court considered that the imposition of the PIAP, therefore, proceeded on a flawed and unfair premise and did not conform with the Council's administrative requirements.

The Court found that the Council had breached its duty by giving no consideration to the plaintiff's psychiatric state in deciding to place the plaintiff on a PIAP when it had accumulated corporate knowledge of the pressures the plaintiff had been under as a result of the understaffing and the signs which made the risk of psychiatric injury foreseeable. A reasonable person in the position of the Council would have avoided the pursuit of the PIAP in the first place or intervened to stop the pursuit of the PIAP.

Court finds that the Council's breach caused the plaintiff to suffer psychiatric injury

The Court applied the statutory test for causation from section 305D of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) and found "*… but for Council's breaches of its duty of care in connection with the imposition and pursuit of the Performance Improvement Action Plan, it is unlikely [the plaintiff] would have suffered [the] psychiatric injury. Those breaches were a necessary condition of the occurrence of the injury and it is appropriate the scope of Council's liability should extend to the injury so caused.*" (at [402]).

Conclusion

The Court ordered judgment for the plaintiff in the sum of $1,099,132.69 and set a date to hear from the parties as to costs.

New South Wales Land and Environment Court considers in respect of compensation the statutory requirement to disregard public purpose, the potential up zoning of land, a claim for stamp duty, and solatium

Alannah Milton | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Azizi v Council of the City of Ryde; Alnox Pty Limited v Council of the City of Ryde (No. 2)* [2022] NSWLEC 3 heard before Moore J

May 2022

In brief

The case of *Azizi v Council of the City of Ryde; Alnox Pty Limited v Council of the City of Ryde (No. 2)* [2022] NSWLEC 3 concerned two class 3 land value compensation appeals made to the New South Wales Land and Environment Court (**Court**) against valuation determinations made by the Valuer-General of New South Wales (**Valuer-General**) pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**).

The issues for determination by the Court were the following:

- *Issue 1* – When the public purpose of the acquisition emerged so as to trigger the "*statutory disregard*" required under section 56(1)(a) of the Just Terms Act when assessing the market value of land.
- *Issue 2* – Whether, as at the date of acquisition, there was a prospect of up zoning of the Subject Land that was required to be taken into account when assessing compensation.
- *Issue 3* – Whether Mr Azizi was entitled to receive payment pursuant to section 59(1)(d) of the Just Terms Act for stamp duty likely to be incurred in the acquisition of a replacement residence.
- *Issue 4* – Whether Mr Azizi was entitled to the maximum amount of compensation in respect of the disadvantage resulting from relocation (previously known as solatium) under section 60 of the Just Terms Act.

The outcome of the case involved mixed success for both parties as follows:

- The Court agreed with the Council that the public purpose emerged in March 2016 and not earlier as stated by the former landowners.
- The Subject Land had a future development potential of R3 Medium Density Residential (**R3**) zoning and was not to be valued based on the existing R2 Low Density Residential (**R2**) at the time of acquisition claimed by the Council, or the R4 High Density Residential (**R4**) zoning claimed by the former landowners.
- Mr Azizi was not entitled to receive compensation for the stamp duty associated with purchasing a replacement property as argued by the Council.
- Mr Azizi was entitled to the maximum amount of compensation payable under the Just Terms Act for the disadvantage resulting from relocation as argued by Mr Azizi.

The litigation also involved other legal proceedings in the case of *Council of the City of Ryde v Azizi* (2021) 248 LGERA 204; [2021] NSWCA 165, which related to a 90 per cent advanced payment of compensation required under section 68 of the Just Terms Act as set out in our October 2021 article.

Background

Mr Azizi and Alnox Pty Ltd (**the former landowners**) owned three parcels of land in North Ryde that were acquired by the Council of the City of Ryde (**Council**) following the rezoning of land for residential purposes to public recreation, with the purpose of expanding the adjacent Blenheim Park.

The former landowners purchased the Subject Land at various times in 2011 and lodged with the Council in 2015 a planning proposal to rezone the Subject Land from R2 to R4 (**Planning Proposal**). The Council rejected the proposal and resolved to prepare a planning proposal to rezone the Subject Land to RE1 Public Recreation (**RE1**).

Following an unsuccessful rezoning review application made by the former landowners to the then Department of Planning and Environment, the Council resolved to acquire the Subject Land.

The former landowners made hardship applications under section 23 of the Just Terms Act seeking that the Council acquire the Subject Land on the basis of the former landowners' suffering hardship, which were accepted by Council. The Council acquired the Subject Land on 24 August 2018.

On 21 December 2018, the Valuer-General determined the amount of compensation payable for the acquisition of the Subject Land. However, the Council successfully brought proceedings in the Supreme Court of New South Wales (**Supreme Court**) seeking judicial review of the Valuer-General's determinations. The Supreme Court in the case of *Council of the City of Ryde v Azizi* [2019] NSWSC 1605 found that the Valuer-General's determinations were void and of no effect.

Further determinations were issued by the Valuer-General, which led to the former landowners commencing proceedings in which the former landowners objected to the amount of compensation determined, which is the proceedings the subject of this article.

Issue 1– Public purpose emerged at Council Committee meeting

In respect of Issue 1, the Court held the following:

- Submissions by the former landowners that the public purpose emerged in 2012 when the Council adopted the Integrated Open Space Plan proposing an extension of Blenheim Park and potentiality of acquiring residences to achieve the extension be rejected because the Integrated Open Space Plan only identified a possibility of expansion (at [93]).
- Submissions by the former landowners that the public purpose alternatively arose in 2014 when an open space study was done be rejected because the study had no formal status within the Council and no public consultation had occurred in respect of it (see [97] to [98]).
- Consistent with the Council's submission that the emergence of the public purpose, and therefore the trigger of the "*statutory disregard*", was from 8 March 2016, which was the date of a Council Committee meeting in which the Planning Proposal was considered and opposed by the Council (see [85] and [100]).

The Court's findings suggest that concrete and resolved policies of a Council will be needed to constitute the emergence of a public purpose, rather than less defined early iterations of the public purpose.

Issue 2 – Subject Land had a future development of a hypothetical R3 zoning

In respect of Issue 2, the former landowners contended the appropriate future development potential was R4 zoning, and if that was not accepted by the Court, R3 zoning, and the Council contended it was R2 zoning.

The Court held at [282], on the basis of the rejected Planning Proposal and the specific attributes of the Subject Land and whether they would be a barrier to a higher development potential, that as at the date of compulsory acquisition the Subject Land had a future development potential at a density greater than its R2 zoning, being a hypothetical R3 zoning.

Issue 3 – Mr Azizi was not entitled to be compensated for stamp duty

Loss attributable to disturbance of land which is compensable includes "*stamp duty costs reasonably incurred (or that might reasonably be incurred) … in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired)*" (see section 59(1)(d) of the Just Terms Act).

Section 61(b) provides that where the market value of land is assessed on the basis that the land had potential to be used for a purpose other than its current use, "*compensation is not payable in respect of … any financial loss that would necessarily have been incurred in realising that potential*".

In the context of the Court's finding in respect of Issue 2 that the Subject Land's appropriate zoning was R3, the Court held in respect of Issue 3 that Mr Azizi was not entitled to compensation for stamp duty under section 59(d) of the Just Terms Act and reiterated (see [431] to [440]) the following principles enunciated in the cases of *El Boustani v The Minister administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 33 (***El Boustani***) and *Sydney Water Corporation v Caruso and Ors* (2009) 170 LGERA 298; [2009] NSWCA 391 (***Caruso***):

- The potential for land to be used for a future use must exist as at the date of acquisition (at [95] of *El Boustani*).
- The denial of compensation for disturbance under section 61 of the Just Terms Act occurs where costs in respect of a claim under section 59 of the Just Terms Act would necessarily have been incurred in realising the potential of a future use of the land (at [185] of *Caruso*).

- "*[W]here stamp duty is incurred by persons entitled to compensation in connection with the purchase for relocation where that relocation is necessary to enable the potential to which s 61 refers to be realised, then … s 61 denies a claim under s 59(d)*" (at [185] of *Caruso*).
- "*[I]n realising that potential*" as stated in section 61(b) of the Just Terms Act means "*making real or giving reality to the potential of the land to be used for a purpose other than that for which it is currently used*" (at [109] of *El Boustani*).
- "*[A]ny financial loss*" as stated in section 61(b) of the Just Terms Act "*must be incurred inevitably or as a necessary result of in realising the potential to use the land for a purpose other than that for which it is currently used*" (at [110] of *El Boustani*).

The Court nevertheless went on to consider how much stamp duty compensation might be allowed if its interpretation of the statute was wrong, and held that the amount would be calculated on the basis of the full quantum of market value compensation on an apportioned basis.

Issue 4 – Maximum compensation for disadvantage resulting from relocation was allowed

In respect of Issue 4, the Court considered the criteria stated in section 60(3) of the Just Terms Act, including Mr Azizi's interest in the Subject Land, the time Mr Azizi resided on the Subject Land, any inconvenience suffered by Mr Azizi in being removed from the Subject Land, and the period after the acquisition of the Subject Land that Mr Azizi was allowed to remain in possession of the Subject Land, and held that Mr Azizi would be entitled to the statutory maximum compensation for the disadvantage resulting from his relocation with no discount.

Conclusion

The Court relevantly held that the Subject Land had a future development potential that was different to that contended for by the parties, which triggered the application of section 61(b) of the Just Terms Act, denied the application for costs associated with the loss attributable to disturbance in respect of stamp duty under section 59(d) of the Just Terms Act, and held that Mr Azizi was entitled to the statutory maximum for the disadvantage resulting from his relocation from the Subject Land.

Road out of COVID-19: Let's revive development in Fishermans Bend, Victoria

Amar Singh | David Passarella

This article summarises the development opportunity available in respect of urban renewal and growth in areas like Fishermans Bend, Victoria, which may aid in Victoria's COVID-19 recovery, and the work of the Planning Government Infrastructure and Environment group in Victoria in respect of the Fishermans Bend Framework published by the Victorian Government in 2018

May 2022

The COVID-19 pandemic caused fundamental changes to how individuals, businesses and governments operate. Restrictions and lockdowns forced people away from the CBD and into the suburbs, while builders and developers bore the brunt of the financial costs associated with delays and material shortages in the property and construction sector.

However, as we begin to understand the economic and societal consequences of COVID-19, the time is ripe to take advantage of those opportunities that can help lead us out of this pandemic and kickstart our recovery.

Despite the numerous challenges that remain, including inflation, supply chain disruptions and the war in Ukraine, the Victorian property market remains strong. Following the recent Victorian budget, which provides billions of dollars to be invested in State infrastructure, developers, builders and landowners have a golden opportunity to capitalise on these unique economic conditions.

Fortunately, we don't have to look far beyond Melbourne's Hoddle Grid to find attractive prospects for urban renewal and growth. Areas like Fishermans Bend are primed for development as people return from the outer regions to live and work in Melbourne.

As part of a wider strategy to revitalise this traditionally industrial area, the Fishermans Bend Framework was published by the Victorian Government in 2018. The Framework aims to transform Fishermans Bend into a mixed-use area that is "*a thriving place that is a leading example for environmental sustainability, liveability, connectivity, diversity and innovation*". The Framework's long term strategic plan is to host upwards of 80,000 jobs and 80,000 residents by 2050.

In order to facilitate this strategic shift, Amendment GC81 introduced a series of permanent planning controls to the Melbourne and Port Phillip Planning Schemes in October 2018. Our Victorian Team acted for major landowners and developers with key interests during this time, and have first-hand experience with these changes.

Key among the new controls was the 'Infrastructure Contributions Overlay' (**ICO**), which was applied to all four precincts in Fishermans Bend, Montague, Lorimer, Sandridge and Wirraway. While acting for various parties during the process, our Team's submissions to the Panel were that an ICO was simply not the right tool for Fishermans Bend. Critically, the effect of the ICO was to prevent any and all subsequent development of the area by restricting planning permits until an Infrastructure Contributions Plan (**ICP**) is put in place.

ICPs are best applied to metropolitan greenfield growth areas, not inner city industrial precincts. This is because the valuation of land in urban areas comes with added complexity that is not experienced in greenfield areas. The ICP model is not suitable for areas like Fishermans Bend where whole sites will be acquired and it is too difficult to capture the value of site specific improvements or the numerous tenancies which exist within many of the landholdings. In particular, the level of site-by-site research and analysis required to achieve this is clearly impractical for an area as dense and complex as Fishermans Bend.

At the time of Amendment GC81, our Victorian Team advocated for a Public Acquisition Overlay (**PAO**) approach. In this way, land could be reserved for public purposes without unnecessarily constraining development opportunities. This is common practice for areas similar to Fishermans Bend and provides for a much more efficient and fair process.

With the exception of a small number of landowners and developers who have had their planning permits progressed through the Standing Advisory Committee process, four years have now passed since Amendment GC81 and, for the most part, developers are still hamstrung by these planning controls while the opportunities in Fishermans Bend remain unfulfilled. If the PAO approach had been adopted, as our Victorian Team had advocated at the time, the land would now be ripe for development rather than clouded by uncertainty caused by the lack of an ICP.

The property sector is key to the national and State economy, supplying more jobs than mining and manufacturing combined, and it will be a crucial piece in our COVID-19 recovery.

It is time to revive development and rejuvenate Fishermans Bend.

Queensland Court of Appeal finds no error of law in respect of a refusal of a change application seeking to remove a stepped form frontage of an apartment building that was held to be integral to the original approval

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Upan Company Pty Ltd v Gold Coast City Council* [2022] QCA 75 heard before Sofronoff P, Morrison JA, and Davis J

June 2022

In brief

The case of *Upan Company Pty Ltd v Gold Coast City Council* [2022] QCA 75 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the decision of the Planning and Environment Court of Queensland (**Planning and Environment Court**) to refuse a change application (**Change Application**) seeking to change a development approval granted by the Gold Coast City Council (**Council**) for residential apartments in Main Beach (**Proposed Development**).

The judgment of the Planning and Environment Court was two-fold.

Firstly, in the case of *Upan Company Pty Ltd v Gold Coast City Council* [2021] QPEC 37 (***Upan (No. 1)***), the Planning and Environment Court provided reasons which relevantly identified non-compliances with the *Gold Coast City Plan 2014* (**City Plan**) in respect of the requirement for a podium form frontage with appropriate setbacks, which if compliance was achieved, may have resulted in an approval of the Proposed Development. The Planning and Environment Court observed that no condition to achieve compliance had been raised and heard further from the parties.

Secondly, in the case of *Upan Company Pty Ltd v Gold Coast City Council (No. 2)* [2021] QPEC 50 (***Upan (No. 2)***), the Applicant provided the Planning and Environment Court with amended plans of development (**Amended Plans**) said to address the Court's concerns raised in *Upan (No. 1)*. The Planning and Environment Court disagreed, and in any event, determined that the appeal related to the Change Application in respect of the Proposed Development and not the Amended Plans.

A summary of *Upan (No. 1)* and *Upan (No. 2)* is available in our February 2022 article.

The following errors of law alleged by the Applicant were considered by the Court of Appeal:

- *Ground 1* – The appeal was dismissed without a finding that a condition could not be imposed on an approval to achieve compliance with the City Plan.
- *Ground 2* – The Applicant was not afforded procedural fairness because it was not given an adequate opportunity to give evidence and submissions about potential conditions.
- *Ground 4* – Neither the Proposed Development nor the approved development had a tower and podium form as required by the City Plan and therefore ought not to have been assessed against that requirement.

Ground 3 was not relevant as it was not pursued by the Applicant before the Court of Appeal.

The Court of Appeal refused leave to appeal because it found no error in the reasoning of the Planning and Environment Court as no condition had been put before that Court by the parties, which permitted it to exercise its discretion under section 60(2)(d) (Deciding development applications) of the *Planning Act 2016* (Qld) (**Planning Act**) on the basis that compliance with the City Plan could not be achieved by imposing a condition. It was also within the Planning and Environment Court's discretion to refuse to reopen the hearing to hear evidence in respect of the Amended Plans.

Factual matrix

In October 2018, the Council granted an approval for a beachfront residential development comprising two and three bedroom apartments over 20 storeys.

In February 2020, the Applicant made, under section 78 (Making change application) of the Planning Act, the Change Application. The Change Application relevantly proposed substantial changes to the external frontage of the approved development, including the removal of its stepped form frontage.

The Council refused the Change Application and the Applicant appealed to the Planning and Environment Court. The Planning and Environment Court delivered its reasons in *Upan (No. 1)*, which relevantly held the following in respect of the Proposed Development's compliance with the City Plan:

1. It did not comply with overall outcome 3(e)(i)(B) of the Light Rail Urban Renewal Overlay Code (**Podium Requirement**), which relevantly required high rise buildings to have a "*tower and podium form*".
2. It did not comply with overall outcome 2(d)(v) of the Medium Density Residential Zone Code, which relevantly required a built form with "*varying site cover to reduce building dominance*".
3. Though the approved development did not comply with Item 1 above, it included a stepped frontage which was integral to the Council's original approval in 2018.
4. The parties did not propose any condition to address the non-compliances stated in Items 1 and 2 above.

Following *Upan (No. 1)*, the Applicant submitted the Amended Plans which it alleged addressed the Planning and Environment Court's concerns stated in Items 1 to 3 above. In *Upan (No. 2)*, the Planning and Environment Court did not agree that the Amended Plans alleviated its concerns and held that the Amended Plans were not part of the Change Application the subject of the appeal and would require a reopening of the hearing.

Ground 1 – No condition was submitted for the Planning and Environment Court to consider

The Planning and Environment Court had invited the Applicant to propose a condition or conditions aimed at overcoming the non-compliances with the City Plan stated in Items 1 and 2 above, and was instead provided with Amended Plans said to resolve the non-compliances.

The Court of Appeal found no error of law in the Planning and Environment Court's reasoning in respect of Ground 1, and held that the Planning and Environment Court was not presented with a condition to impose on an approval and was therefore able to be satisfied that compliance with the City Plan could not be achieved by imposing a condition. Accordingly, it was permitted under section 60(2)(d) of the Planning Act to exercise its discretion to refuse the Change Application (see [38], [67], and [75]).

Ground 2 – Applicant did not have a right to be heard in respect of the Amended Plans

The Court of Appeal held that the Applicant sought to reopen the appeal and have a further hearing in respect of the Amended Plans, rather than submitting a condition to overcome the non-compliance with the City Plan as was invited by the Planning and Environment Court in *Upan (No. 1)* (at [74]).

The Court of Appeal found no error of law in respect of Ground 2 because the Planning and Environment Court was permitted to exercise its discretion to refuse to reopen the appeal and hear further evidence.

Ground 4 – Proceeding below did not allege an error in respect of the Podium Requirement

The Court of Appeal rejected the Applicant's submissions that because both the approved development and Proposed Development did not satisfy the Podium Requirement, that provision of the City Plan was not relevant to the Planning and Environment Court's assessment of the Change Application.

The Applicant had engaged in submissions in respect of the Podium Requirement before the Planning and Environment Court and made no submission that it was not relevant or that it would be an error to assess the Proposed Development against it. The Court of Appeal held that Ground 4 was an unsuitable basis to grant leave to appeal for reasons including that it was not raised at any stage in the Planning and Environment Court and that, in accordance with the High Court's judgment in *University of Wollongong v Metwally (No. 2)* [1985] HCA 28; (1985) 59 ALJR 481, the Applicant ought to be bound by the conduct of the case below (see [78] to [88]).

Conclusion

The Court of Appeal found no error of law that warranted a grant of leave to appeal against the judgments of the Planning and Environment Court, and the Applicant was ordered to pay the Council's costs of and incidental to the application for leave to appeal.

Australian Federal Court dismisses applications for a summary dismissal of an application for compensation by the Pitta Pitta People

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Federal Court of Australia in the matter of *Melville on behalf of the Pitta Pitta People v State of Queensland* [2022] FCA 387 heard before Mortimer J

June 2022

In brief

The case of *Melville on behalf of the Pitta Pitta People v State of Queensland* [2022] FCA 387 concerned an application for compensation (**Compensation Application**) in relation to extinguishment or impairment of native title filed in the Federal Court of Australia (**Court**) by representatives on behalf of the Pitta Pitta People (**Compensation Applicant**), and subsequent interlocutory applications by the State of Queensland (**State**) and the Pitta Pitta Aboriginal Corporation RNTBC (**RNTBC**) seeking a summary dismissal of the Compensation Application.

Both the State and the RNTBC sought dismissal of the Compensation Application under section 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), or for the Compensation Application to be struck out entirely under section 84C(1) of the *Native Title Act 1993* (Cth) (**NTA**). The State and the RNTBC relied upon the following arguments:

- The Compensation Applicant was not authorised to make the Compensation Application under section 251B(a) of the NTA.
- The Compensation Applicant did not have standing to make the Compensation Application under section 61(1) of the NTA.

The Court dismissed both interlocutory applications and held that the matter would be listed for trial in 2023, as it found numerous questions of law and fact which were unsuitable for a summary determination.

Background

In 2012, it was determined in the case of *Aplin on behalf of the Pitta Pitta People v State of Queensland* [2012] FCA 883 that the Pitta Pitta People hold native title over the land and waters around the township of Boulia, in western Queensland. This determination took effect on 17 January 2014, and from that date the native title was held in trust by the RNTBC. In 2020, the Compensation Applicant, comprising an identified number of persons, made the Compensation Application on behalf of the Pitta Pitta People (at [111]).

Court finds that whether the Compensation Applicant has authorisation to make the Compensation Application is a matter which should be determined at trial

The State and the RNTBC submitted that the Compensation Applicant was not authorised to make the Compensation Application as the Compensation Applicant was relying upon authorisation by way of traditional design, but did not meet the requirements under section 251B(a) of the NTA. The requirements under section 251B(a) of the NTA are only met if there is a traditional decision-making process for authorising "*things of that kind*", in this case being a compensation application. The State and the RNTBC submitted that the Compensation Applicant was unable to demonstrate that any traditional Pitta Pitta law or custom relating to a decision-making process for compensation exists. The State and the RNTBC further submitted that if the Court found that there was an existing traditional decision-making process, there was no evidence that the Compensation Applicant had complied with this traditional process.

The Court found that the issue of authorisation was unsuitable for summary determination on a strike out application for the following reasons:

- The question of the proper construction of section 251B(a) of the NTA involves legal complexities, which are not suitable for summary determination (at [74]).
- Section 251B(a) of the NTA requires that a party be afforded the usual opportunity to gather and adduce evidence (at [75]).

- The evidence given by the Pitta Pitta Elders and other witnesses should not be summarily dismissed as wrong, inaccurate, or insufficiently probative, and instead deserves to be heard (at [76]).
- There is likely some value in understanding expert opinion on the matter, and the fact that expert opinion exists tends against a summary dismissal and in favour of a trial (at [77]).
- Evidence was given which established that there is a factual debate about whether a traditional Pitta Pitta decision-making process regarding compensation exists, which is a triable issue (at [78]).

Court finds that whether the Compensation Applicant has standing to make the Compensation Application is a matter which should be determined at trial

The State submitted that the Compensation Applicant did not have standing to make the Compensation Application, as section 61(1) of the NTA operates in a way which does not allow the Compensation Applicant to make a claim for acts done in the area determined to be subject to native title held in trust by the RNTBC on or after 17 January 2014. The State argued that in order for the Compensation Applicant to make a compensation application for acts done on the land held in native title by the Pitta Pitta People, the act must have been committed before 17 January 2014, when the RNTBC began holding that native title in trust.

The RNTBC submitted that the Compensation Applicant did not have standing at all as they are not the RNTBC, and therefore do not hold the native title rights and interests in the land and waters surrounding Boulia, regardless of whether the acts were committed before 17 January 2014 or not.

The Court found that the question of standing involved complex legal issues relating to the interpretation of section 61(1) of the NTA, which were unsuitable for a summary determination. The Court also noted that if the contentions made by the State and the RNTBC were accepted, they "*... may work to the real disadvantage of the common law holders where there is a dysfunctional or divided RNTBC*" (at [101]).

Conclusion

The Court dismissed the interlocutory applications of both the State and the RNTBC, finding that whether the Compensation Applicant is authorised to make the Compensation Application under section 251B(a) of the NTA and has standing under section 61(1) of the NTA are matters which should be determined at a trial. The Court concluded by encouraging the RNTBC and the Compensation Applicants to pursue a compensation application "*… in a more collaborative way*" (at [120]).

Development on the right track as Planning and Environment Court of Queensland dismisses a submitter appeal against the decision to approve a development application for development on land that saddles the Albion train station

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cox v Brisbane City Council & Anor* [2022] QPEC 10 heard before Williamson KC DCJ

June 2022

In brief

The case of *Cox v Brisbane City Council & Anor* [2022] QPEC 10 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to approve a development application for a preliminary approval for a material change of use (food and drink outlet, market, multiple dwelling, office, parking station, retirement facility, shop, and short-term accommodation) and an associated variation request (**Development Application**) to vary the provisions of the *Brisbane City Plan 2014* (Version 12) (**City Plan**) in respect of land which sleeves the eastern and western sides of the Albion train station and associated rail corridor and adjoins the Albion District Centre (**Subject Land**).

The Development Application sought to establish a master planning framework to facilitate the development of the Subject Land, which had been under the control of Queensland Rail, with transit oriented development across four precincts, numbered 2 to 5. The submitter only opposed the Development Application with respect to precincts 2 and 4.

The Court considered the following central issues:

- Whether the uses proposed in precincts 2 and 4 comply with the City Plan.
- Whether the height, bulk, scale, and intensity of the building envelopes proposed in precincts 2 and 4 comply with the City Plan.
- Whether there is a need for the type and scale of development proposed in precincts 2 and 4.
- Whether a variation approval in respect of precincts 2 and 4 would have an adverse effect on future submission rights.

The Court found that the proposed development is meritorious and ought to be approved with regard to the acceptability and intensity of the proposed uses in precincts 2 and 4 according to the City Plan's Strategic Framework and applicable neighbourhood plans, and the capacity to appropriately manage any future adverse impacts on amenity and character with conditions.

Court finds that the proposed uses in precincts 2 and 4 are consistent with the Strategic Framework and applicable neighbourhood plans having regard to the relevant version of the City Plan that includes amendments made in May 2020

The Court found that the proposed uses in precincts 2 and 4 are acceptable uses and of an acceptable intensity under the City Plan for the following reasons:

- The proposed uses for each precinct are inconsistent with the intent and development expectations for the Character residential zone and Low density residential zone with respect to precinct 2, and the Special purpose (Transport industry) zone with respect to precinct 4. Although non-compliance of this kind is a matter that would ordinarily attract considerable weight in the exercise of the planning discretion, the Court found that the proposed uses' inconsistency with the relevant zones under the City Plan did little to advance the refusal case in circumstances where the zoning of the Subject Land is unsound and has been overtaken by events for the following reasons:

- The Subject Land which is included within precinct 4 is surplus to Queensland Rail's requirements and is to be given over to an urban purpose which is inconsistent with the intent of the Special purpose (Transport industry) zone.
- Overall Outcome 4(d) of the Special purpose (Transport industry) zone anticipates that the underlying special purpose of the Subject Land may cease and that the Subject Land can be re-used for an alternative purpose, provided that the use occurs in an integrated manner.
- The underlying reason for the Character residential zone no longer exists and cannot be replaced as the residential dwellings, which were located within precinct 2 and that the Character residential zone was intended to protect, were demolished some three to four years after the City Plan took effect.
- The Subject Land included within precinct 2 is not suitable for low density residential development because it is surrounded on three sides by heavy infrastructure.
- The Strategic Framework and neighbourhood plans, being the Lutwyche Road Corridor Neighbourhood Plan (**LRCNPA**) with respect to precinct 2 and the Clayfield-Wooloowin District Neighbourhood Plan (**CWDNPA**) with respect to precinct 4, which prevail over the zones according to section 1.5 of the City Plan, provide a reasonable expectation that development on the Subject Land may be more intense than anticipated in the two residential zones.

- Transit oriented development, which is development that promotes growth along transport corridors at identified nodes, is supported by the Strategic Framework and the codes for the LRCNPA and CWDNPA, including amendments made in May 2020 which reflect a material shift in forward planning.
- The town planning evidence established that the Subject Land's physical relationship to the recognised transport node at Albion meant the Subject Land is inherently suitable for accommodating future growth in a Growth Node along a high frequency public transport corridor.
- The City Plan demonstrates that there is considerable public interest in transit oriented development which optimises public investment in rail infrastructure by clustering residential and employment uses around a high frequency train station and District Centre. The Court found that the evidence established that this public benefit could be achieved by the proposed development in circumstances where impacts on character and amenity can be conditioned and managed appropriately in the context of future development.
- The proposed development will contribute to the ongoing urban renewal and intensification of the Albion District Centre and surrounding area to facilitate the optimisation of important public infrastructure.

Court finds that the non-compliances with respect to the height of development in precincts 2 and 4 did not warrant refusal of the Development Application

The submitter argued that the height and scale of the proposed development in precinct 2 (up to 15 storeys) and precinct 4 (up to 8 storeys) will, having regard to the local context, have an unacceptable impact on the character and amenity of the locality, visually dominate the area, and provide insufficient height transitions.

The Court found that the development proposed in precinct 2 would not have an unacceptable impact on the visual amenity or character of the locality because the expert evidence established that the proposed development would achieve an appropriate building height transition and there will be significant separation between the proposed development in precinct 2 and the surrounding area.

With respect to precinct 4, the Court accepted that an "*… unbroken podium structure for the length of the precinct would be overbearing, and present as a wall of development …*" (at [159]). However, the Court found that this was a matter that would be appropriately managed by the proposed conditions which would require, for any podium form that exceeds 20 metres in length, recessed areas of deep planting zones every 20 or 40 metres of street frontage.

Court finds that the issue of need was not determinative

The Court found that the issue of need is not decisive in this appeal for the following reasons:

- The Subject Land is well located to provide transit orientated development that has the potential to improve the community's well-being in circumstances where the proposed development would not have any unacceptable impacts on character or amenity.
- The proposed development represents an efficient use of the land in economic terms.
- The City Plan recognises that the public interest and community well-being will be well served through the intensification of development in Growth Nodes on Selected Transport Corridors, such as that proposed by the Development Application.
- The City Plan does not require the demonstration of need to develop the Subject Land.

- Amendments made to the City Plan in May 2020 reflect the proposition that the Council accepts that the public interest is better served by more intense urban development on the Subject Land than the medium density residential development contemplated by Overall Outcome 7 of the LRCNPA code.

Court finds that the proposed variations to the City Plan will not unacceptably cut across future rights of submission

The submitter argued that the variation request ought to be refused because future submitter rights would be affected, because the variations sought included a change to the level of assessment for a material change of use for one of the uses included within a prescribed building envelope from impact assessable to code assessable. This variation would remove the right to make properly made submissions and accrue an appeal right.

The Court was satisfied that the variations sought by the Development Application will not unacceptably cut across future rights of submission in a manner that would warrant refusal of the Development Application, as the community had been given ample opportunity to examine the proposed development and raise planning issues of concern by way of submissions during public notification of the Development Application and community consultation, which went over and above that required by the *Planning Act 2016* (Qld).

Conclusion

The Court was satisfied that the Development Application ought to be approved subject to conditions and adjourned the appeal to allow the parties to agree on final orders that disposed of the appeal in a manner consistent with the Court's judgment.

Planning and Environment Court of Queensland allows an appeal against the refusal of the demolition of a pre-1947 house that no longer contributed to traditional building character

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Graya Developments Pty Ltd v Brisbane City Council* [2021] QPEC 49 heard before Jones DCJ

June 2022

In brief

The case of *Graya Developments Pty Ltd v Brisbane City Council* [2021] QPEC 49 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse an application for a development permit for building works, which relevantly included the demolition of a pre-1947 dwelling house (**Development Application**).

The Court relevantly held that the pre-1947 dwelling house was within a section of Moray Street, New Farm that had traditional character as described in the Traditional Building Character (Demolition) Overlay Code (**Demolition Overlay Code**) of the *Brisbane City Plan 2014* (Version 20) (**City Plan**). The issue for the Court was therefore whether, objectively, the changes made to the dwelling house since its construction were substantial or resulted in it no longer having the appearance of being constructed in 1946 or earlier.

The Court held that the dwelling house had been substantially altered, which resulted in the loss of its ability to make any contribution to the traditional building character of the relevant part of Moray Street. Any change that could be made to restore the dwelling house to its pre-1947 state was not relevant to the Court's determination.

The Court therefore allowed the appeal.

Factual matrix

The Subject Land is located on Moray Street, New Farm. The Court accepted expert evidence that the original dwelling house was likely constructed on the Subject Land circa 1912 to 1913, and had features, including a short-ridge bungalow roof and U-shaped veranda, that were generally seen on buildings constructed circa 1900 to 1920s. In around 1925, the eastern part of the veranda was enclosed.

In the late 1940s to 1950s further alterations, including the replacement of the front original timber stairs with a steel framed and balustraded entry staircase and the enclosure of the veranda on the front and sides, were made to the dwelling house which converted it into four individual flats each with individual pedestrian access (**1950s Changes**).

City Plan matrix and parties' positions

According to the City Plan, the Subject Land is within the Low-Medium Density Residential Zone and the New Farm and Teneriffe Hill Neighbourhood Plan Area.

The Development Application was code assessable under the City Plan.

The following provisions of the Demolition Overlay Code were relevant to the Development Application:

- *Overall Outcome 2(a)* – Development protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Demolition Overlay Code their traditional character and traditional building character.
- *Overall Outcome 2(d)* – Development protects a residential building or part of a residential building constructed in 1946 or earlier where it forms part of a character streetscape comprising nearby residential dwellings constructed in 1946 or earlier.
- *Overall Outcome 2(h)* – Development ensures residential buildings constructed in 1946 or earlier are retained and redevelopment complements the traditional character of buildings constructed in 1946 or earlier.
- *Performance outcome PO5(c)* – Development involves a building which does not contribute to the traditional building character of the relevant part of the street.

- *Acceptable outcomes AO5(a), AO5(c), and AO5(d)* – Development involves a building which has been substantially altered or does not have the appearance of being constructed in 1946 or earlier; or if demolished, will not result in the loss of traditional building character; or is in a section of the street that has no traditional character.

The Applicant's position was that the Development Application complied with Acceptable Outcome AO5(a) because the dwelling house had been substantially altered.

The Council's position was that the dwelling house had not been substantially altered so as to comply with Acceptable Outcome AO5(a) of the Demolition Overlay Code.

Court finds Development Application complies with Acceptable Outcome AO5(a)

The Court rejected architectural evidence that despite the changes made to the dwelling house it was recognisable as being of timber and tin traditional character by virtue of it retaining its traditional tin roof.

The Court held that the relevant test was what a reasonable person objectively looking in would think and not "*… what an expert in the field might make of things …*" (see [17] to [21]). Whether the dwelling house could be restored was not relevant to that assessment (at [28]).

The Court held that although the dwelling house would have presented to the street as a traditional timber dwelling with a tin roof after the enclosure of the eastern part of the veranda in circa 1925, the 1950s Changes substantially altered the dwelling house and changed the way it presented to the street (see [11], [14], and [21]).

The Court held that the full enclosure of the veranda and the use of asbestos sheeting and discordant windows, which resulted in the loss of the original three-dimensional effect of the original dwelling house, presented a flat, featureless surface to the street (at [23]).

Conclusion

The Court held that the dwelling house did not present to the street as an "*iconic Queenslander*" and did not make any contribution to the traditional building character of the relevant part of the street. Accordingly, the Court allowed the appeal.

Planning and Environment Court of Queensland upholds a decision to regularise an existing unlawful dance studio in a warehouse

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wormell Pty Ltd v Gold Coast City Council & Anor (No. 2)* [2021] QPEC 22 heard before Kent KC DCJ

June 2022

In brief

The case of *Wormell Pty Ltd v Gold Coast City Council & Anor (No. 2)* [2021] QPEC 22 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Gold Coast City Council (**Council**) to approve on a community title scheme lot at Molendinar a development application for a material change of use for a dance studio, with the development application having been made to regularise an existing unlawful use of the premises.

The premises was approved for a warehouse use. The development application was for "*indoor sport and recreation*". The submitter operates a metal fabrication business that shares access and manoeuvring areas for the building in which the premises is located.

The two broad issues for the Court to determine were, firstly, whether the proposed use is "*indoor sport and recreation*" or an "*educational establishment*", and secondly, whether the proposed use complies with the *Gold Coast City Plan 2016* (**City Plan**).

The Court dismissed the appeal for the following reasons:

- The proposed use was for "*indoor sport and recreation*", being what was applied for in the development application (see [10] to [27]).
- The development application complied with the Strategic Framework and Low Impact Industry Zone Code (**LIIZ Code**) of the City Plan (see [28] to [75]).
- There were no relevant matters in support of refusing the development application (see [76] to [90]).

Proposed use was properly characterised as "indoor sport and recreation"

The submitter argued that the proposed use was not properly characterised as "*indoor sport and recreation*" but was more correctly characterised as an "*education establishment*", the consequence of the distinction being that an "*education establishment*" is an inconsistent use for the Low Impact Industry Zone in which the premises was included under the City Plan. The submitter argued that "*educational establishment*" was the correct use category because the educational component of the proposed use was central and not ancillary, and purely recreational dance was not proposed, and the proposed classes would involve education and training.

The applicant argued that the development application remained impact assessable and that the focus of consideration should be on the merits assessment of the activities constituting the use for which approval was sought rather than fitting the activities into a definition within the City Plan. The applicant and the Council argued that the proposed use was correctly categorised as "*indoor sport and recreation*" for the following reasons:

- The proposed use was primarily for fitness and fun and not for specific formal qualifications. Education and training are only ancillary to the main activities of the dance school. The fact that a level of instruction may enable participants to go on to make a career in the field did not render the facility an educational establishment.
- There was no evidence to suggest that the dance school teachers would be focusing on conducting exams or delivering structured classes by the Royal Academy of Dance.

The Court accepted the applicant's and the Council's submission that the proposed use was "*indoor sport and recreation*" because that conclusion was approached in a "*practical and common sense way*" (at [27]).

Proposed use complies with the Strategic Framework in the City Plan

The submitter argued that the proposed use compromised the planning intent stated in the Strategic Framework in the City Plan. In particular, based on the characterisation of the use as an "*educational establishment*" which the Court found was misconceived, the submitter argued that the proposed use was a sensitive land use and therefore the development application conflicted with section 3.2.2 of the Strategic Framework, which is concerned with addressing reverse amenity impacts arising from sensitive land uses being adversely impacted by industrial development.

The applicant's and the Council's town planning experts' evidence was that the proposed use was not in conflict with section 3.2.2 of the Strategic Framework "*… as it is not a sensitive land use as defined; rather such a use [indoor sport and recreation] is one that by its inherent nature may impact on sensitive land uses*" (at [33]).

The Court preferred the applicant's and Council's submissions and held that the proposed use would instead impact other sensitive uses because of the noise and traffic generated by the use and the hours of operation (at [43]).

The submitter also argued that the premises, which was within a General Industry Area under the City Plan because it was in the Low Impact Industry Zone, ought to be protected from encroachment and that only complementary uses should be accommodated, which the submitter argued the proposed use was not.

The applicant and the Council argued that the proposed use may be established within the General Industry Area if it cannot be catered for in other areas and will not compromise the long-term use of the relevant land for the intended industrial purpose. The applicant's and the Council's town planning experts' opined that the large floor area requirements for the proposed use, as well as the potential amenity impacts, meant that it was not readily catered for in other areas. The applicant also submitted that the Council had approved approximately 39 other development applications for indoor sport and recreation uses in low impact industry zoned land between 15 March 2016 and 18 September 2020.

The Court agreed with the applicant and the Council and held that the proposed use was permitted in a General Industry Area for the following reasons (at [57]):

- The proposed use was not readily catered for within other areas because of its scale and nature, and amenity impacts on surrounding land uses.
- The proposed use does not compromise the intended industrial purpose and long-term use.
- Section 3.5.2.1 of the Strategic Framework of the City Plan contemplates indoor sport and recreation as a complying use, and the Court was satisfied that, in this instance, compliance was achieved.

Proposed use complies with the relevant assessment benchmarks in the LIIZ Code

The submitter argued that the proposed use did not comply with the purpose of the LIIZ Code, in particular section 6.2.9.2(1) the purpose of which was summarised in the Court's judgment as being "*… to provide for service and low impact industrial uses as well as other 'support' uses where they do not compromise long term use of the land for industrial purposes*" (at [58]), because the proposed use did not support the intended industrial uses.

The applicant and the Council argued that the LIIZ Code was to be read as a whole and "*… in a way which is practical … and as intending to achieve a balance between outcomes*" (at [65], citing the case of *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147; (2014) QPELR 686). The applicant and the Council argued, with whom the Court agreed, that adopting that approach to the construction of section 6.2.9.2(2)(a) of the LIIZ Code sets out non-industrial uses which may achieve the purpose of the LIIZ Code, explicitly including indoor sport and recreation uses. The Court held that the proposed use complied with the overall outcomes of the LIIZ Code, and that even if there was non-compliance it would be technical or minor and the proposed use would not compromise the operation of industrial uses intended within the Low Impact Industry Zone (at [66]).

The submitter also argued that the proposed use did not comply with the overall outcomes of the LIIZ Code, in particular section 6.2.9.2(2)(a)(vi) which states that land uses "*that are incompatible and have the potential to compromise the industrial operation of the zone such as sensitive land uses are not supported.*"

The Court accepted the Council's submissions, being that the proposed use "*… is not a sensitive land use; its scale and nature is inappropriate for other areas; and the use does not compromise the long or short term use of the land for industrial purposes and can comfortably co-exist in the industrial area as it has done for six years*" (at [75]).

No relevant matters supported a refusal of the development application

The Court did not find any relevant matters which supported a refusal of the development application. In particular, the Court held that the proposed use conformed with the community's reasonable expectations given that there was compliance with the relevant assessment benchmarks in the City Plan and were other approved dance studios in the Low Impact Industry Zone (at [85]).

Conclusion

The Court dismissed the appeal.

Planning and Environment Court of Queensland approves proposed residential lots in proximity to an industrial zone after finding that the development reflects the planning strategies of the Brisbane City Plan 2014

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *G R Construction & Development Pty Ltd v Brisbane City Council* [2022] QPEC 9 heard before Kefford DCJ

June 2022

In brief

The case of *G R Construction & Development Pty Ltd v Brisbane City Council* [2022] QPEC 9 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by G R Construction and Development Pty Ltd (**Applicant**) against the decision of the Brisbane City Council (**Council**) to refuse the Applicant's development application for a development permit for reconfiguring a lot into 24 lots, and a preliminary approval for operational works for filling and excavation (**Development Application**) to facilitate the creation of 12 residential lots, a drainage reserve, an access easement, and a road reserve on land at Hemmant (**Subject Land**).

The Council refused the Development Application because the proposed development was non-compliant with the planning strategies of the *Brisbane City Plan 2014* (Version 15) (**City Plan**). The Court assessed the Development Application against the relevant assessment benchmarks and planning intent of the City Plan and allowed the appeal for the following reasons:

- The proposed development did not result in adverse amenity impacts, reverse amenity impacts, or change the character of the area.
- The proposed development ensured existing and future industry uses on the adjacent industry zoned land were adequately protected.
- The applicable zone, being the Rural Residential Zone, was reflective of several planning strategies in the City Plan.

Background

The Council argued that the Development Application did not comply with the assessment benchmarks concerned with the preservation of amenity features and industrial land use in the Strategic Framework, Rural Residential Zone Code, Hemmant-Lytton Neighbourhood Plan Code, and the Subdivision Code of the City Plan.

Court finds that the proposed development will not have an unacceptable impact on the character and visual amenity of the area

The Council argued that the proposed development would facilitate residential development at a density that would result in unacceptable visual amenity impacts on the residents that directly interface with the proposed development, people travelling on the adjacent street, and users of a park to the west of the Subject Land.

The Court considered the assessment benchmarks relied upon by the Council in the Strategic Framework, Rural Residential Zone Code, Hemmant-Lytton Neighbourhood Plan Code, and the Subdivision Code of the City Plan and approached its consideration as follows:

- Will the proposed development deliver an amenity outcome that is anticipated by the City Plan?
- Will the proposed development preserve the scenic amenity and character of the Subject Land?
- Will the proposed development provide a high level of residential amenity?
- Will the proposed development maintain the character of the local area?

Will the proposed development deliver an amenity outcome that is anticipated by the City Plan?

The size of the proposed lots did not accord with the planned uses and development intensity stated in the Rural Residential Zone Code and Hemmant-Lytton Neighbourhood Plan Code. The Court therefore held that the proposed development would not deliver an amenity outcome anticipated by the City Plan (at [51]).

Will the proposed development preserve the scenic amenity and character of the Subject Land?

The Court first considered the attributes of the Subject Land. The Subject Land climbs gradually from the recreation reserve adjacent to Bulimba Creek at its western end to a high-point where an existing house is located. The relevant experts opined that the Subject Land has a rural residential character, with sporadic coverage of native trees, shrubs, and regrowth vegetation, and an area of low grass.

The Council argued that the proposed development would not preserve the scenic amenity and topographical features of the Subject Land because a 50-metre wide band of the rural residential character would be removed. The Court held that almost half of the Subject Land was non-compliant with the assessment benchmarks for low density residential development because the scale of the proposed residential activities was far greater than what would be reasonably anticipated to meaningfully preserve the scenic amenity of the Subject Land (at [63]).

Will the proposed development provide a high level of residential amenity?

The visual amenity experts opined that with the imposition of appropriate conditions the future residents of the proposed development would enjoy a high standard of visual amenity. The Court agreed and held that the proposed development could be conditioned to comply with the assessment benchmarks in the City Plan in respect of visual amenity (at [67]).

Will the proposed development maintain the character of the local area?

The Court rejected the Council's town planner's use of the zoning map to demonstrate that the proposed development was in contrast to the openness of a semi-rural area because "*… the average person does not perceive the existing character by reference to colours on a map*" (at [91]).

The Court held that the perspective of what the average person would perceive was that "*[t]he character of a locality is the aggregate impression formed having regard to the individual features and traits of the development and the natural environment in the locality*" (at [91]).

Under that lens, the Court held that the proposed development satisfied the character outcomes of the assessment benchmarks in the City Plan for the following reasons:

- The Court accepted the evidence of the Applicant's town planning expert that the proposed development could be easily screened from view from existing residences by using the topographical attributes of the Subject Land and hilltop tree canopies (at [84]).
- The loss of vegetation caused by the proposed development did not impact the character of the surrounding area because the change in visual amenity was limited to that which would be experienced if an existing resident stood at a particular point in the backyard of their property and looked over a 1.7 metre-high fence (at [100]). The Court held that this change in visual amenity was not representative of how the average person would perceive the character of the locality (see [84] to [100]).
- The Court held that the evidence submitted by the Council's town planning expert that there would be a material reduction in the open landscape values of the surrounding area was an overstatement (at [103]).

Court finds that the proposed development will not encroach on industrial uses and future residents will experience appropriate acoustic amenity

The Council argued that the proposed development would be impacted by nearby industrial development and would risk an unreasonable restriction on the continuation of existing industrial activity and the establishment of future industrial activity.

The Court approached its consideration in respect of the Council's position in two parts.

All residents will experience appropriate levels of acoustic amenity

The Applicant's acoustic engineer provided modelling based on monitored noise levels at the Subject Land which demonstrated predicted noise levels using a range of acoustic treatments. The Applicant argued that the acoustic engineer's evidence supported its position that compliance with the City Plan's noise standards could be achieved by common acoustic treatments.

The Court accepted the evidence of the Applicant's acoustic engineer that approving the proposed development would result in an improvement to the acoustic amenity of existing residents and the Court was satisfied "*… that future residents of the proposed development will enjoy appropriate acoustic amenity*" (at [126]).

Existing and future industry was adequately protected from interfering encroachment

The Council argued that the proposed development would cause unacceptable levels of reverse amenity impacts on future and existing industry because the industry uses were conducted pursuant to development approvals that have no or limited noise conditions. The Council argued that there were no restrictions on the industry uses to operate at greater noise levels or extended hours of operation.

The Court rejected the Council's argument and held that the proposed development would not result in any greater reverse amenity constraint upon lawful industrial activity than that which presently existed (at [145]). The Court's reasons were as follows:

- The fact that the proposed development was outside of the Industrial Amenity Overlay Code Zone was a strong indication that the proposed development was sufficiently distanced from the industrial land in the General Industry A Zone (at [137]).
- The acoustic amenity experts agreed that existing residents would enjoy improved acoustic amenity if the proposed development proceeded (at [139]).
- The constraint placed upon existing industrial uses would not be increased by the proposed development because there were already sensitive uses closer to the industrial area than that of the proposed development (see [139] to [141] and [145]).
- The Court accepted the Applicant's submissions that the prospect of an increase in the intensity of the existing industrial uses was "*hypothetical, speculative and unlikely*" (see [142] to [143]).
- The Court did not have the benefit of the development approvals for the existing industrial uses and any material increase in the intensity or scale of those industrial uses would likely be a material change of use for which a new development permit may be required (at [144]).

Court finds that approving the Development Application was not ad hoc land use planning

The Council argued that a decision to approve the Development Application and thereby allocate the Subject Land to the future supply of urban residential development, rather than rural residential development, would intrude on the Council's role as the planning authority.

The Court rejected the Council's argument and held that a decision to approve the Development Application would not be determinative of future land developments under the Rural Residential Zone Code and would not be an ad hoc approach to land use planning (see [170] to [173]).

The Court's reasoning was based on the accepted facts that more than half of the Subject Land would be retained for a use consistent with the Rural Residential Zone Code and the specific attributes of the proposed development.

Court finds that relevant matters supported approval of the Development Application and exercised its planning discretion

The Court held that the evidence of the Applicant's economist supported a need for the proposed development which would improve the ease, comfort, convenience, and efficient lifestyle of the community, which was a relevant matter supporting an approval of the Development Application.

The Court agreed with the Applicant's concession that the proposed development did not satisfy some relevant assessment benchmarks in the City Plan because the proposed development was for low density residential development in a Rural Residential Zone where land is to be used for rural residential purposes. The Court was satisfied, however, that the proposed development did not offend the planning rationale for the Rural Residential Zone because of the Court's findings in respect of amenity impacts, the appropriate separation from industry, and the other relevant matters supporting an approval of the proposed development.

Conclusion

The appeal was allowed, and the Development Application was remitted to the Council to issue a decision notice approving the Development Application subject to lawful conditions.

Procedural fairness determined by the Supreme Court of Queensland to include the right to be heard in respect of alternative proposals considered by the resuming local government

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Hamelech Basodeh Pty Ltd v Gold Coast City Council & Anor* [2022] QSC 57 heard before Davis J

July 2022

In brief

The case of *Hamelech Basodeh Pty Ltd v Gold Coast City Council & Anor* [2022] QSC 57 concerned an application to the Supreme Court of Queensland (**Court**) by a landowner (**Applicant**) under section 43 (Application for review) of the *Judicial Review Act 1991* (Qld) and section 10 (Declaratory order) of the *Civil Proceedings Act 2011* (Qld) seeking declarations in respect of the decision of the Council of the City of Gold Coast (**Council**) to apply (**Resumption Application**) under section 9 (Ways in which land is to be taken) of the *Acquisition of Land Act 1967* (Qld) (**ALA**) to the Minister for Resources (**Minister**) to take for the protection of koala habitat the Applicant's land located at Pimpama, Queensland (**Subject Land**).

The grounds upon which the Applicant sought the declarations were as follows:

- *Procedural Fairness Ground 1* – The Applicant was not afforded procedural fairness at an objection hearing in respect of the proposed taking of the Subject Land because the Applicant was not given notice of alternative proposals stated in the Council's delegate's objection report (**Objection Report**) nor the opportunity to respond to those proposals at the objection hearing.
- *Procedural Fairness Ground 2* – The Applicant was not afforded procedural fairness at the objection hearing because the Applicant was not given the opportunity to respond to the reliance by the Council's delegate on a report commissioned by the Applicant in 2014 in relation to the Subject Land being within a key resource area (**Key Resource Area Report**).
- *Invalid Delegation Ground* – The Council did not validly delegate to the chief executive officer its powers in respect of conducting the objection hearing and producing the Objection Report because the resolution of the Council purporting to delegate the powers (**Delegation Decision**) did not comply with the now repealed section 258 (Notice of meetings) and section 277 (Public notice of meetings) of the *Local Government Regulation 2012* (Qld) (**LGR**).

Whilst the Court did not find for the Applicant in respect of Procedural Fairness Ground 2 and the Invalid Delegation Ground, the Court declared void and of no effect the Resumption Application on the basis of Procedural Fairness Ground 1.

Background

The Council, as a constructing authority under the ALA, gave the Applicant under section 7(1) (Notice of intention to take land) of the ALA a notice of intention to resume the Subject Land for "*… the conservation of koalas on land in a Regional Landscape and Rural Production Area*".

Under sections 7(3)(d) and 7(3)(e) of the ALA, the Applicant served a notice on the Council, which relevantly stated the following grounds of objection to the Council's taking of the Subject Land and sought that the Applicant be heard at an objections hearing in respect of the grounds for objection:

- Taking the Subject Land was inconsistent with Council's obligations to act in accordance with the local government principles under section 4(2)(a) (Local government principles underpin this Act) and section 4(2)(d) of the *Local Government Act 2009* (Qld) because the Council had not identified that the taking of the Subject Land was value for money nor had it considered viable alternatives to secure koala conservation land.
- Taking the Subject Land for the conservation of koalas was inconsistent with the requirements in the *State Planning Policy* (**SPP**) to protect a key resource area and avoid new sensitive land and incompatible uses, and an alternative "*koala land proposal*" of the Applicant would comply with the requirements in the SPP.

The Applicant attended the objections hearing which was attended by a local government officer at which the Applicant raised an issue as to whether the local government officer held a delegation to hear the objection. The objections hearing was adjourned and the Council then made the Delegation Decision giving the officer the apparent delegation and the delegate recommenced the objections hearing and, in accordance with section 8(2)(b) (Dealing with objections) of the ALA, wrote the Objection Report.

The delegate invited the Applicant to correct any factual inaccuracies in a draft of the Objection Report, and the Applicant's response identified matters that had not previously been raised with the Applicant, which relevantly included the matters the subject of Procedural Fairness Ground 1 and Procedural Fairness Ground 2, and requested that the Applicant be heard on those matters.

The final Objection Report was delivered to the Council and the Council was of the opinion that the Subject Land was required to be taken for the protection of koala habitat and accordingly, made the Resumption Application. The Minister had not yet determined the Resumption Application at the time the Applicant commenced the application for review.

Procedural fairness principles

In considering Procedural Fairness Ground 1 and Procedural Fairness Ground 2, the Court relevantly had regard to the following well-established common law principles:

- The burden on an applicant alleging that the rules of natural justice have been breached is to prove, on the balance of probabilities, that a different decision *could* have been made had procedural fairness been afforded (see [44] and [47]).
- An opportunity to be heard ordinarily requires a person to be informed of the relevant issues and the nature and content of adverse material, and entitles the person to make submissions supporting their interests, which includes the right to provide information and make submissions in respect of adverse material before a decision-maker (see [51] and [52]).
- A decision-maker is required to identify any critical issue to the decision which is not apparent from the nature of the terms of the relevant statute and of any adverse conclusion which would not obviously be open on the material (at [52]).
- The failure to afford a person whose interests are affected an opportunity to respond to material will not be a breach of procedural fairness, where the material was not taken into account by the decision-maker or could not affect the ultimate decision of the decision-maker (at [81]).
- The reasons of a decision-maker are not meant to be "*… scrutinised upon over-zealous judicial review by seeking to discern [error]*" (at [82]).

Procedural Fairness Ground 1 – Applicant entitled to be heard in respect of the alternatives considered by the Council and therefore denied procedural fairness

The Court considered the following in respect of Procedural Fairness Ground 1 (see [39] to [40]):

- Whether the construction of the ALA required the Applicant to be heard in respect of the alternative proposals such that a denial to be heard would result in a denial of procedural fairness.
- Whether the decision was affected by jurisdictional error in that the decision was made beyond the power conferred by the ALA, and where it was, whether the non-compliance was so material so as to nullify the decision.

The Court held that the construction of the ALA permitted a person to advocate in favour of its grounds of objection to persuade a constructing authority to depart from its preliminary decision to acquire land, and required that the person be given the opportunity to deal with matters adverse to its interests, which relevantly included being informed of any issue which might be critical to the ultimate decision (see [49] to [53]). "*Any breach of that obligation will render the decision beyond power if the applicant establishes that a different decision could have been made if there had been compliance*" (at [53]).

The Court held that the Applicant was not afforded procedural fairness because the Council in accordance with its discretion elected to consider alternatives to the resumption of the Subject Land, and therefore was obliged to allow the Applicant to be heard on those alternatives (see [66] and [69]).

The denial of procedural fairness was material and therefore beyond jurisdiction because submissions by the Applicant in respect of the alternative proposals to resumption *could* have affected the ultimate result (see [73] to [74]).

Procedural Fairness Ground 2 – No material breach of the rules of natural justice because the Key Resource Area Report was not critical to the Council's ultimate decision

The Key Resource Area Report was referred to in the Objection Report to the extent that it was "*… consistent with Council's current zoning of the [Subject Land]*", which supported that the key resource area in which the Subject Land is located is not practicable for future exploitation and was consistent with various town planning decisions demonstrated in the planning scheme and policies of the Council.

The reference in the Objection Report to the Key Resource Area Report simply observed the consistency between the report and the town planning decisions of the Council and was not the basis for the decision that the Subject Land was not suitable for future exploitation (see [83] and [84]). Accordingly, the Court held that if there was a breach of the rules of natural justice, the breach was not material (at [85]).

Invalid Delegation Ground – No statutory intention to invalidate a resolution where councillors participated notwithstanding non-compliance with statutory notice requirements

It was agreed between the parties that the notice which enclosed the agenda for the Council meeting at which the Delegation Decision was made was given to the Councillors the day before the meeting.

The Court relevantly held as follows in respect of the Delegation Decision (see [97] to [104]):

- The Council meeting was a "*special meeting*" under section 258 of the LGR as opposed to a "*scheduled meeting*" under section 277 of the LGR, which required that the notice be given "*at least 2 days before the day of the meeting unless it is impracticable to give the notice*" (emphasis added).
- An executive decision made contrary to statute is not void unless there is a legislative intention that the decision will be invalidated where there is non-compliance with the statutory process, which requires a consideration of the proper construction of the statute and an assessment of the degree of departure.
- The notice requirements in section 258 of the LGR were designed to ensure that councillors have proper notification of the matters to be discussed at a special meeting and the opportunity to participate in the meeting, and there is no statutory intention to invalidate such decision where councillors do participate and unanimously make a resolution.
- The Delegation Decision is valid because the Councillors participated in the meeting despite the short notice of the agenda for the meeting and unanimously resolved to make the Delegation Decision.

Conclusion

The Court declared void and of no effect the Resumption Application on the basis that the Applicant was not afforded procedural fairness in respect of the alternative proposals to resumption considered by the Council's delegate.

Lack of need and the preservation of rural character results in the Planning and Environment Court dismissing an appeal against the refusal of a service station in Cairns

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QPEC 6 heard before Everson DCJ

July 2022

In brief

The case of *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QPEC 6 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the refusal by the Cairns Regional Council (**Council**) of a development application for a development permit for a material change of use of land for a service station, shop, and food and drink outlet, and a development permit for reconfiguring a lot (boundary realignment).

The Court considered the following issues that were in dispute between the parties having regard to the relevant provisions of the *CairnsPlan 2016* (Version 2.1) (**Planning Scheme**) (see [25]):

- *Issue 1* – Whether the proposed development is appropriate for the Subject Land.
- *Issue 2* – Whether the proposed development would have an unacceptable impact on rural character and scenic amenity.
- *Issue 3* – Whether any relevant matters warrant approval of the proposed development, in particular whether there is a sufficient need for the proposed development.

The Court relevantly held that "*[t]here is a strong intent running through the [P]lanning [S]cheme that the [Subject Land] is not to be developed in a manner contemplated by the proposed development*" (at [2]), and that the Applicant did not demonstrate that there were relevant matters or a sufficient level of need for the proposed development to overcome the "*fundamental and serious inconsistencies*" with the Planning Scheme (at [41]).

Whilst the proposed boundary realignment was not a central focus in the Court's reasons, the Court also held that it was not justified (at [42]).

Background

The Subject Land comprises two mostly flat, unimproved lots with a combined area of 22 hectares and is located in a rural area characterised by its rural amenity and rural uses.

Under the Planning Scheme, the Subject Land is located within an inter-urban break and the Barron River floodplain. The strategic framework, rural zone code, and flood inundation overlay code of the Planning Scheme relevantly seek to protect the rural character of the rural area and the scenic amenity of the inter-urban break. The Subject Land is also mapped as having high landscape value, which value is broadly defined under the Planning Scheme to be "*[l]andscape attributes perceived by the community and visitors as contributing to the attractive scenery and distinctive visual imagery of the Cairns region*".

The proposed development relevantly comprises a service station, two fast food outlets, a kiosk, a dining area, amenities, and a heavy vehicle drivers' lounge that would operate 24/7. Outdoor structures are proposed to be built to cover the fuel bowser dispensers and the entrance to the service station, and large signs are proposed to draw attention to the facility.

Assessment of the proposed development

The Court relevantly had regard to the following planning law principles in assessing the proposed development under section 60(3) of the *Planning Act 2016* (Qld) (see [13] to [15] and [34]):

- The starting point is that any compliance or non-compliance with the Planning Scheme is to be accorded the appropriate weight determined by the decision-maker by virtue that a planning scheme is a reflection of the public interest that is to then be considered and balanced with any other relevant factors (citing [42] to [43] of *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257; [2020] 48 QLR; (2020) 246 LGERA 90 (***Abeleda***)).

- Planning instruments are to be constructed according to the same principles as the construction of statutes identified in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 and "*… need to be read as a whole, in a way which is practical and as intending to achieve a balance between outcomes*" (citing [52] of *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147; (2014) QPELR 686; 201 LGERA 82).
- Planning need is widely interpreted as "*… indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community … need cannot be a contrived one … there is a latent unsatisfied demand which is either not being met at all or is not being adequately met …*" (citing [21] of *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414).

Issue 1 – Proposed development is inappropriate for the Subject Land

Although the Court accepted that the proposed development may be suited for the Subject Land from a "*purely functional perspective*", it is at odds with the clear planning strategy and intent for the Subject Land and would result in "*unacceptable planning consequences*" (at [33]).

The Court held that the proposed development was not reflective of the Planning Scheme for the reasons that it would compromise the long-term use of the Subject Land for rural purposes, would result in the fragmentation of agricultural land, would have an "*… intrusive effect on the rural or scenic values*" of the Subject Land, and would compromise landscape values (at [29]).

Issue 2 – Proposed development would unacceptably impact rural character and amenity

The Court agreed with the Council's visual amenity expert that there was "*... nothing about the proposed development [related] to the rural landscape character … It will present as a disparate and incongruent intrusion into the rural landscape*" (at [8]).

Issue 3 – Sufficient need and relevant matters not demonstrated to override inconsistencies with the Planning Scheme

The Court was not persuaded by the Applicant's need expert that there was a sufficient level of need for the proposed development either upon an assessment based on the road transport industry or tourist industry. The five operating service stations, one approved service station, and three proposed services stations within the relevant area were sufficient to meet any need (see [35] to [40]).

The Court held that any need or benefits of convenience, competition, and choice were insufficient to overcome the extent of the inconsistencies with the Planning Scheme (see [41] and [26]).

The Applicant's submission in respect of community expectations was also unsuccessful because the Court held, consistent with the Court of Appeal's decision in *Abeleda*, that the Planning Scheme was a reflection of the public interest and was the source of community expectations (at [27]).

Conclusion

The Court held that the proposed development would be "*a significant and unacceptable encroachment*" into the rural area and that there was not a planning need or other relevant matters that justified granting an approval despite the non-compliances with the Planning Scheme.

Planning and Environment Court of Queensland approves a change application after finding that a 2.6 metre extension to a jetty is a minor change

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Pelican Noosa Pty Ltd v Noosa Council* [2021] QPEC 11 heard before Cash KC DCJ

July 2022

In brief

The case of *Pelican Noosa Pty Ltd v Noosa Council* [2021] QPEC 11 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Noosa Council (**Council**) to refuse a change application seeking to regularise the construction of a jetty.

The Applicant applied to the Council to extend a jetty. The concurrence agency mandated that the development proceed "*generally in accordance with*" plans attached to its response (**Concurrence Agency Response Plans**). The Council approved the development application, which included a condition that the development was to "*generally comply*" with the plans attached to the Council's decision notice (**Decision Notice Plans**), which were different to the Concurrence Agency Response Plans. Most relevantly, the Decision Notice Plans show the jetty setback 2.6 metres from the northern (seaward) boundary of the lease area, whereas the Concurrence Agency Response Plans do not show such setback. The decision notice also includes a condition which relevantly states that "*[v]essels associated with the marine use of the facility must only be moored within the approved lease area*" (**Condition 1**) (see [17]).

The Applicant constructed the extension to the jetty but not with the 2.6 metre setback, and instead so that the northern (seaward) pontoon was within 8 centimetres of the northern (seaward) boundary. The Applicant submitted a change application to the Council to make regular the jetty as constructed and to amend Condition 1.

The Council refused the change application on the grounds that the extension was not a minor change and was contrary to the now superseded *Noosa Plan 2006*.

The two broad issues for the Court to determine were, firstly, how the approval of the development application is to be interpreted, and secondly, whether the proposed changes are a minor change and if they should be approved.

The Court allowed the appeal for the following reasons:

- Condition 1 is to be interpreted to mean that the northern (seaward) pontoon can be used for temporary mooring.
- The proposed changes are a minor change and are not a reason to refuse the change application.

Council acted within its authority to require the setback

The Applicant argued that the Council act outside of its power by imposing the 2.6 metre setback because the Concurrence Agency Response Plans made no reference to the setback. The Applicant relied upon section 62 of the *Planning Act 2016* (Qld) to argue that the Council was required to "*comply with the referral agency's response*" and to include in the approval "*conditions exactly as stated in the response*" (see [16]).

The Court rejected the Applicant's argument because it mischaracterised the absence of a specified setback in the Concurrence Agency Response Plans to be a condition that no setback be imposed at all (at [16]). The Court held that the Council acted within its power to require the setback since the Decision Notice Plans are not inconsistent with the Concurrence Agency Response Plans in respect of the setback, which are silent as to any distance between the jetty and the northern (seaward) boundary, and cannot be interpreted to provide any requirement one way or another (at [16]).

Court rejects Council's interpretation of Condition 1 because of original approval

The central dispute over Condition 1 was the interpretation of the term "*moored*". The Council argued that it ought to be interpreted as meaning "*… tying up of any duration is prohibited, unless the vessel is wholly within the boundaries of the lease*" area (at [18]). The Council relied upon evidence from a coastal engineer who opined that the definitions of "*berth*", "*moor*", and "*dock*" from the Australian Standards and the Merriam-Webster dictionary ought to be adopted (at [19]).

The Court held that technical definitions of the words taken in isolation provided no answer to the effect of Condition 1 (at [20]). Instead, the Court construed Condition 1 in the context of the approval itself.

The Court examined two notations that are present in both the Concurrence Agency Response Plans and the Decision Notice Plans. The first notation states, near the northern section of the jetty extension, "*FERRY PASSENGER WAITING AREA*" and the second notation states, near the new pontoon adjacent to the northern (seaward) boundary of the lease area, "*DROP OFF ONLY*". The Court held that these notations indicate that, firstly, the Council was aware that the jetty had historically been used as a stop, and secondly, that the Concurrence Agency Response Plans and the Decision Notice Plans approve the continued use of the jetty as a stop (at [22]). The Court held that there was no sensible reason to assess Condition 1 against the purpose of the mooring since many historic uses of the jetty were "*practically indistinguishable*" (at [22]). The Court held that interpreting Condition 1 in light of this approval "*… is consistent with the need to construe the approval sensibly, as a whole and having regard to its apparent purpose*" (at [22]).

For those reasons, the Court reached the conclusion that Condition 1 is to be taken to permit temporary or short-term mooring even if the vessel exceeds the boundary of the lease area, and only mooring on something other than a temporary basis would have to be wholly within the lease area (at [24]).

Court finds that proposed changes are minor and should be approved

The Council argued that the Applicant's change application was not minor on the following three grounds:

- The changes introduce a new parcel of land into the approval.
- The changes increase the severity of impacts on the river and its users.
- The change is not minor when considered in the context of the relevant planning scheme.

Proposed changes will not introduce a new parcel of land

The Council argued that the Decision Notice Plans do not permit vessels to operate from the northern (seaward) pontoon, unless they are wholly within the boundaries of the lease area and that removing the 2.6 metre setback would result in an extension of commercial activity into the river. The Council argued that these factors are more than a minor change.

The Court disagreed with the Council and held that the proposed changes would not introduce a new parcel of land or result in a substantially different development because of the Court's conclusion that the original approval already permitted temporary mooring by vessels outside the boundaries of the lease area (at [22]).

Proposed changes will not increase the severity of impacts on the river and its users

The Council relied on the submissions by its coastal engineer to argue that the Applicant's proposed changes will "*increase the scale and intensity of commercial operations in and around the lease area*" (see [33]). The Council's coastal engineer further opined that if the changes were approved and the 13 other leases on the river gained a similar benefit it would significantly reduce the public space on the river (at [34]).

The Court held that the proposed changes will not increase the impacts on the river and its users for the following reasons (at [34]):

- The potential number of vessels that could be berthed within the lease area boundary under the proposed changes is less than if the 2.6 metre setback had been applied and if the Council's interpretation of Condition 1 had been applied.
- There was "*no proper basis*" in arguing that the proposed changes will result in successful changes to the other leases on the river since this would now require an application for a material change of use because the *Noosa Plan 2006* had since been superseded by the *Noosa Plan 2020*.

Proposed changes are minor as defined under the Planning Act 2016 (Qld)

The Council's argument relied on the Court reaching a conclusion that the Decision Notice Plans do not permit vessels wider than 2.6 metres to operate from the northern (seaward) pontoon. The Court held that while the proposed changes would result in some expansion of the Applicant's operations into the northern area of the river, the expansion is not significant because this result is not different from what was originally approved (see [22] and [35]).

Court approves the minor change application

The final matter for the Court to consider was whether the Applicant's proposed changes ought to be made when assessed against the relevant planning scheme. In particular, the Council argued that the proposed changes do not comply with Overall Outcome O11.7.2(hh) and Specific Outcomes O21, O28, and O29 of the Noosaville Locality Code in the *Noosa Plan 2006*. The Council's reasons and the Court's response were as follows:

- The Council argued that on the evidence of the Council's coastal engineer, there is potential for changes to other jetties that would produce an overall loss to the river's area, which is contrary to Overall Outcome O11.7.2(hh). The Court held that there is no real prospect that the alleged changes to other jetties would follow from the approval of the change application because of how such a change would be assessed under the *Noosa Plan 2020* (see [34] and [41]).
- The Council relied on evidence of the Council's town planner to argue that approval of the change application would increase the scale or intensity contrary to Specific Outcome O27. The Court held that an additional 2.6 metres is a negligible increase in scale and intensity when considered against the original approval contemplating the use of the northern (seaward) pontoon by vessels outside of the lease area (at [42]).
- The Council's primary argument was that the change application would result in commercial activity extending beyond the northern boundary of the lease area and not satisfy Specific Outcomes O28 and O29. The Court agreed that commercial activity would extend beyond the boundary of the lease area, but held that some commercial activity had already been approved outside of the lease area and that the total difference produced by the change would be minor and was not a reason to refuse the change application (see [43] and [45]).

Conclusion

The appeal was allowed. The decision to refuse the change application was set aside and the parties were directed to produce to the Court an order that would amend Condition 1 to make it clear that the northern (seaward) pontoon can be used for temporary mooring.

Planning and Environment Court of Queensland dismisses an application for costs in circumstances where opposition to a declaratory proceeding was ultimately vindicated

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2022] QPEC 4 heard before Morzone KC DCJ

July 2022

In brief

The case of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2022] QPEC 4 concerned an application to the Planning and Environment Court of Queensland (**Court**) in which the Applicant sought its costs against the Second Respondents in respect of the Applicant's originating application for declarations and orders in relation to building work on the Aquarius Building, on the grounds that the Second Respondents frivolously opposed the Applicant's originating application (**former proceeding**), introduced late material, and unreasonably failed to accept a *Calderbank* offer. The Cairns Regional Council (**Council**) did not have an active part in the application for costs.

Background

A town planning consent for the Aquarius Building was given on 12 August 1980 (**Town Planning Consent**) as a 15-storey building, but was later certified and built as a 16-storey building. Against that historical anomaly, the Second Respondents obtained a development approval for building work on 19 January 2018 (**Building Work Approval**) to convert the roof top garden, being above their 16th storey penthouse, into a covered and partially enclosed patio area with a lift, and thereby creating a 17th storey.

The Applicant, whose members reside in the Aquarius Building, became concerned about potentially illegal development and commenced the former proceeding, which sought declarations and an order restraining the Second Respondents from acting upon the Building Work Approval. The Applicant offered to resolve the former proceeding on 17 September 2018 on the basis that, in summary, the Second Respondents seek to cancel the Building Work Approval and agree that a development application for a material change of use and for reconfiguring a lot is required. The Second Respondents did not accept the offer.

At a without prejudice meeting facilitated by the P&E ADR registrar on 20 September 2018, the Applicant sought new development plans in respect of the building work the subject of the Building Work Approval and made a further offer to settle the former proceeding, which was also rejected. The Applicant on 10 October 2018 made a further offer, being a *Calderbank* offer (being a reference to the principles in *Calderbank v Calderbank* [1975] 3 All ER 333) meaning that if rejected there may be an entitlement to costs on an indemnity basis if the rejection was unreasonable. The *Calderbank* offer was to resolve the former proceeding, in summary, on the basis that the parties agree that the building work the subject of the Building Work Approval would conflict with the Town Planning Consent and that a development application for a material change of use is required. The *Calderbank* offer was rejected.

The Second Respondents provided revised plans on 19 November 2018 which amended the boundaries for the proposed building works to remove horizontal intrusions from the common property areas, and proposed to lodge an application to change the Town Planning Consent. The Applicant agreed to the Second Respondents' course of action and the Court ordered on 17 May 2019, by consent, that the Second Respondents lodge an application to change the Town Planning Consent by reference to the Second Respondents' revised plans, which the Second Respondents did.

The Council approved the application. The Applicant challenged the Council's decision in a separate proceeding on the basis that the Second Respondents' application lacked the lawful consent of the body corporate (**cognate proceeding**). The former proceeding lay in abeyance pending the resolution of the cognate proceeding, in which the Second Respondents were ultimately wholly successful, and that is the subject of our February 2021 article.

The Applicant then sought its costs in respect of the former proceeding on the following basis:

- The Second Respondents provided the revised plans, which were a response to the Applicant's issue about horizontal intrusions into common property.
- The Second Respondents made the application to change the Town Planning Consent which was approved by the Council, and that was a response to the Applicant's issue that there was an inconsistency in the approvals.

- The Court on 21 May 2021 made a declaration, by consent, that the building work would create a 17th storey.

The Court considered the following questions with respect to the exceptions provided under section 60(1) of the *Planning and Environment Court Act 2016* (Qld) (**PECA**) to the general rule provided by section 59 of the PECA that each party must bear their own costs:

- Whether the Second Respondents' opposition to the former proceeding was frivolous?
- Whether the Second Respondents introduced late material?
- Whether the Second Respondents unreasonably failed to accept a *Calderbank* offer?

After deciding each of these questions in favour of the Second Respondents, the Court dismissed the application for costs.

Court finds that the Second Respondents did not frivolously oppose the former proceeding

The Applicant argued that the Second Respondents frivolously resisted the relief sought in the former proceeding and relied upon section 60(1)(b) of the PECA to provide an exception to the general rule as to costs. In response, the Second Respondents argued that their response was reasonable and meritorious.

The Court relied on Williamson QC DCJ's consideration of the nature of frivolous or vexatious conduct and section 60(1)(b) of the PECA in *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9; (2019) QPELR 662. In [30] of that decision, Williamson QC DCJ held that the phrase "*frivolous or vexatious*" is to be given its ordinary meaning and that "*[a] lack of success does not mean that a proceeding had no reasonable prospects, or lacked merit*" (see [14]).

The Applicant argued that its pursuit of declaratory relief was vindicated by the Second Respondents making the application to change the Town Planning Consent. The Court disagreed with this proposition because the declaratory relief sought to propound the need for a development approval for a material change of use as well as a reconfiguration by way of a building format plan, not to compel the making of the application to change the Town Planning Consent.

The Court found that the Second Respondents' response and engagement in the former proceeding was reasonable and not frivolous as they:

- properly engaged in the former proceeding in circumstances of uncertainty and complexity;
- were caught in a historical anomaly, the origin of which was not their doing;
- were in the unique position to take steps to regularise past wrongs in order to realise their own proposed development;
- engaged public policy considerations while they faced collateral changes to their own interests; and
- succeeded with an approved change to the Town Planning Consent which effectively regulated the historical anomaly to facilitate the proposed development in the face of the Applicant's challenge.

Court finds that the Second Respondents' introduction of late material does not warrant a different costs order

The Applicant relied on the exception to the general rule as to costs provided under section 60(1)(e) of the PECA with respect to the introduction of revised plans and the making of the application to change the Town Planning Consent.

The Court found that this was not a typical case where the provision of late material caused some cost consequence and that the introduction of this material better defined the real issues for determination, progressed the proposed development, regularised the historical anomaly, and achieved certainty in the public interest. Accordingly, the Court did not accept that the Second Respondents' efforts in respect of the late material warranted a different order as to costs.

Court finds that the Second Respondents did not unreasonably fail to accept the Calderbank offer

The Court noted at [54] that "*[t]he rejection of a Calderbank offer does not create an automatic entitlement to costs on an indemnity basis. Such an order could only be made if the rejection of that offer was unreasonable*".

The Court did not accept that the Second Respondents' rejection of the *Calderbank* offer was unreasonable in circumstances where the offer was premised on a requirement to make a development application for a material change of use which was entirely vindicated.

Conclusion

The Court dismissed the application for costs and made no order for costs with the effect that each party is required to bear their own costs of the former proceeding, including the application for costs.

Victorian Civil and Administrative Tribunal rules on the expiration of an amended planning permit

Nathan Herlinger | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Dahlenburg v Hindmarsh SC (Red Dot)* [2022] VCAT 669 heard before Michelle Blackburn, Member

July 2022

In brief

The case of *Dahlenburg v Hindmarsh SC (Red Dot)* [2022] VCAT 669 concerned a preliminary hearing in the Victorian Civil and Administrative Tribunal (**VCAT**) in respect of the interpretation of the permit expiration provisions in section 68 of the *Planning and Environment Act 1987* (Vic) (**PE Act**) in an appeal proceeding against the decision of the Hindmarsh Shire Council (**Responsible Authority**) to amend an amended planning permit granted in 2019 (**2019 Amended Permit**) to facilitate additional buildings and works to increase the holding capacity of ducks on a duck farm.

The Applicants relevantly lodged an objection in relation to an application made by the Respondent to the Responsible Authority in 2021 seeking to amend the 2019 Amended Permit. The Responsible Authority granted the amended planning permit, which resulted in the appeal to VCAT and the preliminary hearing seeking to determine whether the 2019 Amended Permit had expired because the development aspect of the 2019 Amended Permit was not acted upon within sufficient time.

The question in respect of the currency of the 2019 Amended Permit raised further issues, being; whether there is still a permit in existence which can be amended and if so, the terms of that permit.

VCAT held that the 2019 Amended Permit had, under section 68(3)(b) of the PE Act, expired because the development the subject of the 2019 Amended Permit had not been completed within two years from its date of issue. Accordingly, the Responsible Authority could not amend the 2019 Amended Permit because it had expired.

Facts

The Respondent operates a duck farm located at 142 Drapers Road, Nhill (**Site**). The ducks are housed in a number of sheds constructed on the Site.

The establishment of the existing duck farm was authorised by the original planning permit, which was issued by the Responsible Authority on 18 August 1999 (**Original Permit**).

On 27 May 2019, the Responsible Authority granted the 2019 Amended Permit which facilitated the construction of additional buildings and works to increase the shed size and increase the maximum number of ducks able to be kept on the Site from 12,000 to 24,000 (**Proposed Development**). There were no conditions in the 2019 Amended Permit concerning its date of expiration.

In September 2021, the Respondent made an application to the Responsible Authority seeking to amend the 2019 Amended Permit to change the nature of the buildings and works authorised by the 2019 Amended Permit. The Responsible Authority granted the amendments sought to the 2019 Amended Permit.

2019 Amended Permit had expired under section 68(3)(b) of the PE Act

Section 68(3) of the PE Act relates to a permit for the development and use of land that is taken to be a combined development and use permission. Thus, a permit under section 68(3) of the PE Act can expire as a whole for reasons that may only relate to a part of the permission, ie a part relating to the use of land or a part relating to the development of land (at [20]).

Since the Proposed Development or any stage of it was not completed within two years after the date of issue of the 2019 Amended Permit and no expiration condition existed, section 68(3)(b) of the PE Act was triggered and rendered the 2019 Amended Permit to expire (see [31] to [32] and [36]).

The consequence of the expiration of the 2019 Amended Permit was that only the terms of the Original Permit remained in force (see [46] to [49]). Thus, the Responsible Authority in making the 2021 amendments was required to amend the Original Permit and not the 2019 Amended Permit (at [48]).

VCAT noted that the ability to extend a timeframe under a permit to complete development is provided for in section 69 of the PE Act. However, as no application was before VCAT in relation to section 69, no determination could be made on that point (at [51]).

Conclusion

VCAT held that the 2019 Amended Permit had expired and therefore was not capable of being amended.

This decision emphasises the importance of including conditions in a planning permit in respect of the expiration of the permit to avoid circumstances where the permit expiration provisions under section 68 of the PE Act are triggered and result in a mandatory two-year expiration date.

This decision is also significant as it demonstrates that both use and development requirements in a planning permit must be satisfied to ensure that the permit does not expire.

Interpreting and drafting infrastructure agreements and LGIPs

Ian Wright

This article discusses the legal perspectives for the interpretation and drafting of infrastructure agreements and LGIPs

August 2022

Legal philosophy, legal doctrine, and legal method

> *Law, legal doctrine and legal method are underpinned by legal theory … How one views the legal system and the legal theory underpinning it to a significant degree governs the formulation of the answers to legal questions ….*
>
> The Honourable Justice James Allsop AO QC
> Chief Justice of the Federal Court of Australia

Structure of presentation

- Legal perspectives for the interpretation and drafting of infrastructure agreements and LGIPs:
  - *Legal reasoning* – Theoretical reason (*which is*) and practical reason (*what ought to be*).
  - *Legal perspectives or attitudes* – Theoretical reason (*third person*) and practical reason (*first person*).
  - Central cases and focal meanings.
- Legal interpretation techniques for infrastructure agreements and LGIPs:
  - Interpretation, construction, and adjudication.
  - Infrastructure agreements are written contracts.
  - LGIPs are statutory instruments.
- Legal drafting techniques for infrastructure agreements and LGIPs:
  - *Legal subject* – The human person who is acting – the acting subject.
  - *Legal action* – The human action which the human person must do (ie a responsibility) or may do (ie a right), but understanding that rights arise from responsibilities.
  - *Legal case* – The circumstances in which the responsibility or right applies.
  - *Legal condition* – The conditions on performance of which the responsibility or right operates.
- Structuring of an infrastructure agreement:
  - *Drafting an infrastructure agreement* – Legal statements in contracts and LGIPs are the recorded speech acts of human persons.
  - *Interpretation of an infrastructure agreement* – Infrastructure agreements and LGIPs once made are the written artefacts of human persons, which are to be interpreted by human persons.
- Key terms and clauses of an infrastructure agreement.

Legal perspectives

Reason and legal reasoning of human persons

- **Reason and reasoning** are simply our thinking. **Legal reasoning** is our thinking in respect of legal philosophy, legal doctrine, and legal method.
- **Reason and legal reason** operate in two different voluntary and interlocking modes or movements in thought:
  - *Theoretical reason* *What is* – Thinking which is analytical, contemplative, descriptive, explanatory, reflective or speculative reason or factual thinking.
  - *Practical reason* *What ought or ought not to be* – Thinking which is normative, directive, or prescriptive reason.

- **Theoretical reason** – How we acquire (1) theoretical understanding of the data and information of the reality and existence of a thing, as well as (2) the theoretical truth and knowledge of the facts and beliefs in respect of the thing.
- **Practical reason** – How we create practical knowledge of a norm or value of what ought to be done and made and pursued and avoided.

Objectives and viewpoints of human persons

- **Objectives**:
  - *Theoretical reason (What is)* – Concerned with the theoretical truth and knowledge of human persons of the reasons for the *facts* and *beliefs* of a subject matter.
  - *Practical reason (What ought or ought not to be)* – Concerned with the practical truth and knowledge of human persons of the reasons for action about what ought to be *done* and *made* and pursued and avoided.
- **Viewpoints or attitudes**:
  - *Theoretical reason (What is)* – Third-person perspective, which is the external or theoretical perspective of the ideal observer who is external to the conscience and free-will of the human deliberation and decision of the acting human person. *This is the ideal observer (such as the person in the grandstand at Suncorp Stadium or on a Brisbane City Council bus) for whom the legal practitioner is the spokesperson*.
  - *Practical reason (What ought or ought not to be)* – First-person agential perspective, which is the internal or practical perspective of the practically reasonable acting person or agent who is internal to the conscience and free-will of the human person who is the participant in the arena of human deliberation and decision. *This is the human person who is deliberating and deciding or has deliberated or decided, such as the parties to the contract or the lawmaker*.

Central cases and focal meanings

- **Cases** – *Legal reasoning is concerned with central cases and not peripheral cases*:
  - *Central cases* – States of affairs which are considered significant and important in making human deliberations and decisions from both the third-person perspective and first-person perspective.

    Eg Advocacy is a central case of a barrister, whilst the drafting of contracts is a central case of a solicitor.

    Eg Love of a married couple is a central case of friendship.

    Eg Australia is a central case of constitutional government.
  - *Non-central, peripheral, marginal or borderline cases* – States of affairs which are not considered significant and important.

    Eg Drafting of contracts is a peripheral case of a barrister, whilst advocacy is a peripheral case of a solicitor.

    Eg Business friendship is a peripheral case of friendship.

    Eg Nazi Germany and Stalin's or Putin's Russia are peripheral cases of constitutional government.
- **Meanings, senses, and uses** – *Legal reasoning is concerned with focal meanings and not secondary meanings*:
  - *Focal meanings, senses, and uses* – Meanings of the central cases.
  - *Non-focal, secondary, analogous meanings, senses, or uses* – Under-developed, immature, defective, deformed, diluted, deviant, corrupted or watered down kinds of reality of the central cases.

Legal interpretation

Interpretation, construction and adjudication

- **Legal meaning of words**:
  - *Interpretation* – Legal meaning of words and sentences.
  - *Construction* – Legal effect of the application of the legal meaning to the relevant facts and circumstances.
  - *Adjudication* – Legal judgement (of a legal practitioner) or juridicial Judgment (of the Judiciary) to determine a legal matter.
- **Interpretation**:
  - *Meaning of the human person, not the words* – The legal meaning of words is the meaning of the human person who uses the words (ie parties to the contract or the lawmaker), rather than the meaning of the words themselves.

- *Objective rather than subjective meaning* – Objective meaning is the meaning that the speaker would objectively have been understood to mean, rather than the subjective meaning that the speaker or the listener understood the words to mean.

- **Construction**:
  - *Context* – Facts (ie actions of human persons) and circumstances (ie choices of human persons) to which the legal meaning is to be applied.
  - *Legal documents* – Legal system, including principles, rules and techniques are part of the context.
  - *Human positive law of a polity* – The responsibilities and rights posited by a lawmaker (ie Parliament, Executive and Judiciary) are assumed to be made with integrity (ie with moral legitimacy and not arbitrariness).

Infrastructure agreements are written contracts – Edelman J "The Interpretation of Written Contracts", 2020

- **Subjective intention is wrong reason** – "*The concern is not with the subjective intention of the parties, or the subjective intention of either of them.*"
- **Objective intention is right reason** – "*The 'intention of the parties' is a shorthand description of an objective approach that is concerned with what a reasonable person would understand to have been intended by the words if written by a notional reasonable person in the position of both of the parties.*"
- **Dialogue and dialectic of legal reasoning** – Between the reasonable person external to the contract (ie third person perspective of the ideal observer) and the reasonable person in the position of both of the parties (ie first-person agential perspective of a practically reasonable acting person).
- **Example contract** – A parent promises in writing to their child that they will attend the child's swimming competition but arrives for only the last 10 minutes. Has the parent broken their promise?
- **Context** – The understanding and knowledge of the facts (ie actions of human persons) and circumstances (ie choices of human persons) which are imputed to the reasonable person in the position of both of the parties of the contract.

LGIPs are statutory instruments – High Court's legal method for interpreting statutory provisions

- ***SZTAL v Minister for Immigration and Border Protection*** **[2017] HCA 34 [14] (Kiefel CJ, Nettle J and Gordon J) (underlining added)**:

  > *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

- ***Project Blue Sky Inc v Australian Broadcasting Authority*** **[1998] HCA 28 [69] (McHugh, Gummow, Kirby and Hayne JJ) (underlining added)**:

  > *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos , Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.*

Legal drafting techniques

Elements of a legal responsibility or right

- There are potentially four elements of a responsibility or right:
  - *Legal subject* – The legal person the subject of the responsibility or right.
  - *Legal action* – The action which expresses the responsibility or right.
  - *Legal case* – The circumstances where the responsibility or right applies.
  - *Legal condition* – The conditions on performance of which the responsibility or right operates.

For example:	
Legal subject:	The [applicant or developer or owner]
Legal action:	Must pay all fees, rates, interest and other charges levied on the land
Legal case:	Where an application has been made to the local government
Legal condition:	The fees, rates, interest and other charges levied on the land have not been paid

- A responsibility or right must include the first and second elements. The third and fourth elements are not always present.
- Often all four elements are found in one legal sentence. This can make the legal sentence long and complex, particularly where there are many legal conditions.
- Traditionally, legal conditions are placed first in a sentence. This is the "*if or where…then*" structure. This is fine if there is only one condition. However, if there are many legal conditions then this creates a problem for the reader. They must keep all these legal conditions in mind before they reach what the responsibility or right is really about. This can be avoided by placing the legal conditions after the legal action.

For example:

Instead of:

If fees, rates, interest and other charges levied on the land remain unpaid and the legal subject makes an application for the release of a plan of subdivision, the legal subject must pay the fees, rates, interest and other charges levied on the land.

Write:

The legal subject must pay the fees, rates, interest and other charges levied on the land if:

(a) the legal subject makes an application for the release of a plan of subdivision; and

(b) the fees, rates, interest and other charges remain unpaid.

Legal subject

- The *legal subject* of a responsibility or right is the legal person. This is to ensure that the identity of the person who is to take the legal action is never in doubt.
- An example legal statement provides as follows:

Example:

"All fees, rates, interest and other charges levied on the land must be paid in accordance with the rate at the time of payment prior to release of the plan of subdivision".

- No legal subject is specified in the example legal statement. It is unclear which of the following persons is to take the legal action (ie pay the money):
  - Applicant.
  - Developer (Proponent).
  - Owner.
- The example legal statement could be rewritten as follows:

Example amended:

"All fees, rates, interest and other charges levied on the land must be paid by the *legal subject* in accordance with the rate at the time of payment prior to release of the plan of subdivision".

Legal action

- The *legal action* specifies what the legal subject is commanded to do (ie a responsibility) or enabled to do (ie a right).
- The legal action must contain a predicate that satisfies as many of the following guidelines as possible:
  - It contains a verb – ie the action to be taken.
  - The verb is finite – ie the action is to be limited in time.
  - The verb is expressed in the active voice as opposed to the passive voice so as not to obscure the legal subject which is identified to take the legal action. For example:

> **For example:**
>
> "The money must be paid by the legal subject" (passive).
>
> "The legal subject must pay the money" (active).

  - It is to contain an object as often as possible. For example, money is the object used in the active/passive voice examples used above.
  - It is to distinguish whether the legal action is mandatory or discretionary.

> **For example:**
>
> If mandatory, the words "must" or "is to" ought to be used.
>
> If discretionary, the word "may" ought to be used.

- The example legal statement could therefore be rewritten as follows:

> **Example amended:**
>
> "The legal subject must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment of all fees, rates, interest and other charges levied on the land".

- The elements of the example legal statement as rewritten are as follows:
  - Mandatory legal action – "must".
  - Legal subject – "The legal subject".
  - Legal action – "must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land".
- The legal action in the example legal statement as rewritten comprises:
  - A verb – "pay".
  - A finite verb – "prior to the release of the plan of subdivision".
  - An active verb – "The legal subject must".
  - An object – "fees, rates, interest and other charges levied on the land".

Legal case

- A responsibility or right is to specify, if appropriate, the circumstances in respect of which or the occasion on which the responsibility or right is to take effect. This is generally known as the *legal case*.
- The legal case is generally introduced by the word "*where*" for those circumstances which may be repeated, and the words "*if*" or "*when*" for those circumstances which will happen only once.
- The example legal statement does not specify the where or when. In the example, the legal statement only takes effect where an application has been made to the local government for the release of the plan of subdivision. However, this has not been stated although it is implied.

- As the example legal statement is currently written, a person could one day after receiving the development approval pay the fees, rates, interest and other charges that were outstanding on that day and they would have satisfied the legal statement even if other fees, rates, interest and other charges became payable after the date of the payment.
- The example legal statement could therefore be rewritten to include the legal case as follows:

> **Example amended:**
>
> "The legal subject must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land when an application has been made to the local government for the release of the plan of subdivision".

Legal condition

- A responsibility or right is to specify, if appropriate, what is to be done for the responsibility or right to become operative. This is generally known as the *legal condition*.
- A legal condition is normally introduced by the words "*if*" or "*where*". However, where there is both a legal case and a legal condition limiting the application of the legal action, the words "*if, where or when*" may be used interchangeably.
- The example legal statement does not specify the legal condition that must be satisfied before it operates. In the example, the responsibility and right will operate where at the date of an application to the local government for the release of a plan of subdivision there are outstanding fees, rates, interest and other charges levied on the land.
- As the example legal statement is currently written, the local government could call on a person to pay the fees, rates, interest and other charges levied on the land notwithstanding that they have already been paid or have been levied but not yet delivered to the person.
- The example legal statement could therefore be rewritten to include the legal condition as follows:

> **Example condition amended:**
>
> "The legal subject must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land where:
>
> (a) an application has been made to the local government for the release of the plan of subdivision; and
>
> (b) the fees, rates, interest and other charges levied on the land have not been paid."

Order of elements of a legal responsibility or right

- There is no set rule as to how the elements of a responsibility or right ought to be ordered. However, it is recommended that wherever possible the responsibility or right is structured as follows:
  - Legal subject.
  - Legal action.
  - Legal case.
  - Legal condition.

Example legal statement rewritten

- If the example legal statement is structured in accordance with the suggested order it may be rewritten as follows:

> **Example condition rewritten:**
>
> "The legal subject must pay all fees, rates, interest and other charges levied on the land where:
>
> (a) an application has been made to the local government for the release of the plan of subdivision; and
>
> (b) the fees, rates, interest or other charges have not been paid."

- The parts of the example legal statement would be structured as follows:
  - Legal subject – "The legal subject".
  - Legal action – "must pay all fees, rates, interest and other charges levied on the land".

    It should be noted that the legal action:
    - > Is in the active voice and is mandatory – "must".
    - > Comprises a verb – "pay".
    - > Comprises an object – "all fees, rates, interest and other charges levied on the land".
  - Legal case – "an application has been made to the local government for the release of the plan of subdivision".
  - Legal condition – "the fees, rates, interest or other charges have not been paid".
- It should be noted that the word "*where*" was chosen to introduce the legal case and the legal condition as more than one plan of subdivision may be lodged with the local government especially where the local government may require changes to the plan of subdivision as submitted.

Structuring of an infrastructure agreement

Making and interpreting an infrastructure agreement – Different perspectives (or attitudes)

Making an infrastructure agreement (Top down)		Interpreting an infrastructure agreement (Bottom up)
Prudential thinking of the human mind	Deliberations and decisions of the human will	Legal interpretation, construction and adjudication
Objects – What for	*Deliberations* – Practical understanding and knowledge of the objects, and conscientious deliberative reflections on the ways to be chosen to pursue and realise the ends by the means	*Motives or purposes or goals* – Deliberations of the objects (the What for) which have been assented to
Ends – Why	*Judgements* – Decisions about the ends which are intended to be the point of the means of a human person's actions	*Intentions* – Judgements of the ends (the Why) which have been formed and willed, but not unintended acts or side-effects
Ways (and will) – How, who, where and when	*Choices* – Decisions about the ways and will to adopt the human opportunities or proposals for the possible courses of action which are to be chosen for the means to the ends	*Circumstances or context* – Choices of the means (the How, Who, Where, and When) for the ends which have been intended
Means – What	*Actions* – Decisions about the technical means and the human means (or human actions) which are to be performed	*Facts or particulars* – Actions of the human means (the What) which have been caused to be done, including any unintended acts or side-effects

Typical structure

- Typical structure of an infrastructure agreement is as follows:
  - *Part 1* – Preliminary, which states the following:
    - > *Parties* – The parties to the document.
    - > *Recitals* – The purpose of the document.
  - *Part 2* – Terms agreed by the parties, including:
    - > *Document name* – The name by which the document may be referred.
    - > *Deed* – That the document is a deed, which is an essential requirement for the document to be binding on the parties.
    - > *Date* – The date on which the document is made.
    - > *Critical terms* – The critical terms of the document.
    - > *Clauses* – Standard clauses.
    - > *Schedules* – Schedules detailing the specific infrastructure responsibilities negotiated by the parties.
  - *Part 3* – Execution by the parties, including the execution clause of each party, to be signed by the relevant authorised person.

Key terms and clauses

Critical terms

- The critical terms of an infrastructure agreement typically include clauses which state the following:
  - *Interpretation* – The defined terms used in the document and matters relating to the interpretation of the infrastructure agreement. Put the defined terms at the beginning, and not at the end.
  - *Nature of the infrastructure agreement* – The nature of the infrastructure agreement under the *Planning Act 2016* and the application of the infrastructure agreement to the following (consistent with the requirements of the *Planning Act 2016*):
    - a proponent for the land the subject of the document (generally, a developer, an applicant or an owner);
    - the owner of the land the subject of the document;
    - an application for an approval for the development land;
    - an approval that may be imposed for the development land;
    - a planning instrument;
    - an instrument for an infrastructure contribution (such as an infrastructure charges notice).
  - *Operation of the infrastructure agreement* – The commencement and termination of the document.
  - *Development entitlements* – How the development entitlements are to be determined if the document relates to an application for a development approval that has not yet been decided or a local planning instrument which has not yet been made by the local government.
  - *Development responsibilities* – The requirements for carrying out the development responsibilities specified in the infrastructure agreement.
  - *Dealings in respect of the land* – How a development responsibility applies if the ownership of the land changes.
  - *Dealings in respect of the infrastructure agreement* – How a development responsibility applies if an interest, right or obligation under the document is the subject of a dealing, such as an assignment or transfer of the interest, right or obligation.

Standard clauses

- There are a number of standard clauses that typically appear in an infrastructure agreement. However, these clauses will not necessarily apply in all circumstances, and must be reviewed for the specific circumstances relating to the infrastructure agreement.
- In order to prepare an infrastructure agreement that offers an absolute degree of certainty, it is essential to understand the operation of the principles embodied in the standard clauses.
- The standard clauses of an infrastructure agreement will vary with the complexity of the transaction, but typically will include clauses which relate to the following:
  - *Security* – The type and form of a security, in what circumstances a security may be reduced, adjustments to a security for indexation, when a security is released, and who keeps the interest earned on a security.
  - *Default of a development responsibility* – The consequences (ie responsibilities) and remedies (ie rights) if a party fails to perform and fulfil a development responsibility.
  - *Right of access* – Rights of access for the respective parties in carrying out, inspecting, and monitoring a development responsibility.
  - *Dispute resolution generally* – The mechanism for resolving a dispute under the infrastructure agreement by way of alternative dispute resolution, such as a mediation or expert adjudication.
  - *Force majeure* – How an occurrence of force majeure (being an event outside of the reasonable control of the parties, such as an act of God, which could not have been prevented by a party) affects a responsibility of a party and the corresponding rights of another party.
  - *Time* – Whether time is of the essence in the infrastructure agreement.
  - *Further action* – What the parties must do to give effect to or complete the infrastructure agreement.
  - *Severance* – The effect on the document where a clause is held by a Court to be invalid, illegal or unenforceable.
  - *Notice* – The form of a notice given under the infrastructure agreement and how the notice must be given.

- *Governing law and jurisdiction* – The law which governs the infrastructure agreement and the jurisdiction of the Courts to hear a matter in the infrastructure agreement.
- *Payment* – Payment of identified and unidentified costs to a party including taxes, as a result of a matter in the infrastructure agreement.
- *Indexation* – When indexation will apply to an amount in the infrastructure agreement and how indexation will be calculated. Choice of CPI or PPI or both.
- *GST* – The application of GST to a payment made under the infrastructure agreement.

Schedules

- Typically, an infrastructure agreement includes the following schedules:
  - Reference schedule.
  - Special conditions schedule.
  - Development entitlements schedule.
  - Infrastructure contributions schedule.
  - Drawings schedule.

Reference schedule and Special conditions schedule

- The *reference schedule* contains the following relevant details for the infrastructure agreement:
  - Short title of the infrastructure agreement.
  - Parties to the infrastructure agreement.
  - Development Land details.
  - Owner details for the Development Land.
  - Security details.
  - Identified payment of costs.
  - Indexation details for relevant matters in the infrastructure agreement.
- The *special conditions schedule* includes the additional conditions that are special to the infrastructure agreement.

Development entitlements schedule

- The *development entitlements schedule* sets out the relevant instruments giving rise to the entitlements for the development of the development land, and includes a description of the following:
  - *Application for an approval* – A prescribed application, including any prescribed approval conditions and prescribed infrastructure charges notice.
  - *Existing approval* – An existing approval, existing infrastructure charges notice and prescribed infrastructure charges notice.
- A prescribed application may be specified in an infrastructure agreement where a development application has been made for the development of the premises but the infrastructure agreement will be entered into before the approval for the development application is given. In these circumstances, the infrastructure agreement will typically be subject to the development approval for the prescribed application taking effect, and may include a copy of the conditions anticipated to be attached to the development approval to be given by the local government.
- The infrastructure agreement may also be based upon the development entitlements under a proposed planning instrument, in which case the proposed planning instrument would be included in the development entitlements schedule.

Infrastructure contributions schedule and Drawings schedule

- The *infrastructure contributions schedule* generally specifies the following:
  - *Infrastructure contribution* – The infrastructure contributions being land, work or financial contributions.
  - *Specification* – The specification and timing of the infrastructure contributions.
  - *Responsible party* – The party responsible for providing the infrastructure contributions.
  - *Other requirements* – Any other requirements for the infrastructure contribution.
- The *drawings schedule* sets out any relevant drawings referred to in the infrastructure agreement, particularly in the specification of an infrastructure contribution in the infrastructure contributions schedule.

Execution

- An infrastructure agreement must include an execution clause for the parties to complete.
- The following persons may execute an infrastructure agreement on behalf of a local government (see section 236 of the *Local Government Act 2009*):
  - the head of the local government (ie Mayor, Interim Administrator or CEO if neither);
  - a delegate of the local government;
  - a councillor or local government employee who is authorised by the head of the local government, in writing, to sign documents.
- A company must execute the infrastructure agreement in accordance with the *Corporations Act 2001*.

To produce out of raw facts a theory of a case is prophecy. To produce it persuasively, and to get it over, is prophecy fulfilled. Singers of songs and dreamers of plays – though they be lawyers – build a house no wind blows over.

Karl N. Llewellyn
American Jurisprudential Scholar

This paper was presented at the Queensland Environmental Law Association Infrastructure Seminar Series, Seminar 2 – Infrastructure Planning and Agreements, 3 August 2022.

Automotive business loses traction after Planning and Environment Court orders the cessation of the unlawful use

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moreton Bay Regional Council v Giffin & Anor* [2022] QPEC 20 heard before Long SC DCJ

August 2022

In brief

The case of *Moreton Bay Regional Council v Giffin & Anor* [2022] QPEC 20 concerned an application to the Planning and Environment Court of Queensland (**Court**) by the Moreton Bay Regional Council (**Council**) under section 180 (Enforcement orders) of the *Planning Act 2016* (Qld) (**Planning Act**) seeking enforcement orders to refrain the Respondents from committing, and require the Respondents to remedy, a development offence on land located in Burpengary, Queensland (**Subject Land**).

The development offence alleged by the Council was an unlawful use of premises (see section 165 (Unlawful use of premises) of the Planning Act) for the reasons that the use of the Subject Land for an automotive spare parts and repair business (**Business**) did not have, and required, a development approval.

The Court held that since at least December 2010 the Respondents were on notice that the Business activities being carried out on the Subject Land were unlawful and had therefore been provided with sufficient time to remedy the unlawful use without Court intervention (at [8]).

The Court was satisfied from the uncontested evidence before it that a development offence had been and was continuing to be committed. The discretionary considerations, such as the role of a local government in achieving good order and governance of its locality, public interest and concern, impact of the use of the Subject Land, and the time that the Respondents had to remedy the unlawful use, weighed in favour of granting the enforcement orders sought by the Council (see [18] and [20]).

The Court relevantly ordered that the Respondents cease the unlawful use of the Subject Land, remove items relating to the Business from the Subject Land, and return the Subject Land to, as close as is practicable, its state before commencing the unlawful use.

Background

The evidence before the Court in respect of the Business was as follows (see [9]):

- The Respondents jointly acquired in late-2004, and owned, the Subject Land.
- The First Respondent around late-2004 to early-2005 moved to the Subject Land the Business, which was previously being conducted on other land, and was certainly operating on the Subject Land by September 2009.
- From July 2005 through to 2021 the Council had received complaints from local residents in respect of the Business.
- The Council issued between December 2010 and January 2015 a number of show cause notices to the Respondents in respect of the use of the Business on the Subject Land. The notices identified that the Council considered the use to be assessable development under its planning scheme which required a development approval.
- The Council issued between April 2011 to September 2013 a number of enforcement notices, which required the Respondents to stop committing and remedy the development offence being committed by the unlawful use of the Subject Land.
- Aerial imagery indicated that the intensity of the Business had increased overtime, and inspections of the Subject Land in March 2022 indicated that a sign for the Business existed at the front of the Subject Land, and that there was on the Subject Land 50 or more vehicles and a number of vehicle parts in various states of repair and disrepair, equipment, including a truck and forklift, and a shipping container.

The Second Respondent stopped being involved in the day-to-day operations of the Business in February 2011, and did not oppose the orders sought by the Council.

The First Respondent did not provide evidence to the Court, but opposed the orders sought by the Council.

Principles relevant to the Court's discretion

The Court held that its discretion to exercise the powers under section 180 and section 181 (P&E Court's powers about enforcement orders) of the Planning Act arises upon the satisfaction that a development offence has or will be committed, and considered the following principles established by the Courts in respect of the characterisation of the use of land (see [14] to [15]):

- "*The appropriate question is to ask what, according to ordinary terminology, is the appropriate designation of the purpose best served by the use of the premises …*".
- To determine the appropriate genus which describes the activities in question, a use must be categorised under a planning scheme in a practical and common sense way.
- Where there are two or more applicable defined uses, an approach which applies the principles of statutory construction is required, including in an approach to find the "*best fit*".
- Where there is conflict in a planning scheme, "*… it must be alleviated as far as possible by adjustments which best give effect to the purpose and language of the provisions, while maintaining the unity of all the statutory provisions*".

Use of the Subject Land for the Business was unlawful and constituted a development offence

In this instance, it was clear based upon the town planning evidence before the Court that the use of the Subject Land for the Business under the relevant planning scheme was currently and historically assessable development. It was therefore not necessary for the Court to categorise the use of the Subject Land in a detailed way to determine that it was unlawful (see [16] to [17]).

The Court was satisfied to the necessary extent that a development offence had been and was being committed on the Subject Land (at [18]).

The Court held, in the context of "*… the general proposition that planning laws should be enforced and offending conduct resolved, with a particular importance on sending a strong message that the contravention of planning laws will not be tolerated*" and being guided by the principles helpfully summarised in *Glastonbury & Anor v Townsville City Council & Ors* [2011] QPEC 128; [2012] 2 QPELR 216 at [131], that the following discretionary matters weighed in favour of the exercise of its discretion to grant the enforcement orders sought by the Council (at [20]):

- There had been public concern in respect of the Business raised and the Council is a publicly elected body whose interests in the proceeding encompass the good order and good governance of the locality.
- Although there was no technical environmental evidence before the Court, the use of the Subject Land for the Business is industrial in nature and without a development approval and possible conditions may be causing or may cause environmental impacts.
- The Respondents have had more than 10 years, on account of the Council not rushing to bring the proceedings before the Court, to seek to regularise the unlawful use and chose not to.

Conclusion

The Court relevantly ordered that the Respondents cease, and remove the Business items used in association with, the unlawful use of the Subject Land, and return the Subject Land, as close as is practicable, to its state before commencing the unlawful use.

Planning and Environment Court of Queensland approves demolition of pre-1947 dwelling, finding that its "traditional building character is weak"

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hunter Family Capital Pty Ltd ACN 604 208 175 v Brisbane City Council* [2022] QPEC 14 heard before McDonnell DCJ

August 2022

In brief

The case of *Hunter Family Capital Pty Ltd ACN 604 208 175 v Brisbane City Council* [2022] QPEC 14 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Hunter Family Capital Pty Ltd (**Applicant**) against the decision of the Brisbane City Council (**Council**) to refuse a development application to demolish a pre-1947 dwelling located in Dickson Terrace, Hamilton.

The following issues were considered by the Court in deciding the appeal:

- Whether the proposed development complies with Acceptable Outcome 5 (**AO5**) of the Traditional Building Character (Demolition) Overlay Code (**Building Character Overlay Code**) in the *Brisbane City Plan 2014* (Version 20).
- Whether the proposed development complies with Performance Outcome 5 (**PO5**) of the Building Character Overlay Code.
- Whether, in the event the development does not comply with AO5 or PO5 of the Building Character Overlay Code, the proposed development should nonetheless be approved in the exercise of the Court's discretion.

In order to determine whether the proposed development complies with AO5 and PO5 of the Building Character Overlay Code, the Court considered the vegetative screening that obscured views of the property, whether the house had traditional building character, and what contribution the house made to the traditional building character of Dickson Terrace. Ultimately, the Court set aside the Council's decision and approved the development application subject to conditions.

Court finds that the development application is to be assessed assuming there is no vegetative screening

The Applicant submitted that the views of the house were largely obscured by vegetation (at [26]), but the Council contended that the vegetation should not be accepted to significantly diminish the visual contribution of the house to the traditional building character of the street (at [27]). The Court accepted the Council's position, and assumed that there was no vegetative screening in front of the house in determining whether the proposed development complies with AO5 and PO5 of the Building Character Overlay Code.

Court finds that the house does not have traditional building character

The Building Character Overlay Code states that traditional building character is found in a combination of one or more of the following elements:

- traditional building form and roof styles;
- traditional elements, detailing and materials;
- traditional scale;
- traditional setting.

The Council's heritage architect expert opined that while the house was not a "*timber and tin*" house, it still had the character of a "*1930's 'modern style' interwar traditional character house*" (at [39]). The Council's heritage architect expert gave evidence that the relevant features of the house included "*… asymmetrical geometric massing with horizontal emphasis, simple geometric shapes and material, corner windows, horizontal cantilevered window hoods and stairs expressed by vertical windows*" (at [39]). These features do not appear in the Building Character Overlay Code or the *Planning Regulation 2017* (Qld).

The Applicant's heritage architect expert opined that the specified features of the house did not align with traditional building character, for the reason that many of the house's features would not be expected in a house until the 1950s (at [43]).

The Court found that "*[w]hile the house exhibits some examples of traditional building character, they are weak*", and thus concluded that if the house did display any traditional building character, it was weak or limited (at [50]).

Court decides that the proposed development complies with both PO5 and AO5 of the Building Character Overlay Code

AO5 of the Building Character Overlay Code states that demolition is permitted where it will not result in the loss of traditional building character (see paragraph (c)) or is in a section of the street within the Building Character Overlay Code that has no traditional character (see paragraph (d)).

The Court found that the Applicant had demonstrated compliance with AO5(c) due to the lack of traditional building character of the house, as well as the lack of cohesion and buildings of similar character and design along Dickson Terrace. The Court also found compliance with AO5(d) due to the dominant nature of the post-1946 houses along Dickson Terrace, which overwhelm the contribution that any pre-1947 dwellings make to the traditional character of the street.

PO5 of the Building Character Overlay Code allows for demolition where a pre-1947 dwelling does not represent traditional building character (see paragraph (a)) or does not contribute to the traditional building character of the part of the street within the Building Character Overlay Code (see paragraph (c)). The Court found that the house demonstrates compliance with PO5, reiterating that "*… the house, at best, exhibits limited traditional building character …*", and does not make a meaningful contribution to Dickson Terrace (at [78]).

Court finds that even in the event that the house does not meet the criterion in the Building Character Overlay Code, it would still exercise its discretion to approve the proposed development

The Court considered the purpose of the Building Character Overlay, being to protect pre-1947 dwellings. However, due to the limited traditional building character of the house, the Court found that in the event that the house does not meet the criterion in the Building Character Overlay Code, the Court would still exercise its discretion to approve the proposed development (at [85]).

Conclusion

The Court set aside the Council's decision and approved the development application subject to conditions. The appeal was adjourned for the parties to agree upon appropriate conditions.

"Broad-brush" approach to adopted charges for working out the cost of extra demand placed on trunk infrastructure networks upheld by the Planning and Environment Court of Queensland

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Allen-Co Holdings Pty Ltd v Gympie Regional Council* [2021] QPEC 64 heard before Rackemann DCJ

August 2022

In brief

The case of *Allen-Co Holdings Pty Ltd v Gympie Regional Council* [2021] QPEC 64 concerned an appeal to be the Planning and Environment Court of Queensland (**Court**) against an infrastructure charges notice (**ICN**) given by the Gympie Regional Council (**Council**) in respect of a development permit for reconfiguring a lot to create 61 lots on land located at Widgee, Queensland (**Development Approval**).

The appeal was under section 229 (Appeal to the tribunal or P&E Court) and schedule 1 (Appeals), Table 1 (Appeals to the P&E Court and, for certain matters, to a tribunal), item 4 (Infrastructure charges notices) of the *Planning Act 2016* (Qld) (**Planning Act**) on the grounds that the ICN involved an error relating to the application of the relevant adopted charge and the working out of extra demand for the purpose of section 120 (Limitation of levied charge) of the Planning Act.

It was common ground between the parties that the Council had erroneously applied an adopted charge of $15,839 per lot rather than the adopted charge of $13,330 per lot which applied to reconfiguring a lot under the Council's charges resolution (**Charges Resolution**).

The Applicant submitted that the adopted charge of $13,330 per lot was only a starting point, because it was a "*global charge*" for all trunk infrastructure networks and therefore a discount ought to be applied because the proposed development would generate extra demand on only the trunk transport and parks infrastructure networks (see [9], [14], and [19]).

The Court held that although "*[i]t is arguably, the broadest of broad brushes*", "*[t]he quantum of the charge is the same irrespective of the type or number of networks upon which the extra demand will be generated*" (at [23]).

The Court also held that an appeal about the ICN can not be about the adopted charge (at [24]). Therefore the Applicant's submission was not within the scope of what was permitted to be appealed against under the Planning Act.

The Court allowed the appeal and replaced the ICN with an ICN that was calculated using the correct adopted charge of $13,330 per lot.

Background

The ICN was given by the Council in respect of the Development Approval because the proposed development would generate extra demand on the trunk infrastructure transport network and parks network.

The Council conceded that there was an error in the ICN in that the Council had applied the incorrect adopted charge.

The Charges Resolution relevantly sets different adopted charges for development in different parts of the local government area. Section 3.1 and Table 2 of the Charges Resolution are relevant to reconfiguring a lot and state that the adopted infrastructure charge is $13,330 per lot.

The Court observed that the Charges Resolution adopted different charges and dealt with different forms of development in different ways. For example, a material change of use for non-residential development sets out a rate per square metre of gross floor area for each trunk infrastructure network which facilitates a network-by-network calculation of the charge, whereas other parts of the Charges Resolution do not use the same method (see [15] to [18]).

Court rejects Applicant's submission about a discount to the adopted charge

The Applicant submitted that the adopted charge for the ICN ought to be discounted because the proposed development would not generate extra demand on the trunk infrastructure stormwater, water supply, and sewerage networks, and therefore ought not be subject to the entirety of the adopted charge (see [14], [19], and [22]). The Applicant argued that adopting a "*global charge*" takes meaning away from section 120(1) of the Planning Act, and is inconsistent with the definitions of "*trunk infrastructure*" and "*development infrastructure*" which specify different components of trunk infrastructure (at [24]).

The Court rejected the Applicant's submission for the following reasons:

- The Charges Resolution has a clear intent to adopt different charges for different development and applies different discounts for different development (at [20]).
- The apportionment table in section 3.2 of the Charges Resolution relied upon by the Applicant does not quantify a discount and is not contained within section 3.1, which is where the adopted charge for reconfiguring a lot is contained (see [21] and [23]).
- The Charges Resolution can be read harmoniously with section 120 of the Planning Act without adopting the "*highly constrained construction*" argued by the Applicant (at [22]), and, in any event, section 120 of the Planning Act does not require the Charges Resolution to apply a discount where development only generates extra demand on one trunk infrastructure network (at [25]).
- The Applicant's submission is "*… something of a veiled attack on the adopted charge under the guise of a submission on the proper interpretation of the charges resolution*", and an appeal cannot be about the adopted charge (at [24]).
- The adopted charge is consistent with the purpose of the Charges Resolution to fund a part of the establishment cost for trunk infrastructure and the application of a single charge does not mean the charge is for something other than the extra demand that the particular development will generate on trunk infrastructure (see [26] to [27]).

Conclusion

The Court held that the ICN ought to be replaced with an ICN that levies a charge using the adopted charge of $13,330 per lot consistent with the Charges Resolution.

Need for a new local centre outweighs requirements that development be "small scale" and service the "local community" in a remitted planning appeal in the Planning and Environment Court of Queensland

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fabcot Pty Ltd v Cairns Regional Council & Ors (No. 3)* [2022] QPEC 12 heard before Everson DCJ

August 2022

In brief

The case of *Fabcot Pty Ltd v Cairns Regional Council & Ors (No. 3)* [2022] QPEC 12 (**Fifth Decision**) concerned a rehearing in the Planning and Environment Court of Queensland (**P&E Court**) in respect of a development permit (**Development Approval**) granted by the P&E Court in the case of *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 17 (**First Decision**) for land located in Trinity Beach, Queensland.

The rehearing was required as a result of a successful appeal to the Queensland Court of Appeal (**Court of Appeal**) in the case of *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95; (2022) QPELR 309 (**Second Decision**) by two Co-Respondents by Election (**Commercial Co-Respondents**), who each had a commercial interest that may be adversely affected by the Development Approval.

The Court of Appeal was persuaded by the Commercial Co-Respondents' submission that "*local residents*" and "*local community*" in the Low-Medium Density Residential Zone Code (**Code**) of the *CairnsPlan 2016* version 1.2 (**Planning Scheme**) ought to be construed having regard to the purpose of the Code to provide for "*small scale services and facilities that cater for local residents*" (see [115] of the Fifth Decision).

The Court of Appeal in the Second Decision relevantly remitted the matter for the P&E Court to reconsider "*… the question of non-compliance with the requirements of a 'local community' in the [Code], which require non-residential uses to serve the local community*" (see [26] of the Fifth Decision).

The Court of Appeal held that what is meant by the term "*local*" covers something more than a part of a suburb up to something less than the primary trade area (**PTA**) identified by the economic need experts in the First Decision. However, where "*local*" falls on that spectrum is not clear (see [43] to [46] of the Fifth Decision).

The P&E Court in making the Fifth Decision heard further evidence from the parties and held, as was also found in the First Decision, that contrary to the Code, the proposed development is a local centre that is not "*small scale*" and is inconsistent with the concept of serving the "*local community*" (see [11], [46], and [51] of the Fifth Decision).

However, the following factors supporting approval of the proposed development far outweighed the factors supporting refusal and the P&E Court again granted the Development Approval subject to lawful conditions (at [53] of the Fifth Decision):

- The significant economic, community, and planning need for the supermarket component of the proposed development, which need had increased since the First Decision, and the sufficient need for the child care centre, medical centre, food and drink outlet, and service station components of the proposed development (see [31], [40], and [51]).
- The lack of impact on the hierarchy of centres in that despite the loss of some foot traffic "*… the Smithfield major centre will still represent the focus of employment and economic activity … and remain the dominant centre …*" (at [32]).
- The location is ideal having regard to fundamental planning principles in that it is well-located and physically suitable for the proposed development and has excellent access to the Captain Cook Highway, as well as walking and cycling access which is an advantage to local residents who can access the site without using the Highway (at [32]).
- Other relevant matters, including the efficiencies of co-locating the uses of the proposed development and the need which "*… justifies the creation of a new centre on the site as contemplated in the Strategic Framework of the Planning Scheme*" (at [34] and [51]).

- The other full-line supermarket proposed to be developed by one of the Commercial Co-Respondents "*… is not as well located to serve the pressing need identified within the PTA*" and the proposed development is in a far superior and central location to service that need (see [31] and [52]).

Litigation history

The following proceedings comprise the relevant litigation history in respect of the Development Approval that ultimately led to the Fifth Decision:

- *First Decision* – The First Decision, which is summarised in our June 2020 Article, concerned the following four appeals in the P&E Court in respect of which the P&E Court allowed the appeal by the Applicant subject to the imposition of conditions and dismissed the other three appeals:
  - *Applicant's appeal* – The Applicant relevantly appealed against the decision of the Cairns Regional Council (**Council**) to grant a preliminary approval for the shopping centre, health care services, and reconfiguring a lot components of the proposed development and sought a development permit for those components.
  - *Commercial Co-Respondents' appeals* – The Commercial Co-Respondents sought an order that the proposed development be refused.
  - *Other appeals* – A community association located in the Cairns Beaches area and another local company sought orders that the proposed development be refused. However, the community association did not take an active role in the proceeding and the local company discontinued its appeal and did not participate further.
- *Second Decision* – The Commercial Co-Respondents were both granted leave to appeal to the Court of Appeal, which remitted the matter back to the P&E Court because of an error in the construction of the provisions of the Code (**Remitted Issue**) as was summarised in our October 2021 Article.
- *Third Decision* – Further limited evidence that updated the evidence already considered in the First Decision was permitted by the P&E Court to be adduced in respect of the Remitted Issue in the case of *Fabcot v Cairns Regional Council (No. 2)* [2021] QPEC 40 (see [20] of the Third Decision).
- *Fourth Decision* – The Commercial Co-Respondents sought leave to appeal the Third Decision, which the Court of Appeal refused in the case of *Trinity Park Investments Pty Ltd v Fabcot & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 276.

Factual background

The Subject Land is 4.092 hectares with three street-frontages, one of which is to the Captain Cook Highway. The Subject Land is relevantly located approximately four kilometres from the Smithfield Shopping Centre, which is a major centre under the Strategic Framework of the Planning Scheme (**Strategic Framework**), and the Clifton Village Shopping Centre (see [15] and [20] of the Fifth Decision).

The proposed development is for a "*local centre*" under the Strategic Framework which comprises a shopping centre, including a full-line supermarket and nine small retail tenancies, a medical centre, a child care centre, a service station, operational work for an advertising device, reconfiguring a lot, and an access easement (see [2] of the Fifth Decision).

The Subject Land is within the Low-Medium Density Residential Zone and the Smithfield Local Plan under the Planning Scheme, but is relevantly not within a Local Plan Precinct. In particular, the Subject Land is not within Sub-precinct 3b which is identified for future retail and commercial development and in which precinct a Commercial Co-Respondent has a code assessable development application for a shopping centre (**Competitor Development**) on land approximately two kilometres from the Subject Land (see [18] to [19] of the Fifth Decision).

The Strategic Framework prevails over all other components of the Planning Scheme to the extent of any inconsistency (see [27] of the Fifth Decision and section 5.4(1)(d) of the Planning Scheme). In particular, section 3.3.2.1 of the Strategic Framework contemplates the establishment of a new centre in circumstances where the new centre does not compromise the existing and ongoing hierarchy of centres, there is a need for the new centre, the new centre is of a scale required to service the surrounding catchment, is highly accessible and not located on the periphery, and does not compromise the character and amenity of adjoining premises and surrounding areas (see [28] of the Fifth Decision).

Remitted Issue considered and Development Approval again granted

The P&E Court held that the proposed development was a "*local centre*" under the Strategic Framework, which in the context of the Remitted Issue was not "*small scale*" and would serve the PTA that was beyond serving the "*local community*" as required by the Code.

The P&E Court was satisfied that, despite the non-compliance with the Code, the significant need for the proposed development and the "*… gap in the provision of a full-line supermarket to provide for the need, justifies the creation of a new centre on the [Subject Land] as contemplated in the Strategic framework …*" (at [34] of the Fifth Decision).

The P&E Court also held that other relevant matters, including the location of and access to the proposed development, the co-location of the proposed uses, the convenience to local residents, the lack of impact on the Smithfield Shopping Centre, which is a major centre under the Strategic Framework, and the inability of the Competitor Development to service the need of the PTA, supported the Development Approval.

Conclusion

The P&E Court allowed the appeal and granted the Development Approval subject to the imposition of lawful conditions.

Planning and Environment Court of Queensland dismisses appeal against the refusal of a hard rock quarry and concrete batching plant because of unacceptable noise impacts

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Edith Pastoral Company Pty Ltd v Somerset Regional Council & Ors* [2021] QPEC 52 heard before Williamson KC DCJ

August 2022

In brief

The case of *Edith Pastoral Company Pty Ltd v Somerset Regional Council & Ors* [2021] QPEC 52 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Somerset Regional Council (**Council**) to refuse a development application for a material change of use for an Extractive Industry (Hard Rock Quarry), Concrete Batching Plant and Environmentally Relevant Activity 16, Extractive and Screening Activities (**Development Application**).

The Development Application involved the use of land located at Gregor's Creek (**Land**) for a hard rock quarry extracting up to 10,000 tonnes per annum and a concrete batching plant (**Proposed Development**).

The Court considered in particular the following key questions:

- Whether the Proposed Development is a single planning unit?
- Whether the Proposed Development would result in unacceptable noise impacts?
- Whether the Proposed Development complies with the *Esk Shire Planning Scheme 2005* (**2005 Planning Scheme**), being the planning scheme in effect at the time the Development Application was made, and what weight, if any, ought to be given to its successor planning scheme, the *Somerset Region Planning Scheme* (**2016 Planning Scheme**)?
- Whether there is a town planning need for the Proposed Development?

The Court dismissed the appeal and affirmed the Council's decision after it found that the Land was not suitable for an extractive industry use because of unacceptable noise impacts that cannot be appropriately conditioned, and that the Proposed Development is not necessary to fulfil the local demand for hard rock quarry products.

Court finds that the Proposed Development was always comprised of two planning units

The Development Application sought approval for two planning units defined in the 2005 Planning Scheme as an extractive industry (quarry) and medium impact industry (concrete batching plant). Under the *Sustainable Planning Act 2009* (Qld), the two uses were not "*incidental to and necessarily associated with*" each other (see schedule 3). However, while the Development Application was being assessed by the Council, the *Sustainable Planning Act 2009* (Qld) was repealed and the *Planning Act 2016* (Qld) (**Planning Act**) took effect. Schedule 2 of the Planning Act defines "*use*" to include "*an ancillary use of premises*".

The Applicant argued that the Proposed Development should be assessed as a single planning unit because the concrete batching plant is an ancillary use to the quarry. If the Proposed Development is assessed as a single planning unit, then the concrete batching plant would cease to be regarded as an inconsistent use in the rural zone.

The Court had regard to the principles from the case of *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52 relevant to ancillary uses, and in particular, considered the following (at [55]):

- "*… whether there is a dominant and subservient relationship between the two uses*"; and
- "*… whether the secondary use is present not to merely co-exist with the primary use, but whether the secondary use serves the purposes of the primary use.*"

The Court found that whilst the Applicant's evidence established that the concrete batching plant may receive processed hard rock from the quarry, this was insufficient to establish one use as ancillary to the other. The Court stated that at its highest the evidence established a relationship of co-location and convenience. The Court consequently held that the Development Application was to be assessed and decided on the basis that it had always comprised two planning units.

Court finds that the Proposed Development could not be conditioned to comply with the 2005 Planning Scheme with respect to noise impacts

The Court considered evidence from expert witnesses in respect of noise and found that the noise model for the Proposed Development did not demonstrate compliance with the noise criterion agreed to protect the acoustic amenity of nearby sensitivity receptors and materially understated the likely exceedances of the noise criterion and the impacts on the acoustic amenity and character of the locality.

The Court departed from the ordinary approach of assessing an application on the footing that an applicant will comply with the conditions of approval. This was because the conditions that the Applicant argued would appropriately manage noise were "*onerous, impractical and unproven*" (at [128]). In particular, the Court was not willing to accept impractical management conditions such as a non-concurrent operation strategy which the Applicant relied on to demonstrate partial compliance with the 2005 Planning Scheme with respect to noise.

The Court ultimately found that the Proposed Development could not be appropriately conditioned to comply with the relevant provisions of the 2005 Planning Scheme with respect to noise.

Court finds that the Proposed Development would result in non-compliance with the 2016 Planning Scheme

The Court considered the Proposed Development against the 2016 Planning Scheme as it represented the most recent statement of planning intent for the locality and had already been in force for five years. The Court found that the 2016 Planning Scheme's Extractive Industry Code seeks to manage impacts by ensuring the following:

- land is appropriately separated from sensitive land uses (see Overall Outcome (a) and Performance Outcome PO1) (**Separation Outcomes**); and
- that operational impacts of activity are appropriately managed (see Overall Outcome (b) and Performance Outcome PO7) (**Operational Outcomes**).

The Court found that whilst the Proposed Development could achieve compliance with the Operational Outcomes by limiting its hours of operation, it could not satisfy the Separation Outcomes because of the noise impacts established by the evidence. This non-compliance with the 2016 Planning Scheme was an important matter for the Court given the "*adverse and significant amenity impacts*" that would follow and the emphasis placed on an appropriate separation by the 2016 Planning Scheme (at [201]). The Court found further non-compliances with respect to noise impacts and the Overall Outcomes and Performance Outcomes PO13 and PO14 of the Rural Zone Code.

The Court found that the Land is unsuitable for an extractive industry use, which is not overcome by the Applicant's reliance on the 2016 Planning Scheme.

Court finds that there was no town planning need for the Proposed Development

The Applicant argued that population growth would increase the demand and constrain the supply of hard rock quarry products for the Somerset Regional Council area (**Local Market**).

The Court accepted that the Local Market was already a net importer of hard rock quarry products and that demand will increase commensurably with population. However, the Court was not satisfied that the evidence established the existing supplies were unable to accommodate the existing and future demand for hard rock quarry products. The Court emphasised that the Applicant had "*no real-world evidence*" (at [256]) suggestive of a supply constrained market and that the Proposed Development will be remote from the key areas of predicted population growth that will drive the increase in demand.

The Court thus found that the Applicant did not establish that there is a town planning need for the Proposed Development.

Conclusion

The Court dismissed the appeal and affirmed the Council's decision to refuse the Development Application.

Unjust enrichment insufficient to defend a refund of special charges levied as a result of the invalid resolutions of a Queensland local government

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Redland City Council v Kozik & Ors* [2022] QCA 158 heard before McMurdo JA, and Boddice and Callaghan JJ

September 2022

In brief

The case of *Redland City Council v Kozik & Ors* [2022] QCA 158 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the decision of the Supreme Court of Queensland (**Supreme Court**) in the case of *Kozik & Ors v Redland City Council* [2021] QSC 233 (**Supreme Court Judgment**) which found that the Redland City Council (**Council**) was required to repay monies paid for levied special charges (**Levied Charges**) by the Respondent ratepayers.

A summary of the Supreme Court Judgment is available in our February 2022 article.

Whilst the Court of Appeal ultimately agreed with the determination in the Supreme Court Judgment that the Levied Charges were required to be repaid to the Respondents, the majority of the Court of Appeal did so for different reasons and rejected the Supreme Court's application of the relevant legislation.

Background

The Council had between June 2011 and July 2016 passed resolutions to levy special charges to fund capital and operational expenditure on land adjacent to the Aquatic Paradise Canal Reserve, the Sovereign Waters Lake Reserve, and the Raby Bay Canal Reserve (**Services**). Following the passing of the resolutions, the Council issued rates notices to the Respondents for the Levied Charges which were paid by the Respondents.

The land of each Respondent would benefit from the Services and would increase in value by more than one to two per cent (at [18]).

The Council did not expend all of the Levied Charges on the Services, and relevantly refunded to the Respondents the percentage of the Levied Charges not expended plus interest.

The Council's resolutions to levy special charges to fund the Services did not comply with section 28 (Levying special rates or charges) of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) (**2010 LGR**) and section 94 (Levying special rates or charges) of the *Local Government Regulation 2012* (Qld) (**2012 LGR**) in that the resolutions did not contain the estimates of the costs of or timeframe for carrying out the Services and therefore did not identify an "*overall plan*" as required by the respective provisions. It was common ground between the parties that the Council's resolutions were invalid.

The Respondents submitted that the Council was required to repay the unrefunded portion of the Levied Charges in accordance with the 2010 LGR and 2012 LGR, or alternatively under the general law of restitution because the Respondents paid the Levied Charges under a mistake of law that the Council was entitled to levy the special charges and they were required to pay them.

The Council submitted that it was not obliged to refund the unrefunded portion of the Levied Charges under the 2010 LGR and 2012 LGR nor under the general law, and that the Respondents were precluded from such a refund on the basis that the enjoyment and value of their lands had been enhanced by the Services and to return the unrefunded Levied Charges would cause the Respondents to be unjustly enriched.

Issues to be determined

The Court Appeal considered the same issues as the Supreme Court, which can be summarised as follows (see [32]):

1. *Issue 1* – Did any rate notice issued before 14 December 2012 under section 32(1) (Returning special rates or charges incorrectly levied) of the 2010 LGR include special rates or charges that were levied on land to which they did not apply?

2. *Issue 2* – Did any rate notice issued on or after 14 December 2022 under section 98(1) (Returning special rates or charges incorrectly levied) of the 2012 LGR include special rates or charges that were levied on land to which they did not apply?
3. *Issue 3* – Did any rate notice issued after 5 December 2014 under section 98(1) of the 2012 LGR include special rates or charges that were levied on land to which they did not apply or should not have been levied?
4. *Issue 4* – If Issue 1, Issue 2, or Issue 3 is answered in the affirmative, was the Council liable to the levied landowner under a cause of action in debt, and if so, is recovery of the debt obviated or diminished by the Council having expended the unrefunded amount in carrying out works?
5. *Issue 5* – If Issue 1, Issue 2, and Issue 3 is answered in the negative, was the Council liable to the levied landowner under a cause of action for moneys had and received to the use of the landowner and if so, is recovery of the amount obviated or diminished by the Council having expended the unrefunded amount in carrying out works?

Determination of the issues

The Supreme Court and the majority of the Court of Appeal relevantly determined the issues as shown in the below table.

Issue	Supreme Court Judgment	Court of Appeal Judgment
1	Yes, because the rate notices were not invalid in accordance with section 32(2) of the 2010 LGR (see [28] to [51] of the Supreme Court Judgment).	No, because adopting the ordinary meaning of section 32 means it applies where there had been no effective resolution to levy a rate or charge on any land and not where a rate notice included a special rate or charge (see [26] and [33]).
2	Yes, because the rate notices were not invalid in accordance with section 98(2) of the 2012 LGR (see [52] to [60] of the Supreme Court Judgment).	No, because section 98 of the 2012 LGR was not engaged for the same reason that section 32 of the 2010 LGR was not engaged in respect of Issue 1 (see [28] and [33]).
3	Yes, because the rate notices levied special charges that were levied on land and units to which those special charges did not apply and should not have been levied within the meaning of section 98(1) of the 2012 LGR (see [61] to [74] of the Supreme Court Judgment).	No, because the circumstances did not engage section 98 and section 94(14) of the amended 2012 LGR which operated "… *to preserve from invalidity a resolution or overall plan that fails to identify some land to which the relevant special rates or charges could have been applied*" (see [28] to [31]).
4	Yes, the Council is liable to each Respondent under a cause of action in debt and the Council cannot by way of a defence that the Respondents will be unjustly enriched avoid or diminish its statutory obligation to repay the unrefunded Levied Charges (see [76] to [100] of the Supreme Court Judgment).	Not necessary to answer because Issue 1, Issue 2, and Issue 3 have each been determined in the negative (at [35]).
5	No, because there was no mistake established for the reason that the Council was entitled to levy the special charges and the rate notices were not invalid upon the proper construction of the 2010 LGR and 2012 LGR (see [101] to [114] of the Supreme Court Judgment).	Yes at the point the Levied Charges were paid because the Respondents paid the Levied Charges under the mistaken belief that they were legally obliged to do so which was a mistake of law (see [41] to [44]). The Council's defence of unjust enrichment and that there was good consideration for the Levied Charges, being the Services, was rejected because the Levied Charges were paid because the state of affairs existing in the Respondents' minds was that they were obliged to pay (at [60]) and it was immaterial that some of the Levied Charges were expended on the Services and provided some benefit to the Respondents (at [61] to [63]).

The minority of the Court of Appeal observed that it would have dismissed the appeal to the Court of Appeal and affirmed the Supreme Court's reasoning in the Supreme Court Judgment (at [100]).

Principles relevant to restitution claims

In deciding Issue 5, the majority of the Court of Appeal relevantly noted the following general law principles:

- Restitution claims are subject to the following principle (see [45] to [46] and *David Securities v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353, pages 378 to 379 and *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* [1994] HCA 61; (1994) 182 CLR 51 at 75):

  > *[T]he payer will be entitled prima facie to recover moneys paid under the mistake if it appears that moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys …*

- There is, subject to defences, a general right to the recovery of money paid in response to an invalid demand for tax (see [47] and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70).
- The recovery of money paid under a mistake of fact may fail if the payment is made for good consideration (see [49] to [52] and *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695). What amounts to "*good consideration*" does not need to involve a contract (at [51]), and requires a consideration of the "*state of affairs contemplated as the basis or reason for the payment*" (at [60]).
- The failure of consideration is judged from the perspective of the payer (at [61]).
- "*Australian law does not recognise a general right to remuneration for work that increases the value of another's property, without a request, actual or implied, to do so*" (see [62] and *Stewart v Atco Controls Pty Ltd (In liq)* [2014] HCA 15; (2014) 252 CLR 307 [47]).

Conclusion

The Court of Appeal allowed the appeal and held that the Council was liable under a cause of action for moneys had and received to refund the entirety of the Levied Charges to the Respondents. The Council was unsuccessful in its defence that were it to refund the Levied Charges, the Respondents would be unjustly enriched by, and received good consideration being, the Services.

Planning and Environment Court of Queensland dismisses an appeal against a refusal of a proposed shopping centre on the basis that the applicant failed to demonstrate need

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Trinity Park Investments Pty Ltd v Cairns Regional Council* [2022] QPEC 15 heard before Everson DCJ

September 2022

In brief

The case of *Trinity Park Investments Pty Ltd v Cairns Regional Council* [2022] QPEC 15 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Cairns Regional Council (**Council**) to refuse a development application for a material change of use for a shopping centre in Smithfield, Cairns.

The Court considered the following issues:

- Whether there was a need for the proposed shopping centre.
- Whether the proposed shopping centre would compromise the effective function of centres provided for in the *CairnsPlan 2016* (version 2.1) (**Planning Scheme**).
- Whether the proposed shopping centre would strengthen self-containment of the Cairns Northern Beaches.
- Whether the proposed shopping centre compromised the delivery of the requirements for a Gateway site, a structure plan, and a particular development form.

The Court ultimately held that the Applicant did not establish a sufficient need for the proposed development as required in the Planning Scheme and therefore dismissed the appeal.

Court finds that a need for the proposed shopping centre would not arise until 2031 or later

Acceptable Outcome AO1.1 of the Smithfield Local Plan Code (**SLPC**) of the Planning Scheme relevantly states that development must demonstrate "*an economic and community need*". This theme is echoed in section 9.4.1.2 of the Centre Design Code (**Centre Design Code**) of the Planning Scheme, which again requires centres to "*support community need*".

The economic need experts for the Council and the Applicant did not conclude that there was an existing need for the proposed shopping centre. The Applicant's economic need expert opined that the need for the proposed shopping centre would arise "*by around 2026*", however the Court agreed with the Council's economic need expert, who opined that the need would only arise "*by around 2031 or later*" (at [21]).

The Applicant submitted that "*any absence of need would not warrant refusal of this application*" as the proposed development is code assessable (at [25]). However, the Court disagreed and found that the fact that the proposed shopping centre is code assessable did not negate the obligation to meet the need requirements in the SLPC (at [25]). The Court also stated that the Planning Scheme when read as a whole contains a clear strategy that need is to be justified prior to approval (at [25]).

Court finds that proposed shopping centre is compliant with the relevant function of centres and self-containment benchmarks

The Court referred to section 7.2.8.3 of the SLPC and section 9.4.1.2 of the Centre Design Code, which emphasise the importance of development reinforcing the hierarchy of centres and strengthening self-containment of the Cairns Northern Beaches. The Court found that the proposed shopping centre would reinforce the centre hierarchy given that it is code assessable on the site, and that, according to evidence from both parties' economic need experts, surrounding centres would continue to function even with the development of the proposed shopping centre (at [29]).

The Court also found that the proposed shopping centre would strengthen self-containment, as it would provide residents of the Cairns Northern Beaches another opportunity to "*shop within their community*" (at [30]).

Court finds that the proposed shopping centre demonstrates compliance with requirements relating to Gateway sites, structure plans, and development design

Whilst the Council raised an issue with a section of the site being designated as a Gateway site, the Court found that the Applicant did not have to meet any Gateway site requirements as the development application was outside of the area designated as a Gateway site.

The Council also raised an issue with the Applicant's structure plan, submitting that it did not meet the requirement under section 7.2.8.3(5)(f)(i) of the SLPC (at [35]). However, the Court agreed with the Applicant and found that the submitted structure plan, which demonstrated that the balance of the site could be developed in accordance with relevant assessment benchmarks, was sufficient (at [37]).

Finally, the Council submitted that the Applicant failed to meet numerous assessment benchmarks relating to street frontage, scale, and character, including section 6.2.14.2(4)(d), Performance Outcome PO3, Acceptable Outcome AO3.1, and Performance Outcome PO5(c) of the Mixed Use Zone Code of the Planning Scheme, as the balance of the site was shown as a future mixed use development area. The Court found that the only obvious non-compliances were that "*… the building is not built to the boundary fronting the Captain Cook Highway and that the proposed provision of car parking is between the building and the highway*" (at [40]). Overall, the Court found that the design was "*… entirely consistent with other similar developments in the Cairns Northern Beaches*" (at [40]).

Conclusion

The Court dismissed the appeal, finding that the code assessable nature of the proposed shopping centre did not exempt it from meeting the need requirements of the relevant assessment benchmarks. Whist the Court did not find that any other issues raised by the Council warranted a refusal of the development application, the failure to meet the need requirements in itself was reason enough to dismiss the appeal.

Planning and Environment Court of Queensland upholds refusal of proposed "out-of-centre" shopping centre

Pusti Patel | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fabcot Pty Ltd v Ipswich City Council & Anor* [2022] QPEC 11 heard before Rackemann DCJ

September 2022

In brief

The case of *Fabcot Pty Ltd v Ipswich City Council & Anor* [2022] QPEC 11 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Ipswich City Council (**Council**) to refuse a development application for a material change of use to facilitate the development of a shopping centre on land situated at 91 and 93 Raceview Street, Raceview (**Proposed Development**).

The development application required impact assessment, and was therefore assessed against the assessment benchmarks in the *Ipswich Planning Scheme 2006* (**Planning Scheme**) and having regard to any other relevant matters.

The Court considered the following issues:

- Whether the Proposed Development would be an inappropriate use of the land.
- Whether the Proposed Development makes a positive contribution and is consistent with community expectations in relation to built form, design, and streetscape outcomes.
- Whether there is an economic, community, and planning need for the Proposed Development on the subject land.
- Whether the Proposed Development would have an unacceptable economic impact upon the centres network.
- Whether there are relevant matters that otherwise support approval or refusal of the Proposed Development.

Ultimately, the Court dismissed the appeal and refused the development application because although there were some factors in favour of the Proposed Development, the Court found that the determinative issues of need and impact were not satisfied because the level of public or community need was relatively modest and the level of impact of the Proposed Development on the centres network was compromising.

Court finds that the Proposed Development would be an inappropriate use of the land

The subject land is located within the Residential Medium Density Zone under the Planning Scheme. A shopping centre is listed as one of the specific uses which "*… are inconsistent with the outcomes sought and are not located within the Residential Medium Density Zone, and constitute undesirable development which is unlikely to be approved*" (at [15]). Therefore, the Court found that the relevant zoning did not provide support for the Proposed Development.

Court finds that the Proposed Development is consistent with community identity

The Court found that the Proposed Development would not have a significant detrimental impact upon the character or amenity of the locality or on the amenity of any existing or future residential uses or upon the streetscape (see [27] to [29]). However, this was not a significant factor to substantially weigh in favour of approval.

Court finds that there is no economic, community, or planning need for the Proposed Development

This was a determinative issue in the appeal. The Court found that although the Proposed Development offered some potential benefit in terms of choice, competition, and convenience, an examination of the population proposed to be served and the existing facilities used by that part of the community did not fully justify the need for an additional full-line supermarket. The Court relevantly found as follows:

- The area is not one of high population growth.
- The area is not one of high growth in disposable income.
- The level of adverse economic impact from the Proposed Development on the existing centres was high, being approximately -16.5 per cent to -17.5 per cent.

The Court therefore found that the level of public or community need was relatively modest and insufficient to warrant approval in the circumstances of the case, particularly given the Proposed Development's likely impacts on other centres (at [73]).

Court finds that the Proposed Development would have an unacceptable impact on the centre network

This was another determinative issue in the appeal. The Court stated that there is a focus in the Planning Scheme for commercial activity within Ipswich to be directed towards development of the area as a "*City of Centres*" (at [30]). The Court accepted that the centres network is the core around which other land uses are allocated and that the number and location of centres are critical "*land use planning decisions*" (at [31]). The Court also stated that the Planning Scheme contains a high level of detail with respect to centres network planning, and that there was no proposed centre designation in the vicinity of the subject land. Therefore, the Court held that the Proposed Development is inconsistent with the centres network in the Planning Scheme and is therefore an out-of-centre development (at [41]).

The likely impact of the Proposed Development on the existing centres network and its effect was described by the Court as compromising rather than within the bounds of normal competition and therefore did not fall within the bounds of acceptability. In determining this, the Court considered the impact on two existing centres in the centres network, being Raceview and Winston Glades, which the Court found to be vulnerable. The Court was satisfied that one likely consequence on both centres would be more vacancies, due to adverse impacts on tenant viability (at [111]). The Court found that the Proposed Development would have a noted impact on both centres and not just one, which reinforced the conclusion that the Proposed Development would inhibit the capacity of the existing centres to properly achieve their planned function.

Court considered other relevant matters including need for residential land and site suitability

The relevant matters considered by the Court included the need for residential land and general site suitability. The Court accepted that the Proposed Development ought not be refused on account of the loss of the land for potential residential development because the Proposed Development would not have a significantly detrimental impact on the amenity of existing or future residential development or on the character of the locality. The Court was also satisfied that the subject land was a suitable location for the Proposed Development had it had no impact on the centres network. However, these relevant matters were not of sufficient weight to overcome the non-compliances with the Planning Scheme.

Conclusion

The Court therefore dismissed the appeal and upheld the Council's decision to refuse the development application.

Planning and Environment Court of Queensland fuels a proposed development in allowing an appeal against the decision of a local government to restrict the operating hours of a service station

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ashanti Logistics Pty Ltd v Sunshine Coast Regional Council* [2022] QPEC 22 heard before Kefford DCJ

September 2022

In brief

The case of *Ashanti Logistics Pty Ltd v Sunshine Coast Regional Council* [2022] QPEC 22 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Ashanti Logistics Pty Ltd (**Applicant**) against conditions imposed by the Sunshine Coast Regional Council (**Council**) on a development permit for a material change of use.

The Applicant sought a development permit to facilitate the redevelopment of four lots containing a service station and a single storey detached house into a modern service station (**Proposed Development**). The Council approved the Applicant's development application by way of a negotiated decision notice which imposed conditions that relevantly related to the hours of operation, design, landscaping, and roadworks. At the time of the hearing, the only remaining condition in dispute related to the hours of operation, which stated as follows (**Condition**):

> *The approved use must not operate outside the hours of 7am to 10pm Monday to Sunday.*

The Council argued that the Condition is relevant to and is reasonably required to preserve the planning intent of the *Sunshine Coast Planning Scheme 2014* (Version 21) (**Planning Scheme**) for the reason that it prevents the loss of amenity and seeks to ensure the Proposed Development only services the immediate area. The Applicant disagreed, and argued that the Condition is not lawful and should not be imposed. The Court allowed the appeal on the basis that the Condition is not relevant to or reasonably required by the Proposed Development as provided for under section 65 of the *Planning Act 2016* (Qld).

Court finds that the Condition is not reasonably required in relation to the Proposed Development or the use of the premises as a consequence of the Proposed Development

The Council argued that the Condition is reasonably required because it mitigates unacceptable adverse amenity impacts from noise, light, and glare created by the Proposed Development. The Council relied on the evidence of its town planning expert, who opined that the amenity impacts will be caused by car doors, tyres, and noise in an otherwise quiet area (at [65]). The Council also argued that these concerns were shared by the local residents of the local area (at [57]).

The Court considered the Council's arguments and held that "*… [the Condition] is not a reasonable response to a change that will be occasioned by the commencement of the [P]roposed [D]evelopment*" (at [101]), and that the noise impact from the Proposed Development is acceptable and that the lighting and glare impacts from the Proposed Development are acceptable.

Noise impact from the Proposed Development is acceptable

The Court first considered the existing amenity of the local area. The Council argued that no use operated in the Local Centre Zone past 10.00 pm, giving the town a "*small community feel*" from the perspective of the local residents (at [51]). The Council conceded that the use rights of a service station are not constrained by operating hours, and that the existing service station had previously operated with extended hours (see [41] and [43]).

The Court rejected the amenity description of the area as quiet and instead preferred the evidence provided in a report from the Applicant's acoustic engineering expert. The Applicant's acoustic engineering expert recorded the night-time noise at 36 decibels and opined that the amenity could not accurately be described as "*very quiet*" (at [63]). Thus, the Court held that the ambient noise measurement does not reflect the acoustic amenity as argued for by the Council.

Both parties' acoustic engineering experts accepted that an appropriate noise criteria ranged between 35 to 52 decibels. The noise impact assessment prepared by the Applicant and submitted as part of the development application process demonstrated that the continuous operation of the Proposed Development would satisfy the appropriate noise criteria, with the adoption of controlled measures.

The Court accepted the Applicant's argument and held that the Proposed Development will not adversely impact the acoustic amenity of identified sensitive uses within the proximity of the Proposed Development if appropriate noise-control measures are implemented. The Court held that the Proposed Development therefore complies with the Performance Outcomes PO2 and PO9 of the Service Station Code, and Performance Outcome PO1 of the Nuisance Code in the Planning Scheme.

Lighting and glare impacts of the Proposed Development are acceptable

The Applicant's lighting expert submitted that the area surrounding the Proposed Development is currently heavily affected by light sources other than that of the Proposed Development. The Applicant's expert opined that the Proposed Development can comply with Australian Standard *AS4282:2019 Outdoor Lighting Obtrusive Effects* as stated in the Applicant's lighting impact assessment report.

The Council did not present any expert evidence on lighting and the Court accepted the Applicant's lighting expert's opinion. The Court held that the 24-hour operation of the Proposed Development will achieve compliance with Performance Outcome PO11 of the Nuisance Code in the Planning Scheme.

Court finds that the Condition is not relevant to the Proposed Development or the use of the premises as a consequence of the Proposed Development

The Council argued that the imposition of the Condition is supported by Performance Outcome PO9 of the Service Station Code, and ensures that the Proposed Development will only serve the local level convenience needs of residents and visitors in the immediate area.

The Council's first argument was that Performance Outcome PO9 of the Service Station Code is intended to minimise an unreasonable loss of amenity for existing and planned residential areas caused by retail business activities. The Council first raised the alleged amenity impact on planned residential areas in oral submissions during cross-examination.

The Court was not satisfied that the Council's oral submissions quantified any amenity impact on future planned residential uses. The Court relied upon its earlier findings in respect of the Proposed Development satisfying Performance Outcome PO9 of the Service Station Code and held that the Condition cannot be lawfully imposed to preserve the amenity of the surrounding area.

The Council's second argument was that retail business activities are intended under the Planning Scheme to only serve the local level convenience needs of residents and visitors in the immediate area. The Court held that the Condition was not justified by the assessment benchmarks relevant to the consistency of the use of the land for the following reasons:

- The Council approved the Proposed Development and maintains that a service station is appropriate even if the Condition is not imposed.
- The previous tenants of the service station had operated 24 hours and the existing lawful use rights do not constrain the hours of operation.

The Court held that the Condition could not be justified on the basis of the intensity or function of the Proposed Development when the relevant assessment benchmarks are "*… viewed through the lens of the local context in which the development is proposed*" (at [138]). The Court also held that the proposed 24-hour operation of the Proposed Development does not indicate a more intensive use than a service station with restricted operating hours because the Proposed Development will not provide for a wide range of local shopping and will not compete with retail offerings in more established centres (at [145]), and the Proposed Development will not attract traffic from outside the local area and will have low levels of usage during the night-time period (at [146]).

Court finds that the Condition is unreasonable

The Court held that even if the Condition was relevant to ensure that the Proposed Development protects the amenity of surrounding areas or to control the intensity of the use, the Condition would nevertheless be unreasonable because the Condition is not required to achieve compliance with the relevant assessment benchmarks, and therefore cannot be lawfully imposed (see [149] to [162]).

The Court held that the conditions reflected in the noise impact assessment were relevant and reasonably required to be imposed on the Proposed Development as agreed by the parties (at [87]). These conditions included the construction of acoustic walls, noise barriers, and limited the operating hours of delivery services and audio visual displays.

Conclusion

The Court allowed the appeal and ordered that the Council's decision on the development application be replaced with an approval, subject to the agreed conditions that minimise acoustic amenity impacts.

Planning and Environment Court of Queensland upholds decision to approve neighbourhood centre because of overwhelming need despite considerable non-compliance with the planning scheme

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Drivas v Brisbane City Council & Anor* [2021] QPEC 68 heard before Everson DCJ

September 2022

In brief

The case of *Drivas v Brisbane City Council & Anor* [2021] QPEC 68 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to approve a development application for a material change of use for a Shop (Supermarket and Liquor Store) and Office and for building work to reposition a pre-1946 building on land situated at 776, 786, 792, and 800 Ipswich Road and 10 Aubigny Street, Annerley (**Land**).

The issue for the Court to determine was whether there was a level of need that justified a full-line supermarket on the Land (**Proposed Development**) notwithstanding significant non-compliance with the *Brisbane City Plan 2014* (Version 17) (**Planning Scheme**).

The Court found approval was justified given an overwhelming need for the Proposed Development and allowed the appeal only to the extent necessary to impose revised conditions of approval to give effect to the agreed position of the parties' relevant experts.

Court found that the Proposed Development would result in considerable non-compliance with the Planning Scheme

The Land is categorised by the Planning Scheme as part of the Suburban Living Area, located within the Moorooka-Stephens Neighbourhood Plan and predominantly included within the Low-Medium Density Residential (2 or 3-storey mix) Zone. The Proposed Development is characterised as a neighbourhood centre under the Planning Scheme.

The Applicant conceded that the Proposed Development, which has a Gross Floor Area (**GFA**) of 3,639.8m^2, does not comply with the Planning Scheme's various assessment benchmarks which seek to restrict neighbourhood centres to small-scale convenience services with a GFA of 2,500m^2 or less (see Strategic Outcome SO6 and Land Use Strategies L6.1 to L6.3 of Element 5.5, Table 3.7.6.1 of the Strategic Framework). The Applicant also conceded that the Proposed Development is inconsistent with numerous provisions of the Low-Medium Density Residential Zone Code, Neighbourhood Centre Zone Code, and the Centre or Mixed Use Code, with respect to its size and scale.

The Court found that Land Use Strategy L6.3 of the Strategic Framework nonetheless offers an opportunity for providing a neighbourhood centre outside of a centre zone and although the Proposed Development's GFA greatly exceeds the limits contemplated by the Planning Scheme, this may be outweighed by an overwhelming need for the Proposed Development.

Court found that there was an overwhelming need for the Proposed Development

The Court took into account the following bases in determining the need for the Proposed Development:

- Population basis, which involves applying the "*well-established rule of thumb that there should be one full-line supermarket provided for every 8,000 – 10,000 residents within a metropolitan area*" (at [36]).
- Floor space basis, which involves applying the current rate of provision of supermarkets within metropolitan Brisbane, being 367m^2 per 1,000 people (at [37]).
- Expenditure basis, which involves allowing for the trade area of a supermarket to capture 70 per cent of the available supermarket expenditure before additional supermarket floor space is needed (at [38]).

The Court was satisfied that an analysis of need in respect of each of the above bases demonstrated that there is a very significant need for the Proposed Development, that the Land is ideally located to meet this need, and that there is no other land nearby which is capable of meeting this need at present.

The Court accepted that in circumstances where customers now shop several times a week and seek a greater range of choice in respect of products, the Proposed Development will serve local residents' day-to-day and local convenience needs despite its size and extent of stock.

The Court also found that the evidence did not demonstrate that the viability of existing centres within the catchment would be compromised by an approval of the Proposed Development.

Conclusion

The Court allowed the appeal only to the extent that revised conditions of approval could be imposed to give effect to the agreed position of the parties' noise and traffic experts.

Planning and Environment Court of Queensland refuses the development of a mixed-use marketplace after finding that the development failed to meet the "Noosa Style" and expectations of the community

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Noosa Spotlight Property 2 Pty Ltd v Noosa Shire Council* [2021] QPEC 77 heard before Muir DCJ

September 2022

In brief

The case of *Noosa Spotlight Property 2 Pty Ltd v Noosa Shire Council* [2021] QPEC 77 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Noosa Spotlight Property 2 Pty Ltd (**Applicant**) against the decision of the Noosa Shire Council (**Council**) to refuse a development application for a material change of use not defined under the *Noosa Plan 2006* (**2006 Planning Scheme**) or the *Noosa Plan 2020* (**2020 Planning Scheme**).

The Applicant sought a development permit to facilitate the development of the land situated at 2-18 and 20 Hofmann Drive, Noosaville for an integrated mixed-use precinct called "*Noosa Marketplace*" (**Subject Land**) comprising offices, large format retail style showrooms with a gross floor area (**GFA**) totalling 8,225m^2, small incubator tenancies, and other mixed uses comprising four buildings of varying scale and form (**Proposed Development**). The Applicant intended to open a Spotlight retail store in one of the showrooms and an Anaconda retail store in another showroom.

The Subject Land is in the Shire Business Centre Zone under the 2006 Planning Scheme. At the time of the appeal, the 2020 Planning Scheme had come into force, under which the Subject Land is in the Major Centre Zone.

The Council categorised the Proposed Development as being solely in the Applicant's self-interest, and as a serious departure from both the 2006 Planning Scheme and the 2020 Planning Scheme. The Applicant argued that the Proposed Development satisfies an economic, community, and planning need. The Court considered the issues that were in dispute between the parties and reached the following conclusions:

- There is no economic, community, or planning need for the Proposed Development.
- The Proposed Development was not an appropriate use of the Subject Land under the 2006 Planning Scheme or the 2020 Planning Scheme.
- The built form, style, and layout of the Proposed Development did not meet the "*Noosa style*" under the 2006 Planning Scheme or the 2020 Planning Scheme.

Court finds that the Applicant has a need for the Proposed Development more so than the community

The Applicant argued that there is a planning, community, and economic need for the Proposed Development. The Council argued that the Proposed Development does not meet an appropriate level of need when judged from the point-of-view of the community and not the developer.

The Court considered the issues of planning, community, and economic need in turn.

Economic need

The Applicant argued that the Proposed Development would satisfy the economic need for large format retail showroom floorspace and for flexible business incubator tenancies.

The Applicant's arguments and the Court's decision with respect to the economic need for large format retail showroom floorspace were as follows:

- The Applicant's economic expert opined that an expectation to travel for goods and services should be exchanged for an increase in a broader range of facilities as the population within the catchment area grows. The Court rejected this opinion and held that projections on lifestyle changes is a matter for the relevant planning schemes and the Council, and "*… does not justify a departure from that which is presently in effect*" (at [91]). The Court further held that, from the perspective of the catchment population, "*… the sprawling nature of the area … leads to an expectation that travel will be necessary to access certain goods and services*" (at [88]).
- Both parties' economic experts agreed that there is a degree of undersupply of large format retail showroom floorspace, but to differing extents. The Court held that it was unnecessary to determine which economic expert's approach was to be preferred because the identified undersupply did not amount to an economic need that could justify the approval of the Proposed Development (at [83]). The Court held that there was not an economic need for the Proposed Development because the goods sold by the Applicant "*are hardly the essentials of life*" (at [90]) and residents in the local catchment are already reasonably well supplied with large format retail showroom floorspace.

With respect to the flexible business incubator tenancies, the Applicant argued that economic need was demonstrated because the Applicant proposed that portions of the 8,225m^2 GFA be taken up by six other businesses, although Harris Scarfe was the only business to express an interest (see [93] and [97]). The Applicant's development manager argued that the other incubator tenancies would be used by new local businesses and start-ups.

The Council argued that there was no evidence as to how the balance of the GFA would be allocated for incubator tenancies and there is insufficient evidence of economic need.

The Court agreed with the Council and held that the Applicant's evidence only went to the intention of such tenancies and did not identify any need. The Court was not satisfied that the Applicant had sufficiently demonstrated a need for other tenancies and held that the Applicant failed to demonstrate an economic need for the total GFA.

Community need

The Applicant presented four arguments in support of community need for the Proposed Development. The Applicant's four arguments and the Court's considerations were as follows:

- The Applicant argued that the Proposed Development will offer improved choice, convenience, and competition to the community. The Court held that choice did not create a community need because the goods offered by the Applicant are not "*essentials of life*" and the goods were readily available within an appropriate travel distance proportionate to the spending habits of the community (at [125]). The Court further held that need is assessed from the perspective of the community and the Applicant's desire for the Proposed Development is not probative of community need by improved choice, convenience, and competition (see [130] and [131]).
- The Applicant argued that the Proposed Development will contribute to the destination lifestyle of the Noosa Shire Business Centre. The Court rejected this argument because the Applicant did not present any cogent evidence that this outcome could not be achieved by a development that was within the scope of the planning limitations for the Subject Land (at [139]).
- The third and fourth arguments related to eliminating the need for Noosa Shire residents to source the goods from outside the local government area, and that the Proposed Development would contribute to employment. The Court rejected both of these arguments since the only realised benefit would be to the Applicant and other business interests and there would be no realised benefit for the community (see [140] to [143]).

Planning need

Both parties' need experts opined that "*[a]part from a portion of the subject site, there is no vacant land in the Noosaville business zoned area for substantial large format retail/showroom uses*" (at [151]). The Applicant argued that this was evidence of a planning need for the Proposed Development and a planning need to maintain the land in the Shire Business Centre Zone for other uses.

The Court held that the 2006 Planning Scheme and 2020 Planning Scheme are a reflection of the needs of the community and relied on the case of *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132 at [67] which relevantly states that "*… It has been established beyond argument that a decision maker must take a Planning Scheme to be an expression of the public interest in terms of land use*".

The Court agreed with the Council's argument that town planning need is assessed against the planning scheme in its current form, relying on the case of *Williams McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33 at [170]. The Court therefore examined the 2020 Planning Scheme and found that Overall Outcome 6.4.1.2(3)(a)(ii) in the Major Centre Zone Code intends for "*a substantial amount*" of non-retailing employment opportunities in the Shire Business Centre Zone (at [173]).

Court finds that there is limited to no scope for the Proposed Development on the Subject Land

The Applicant argued that the Proposed Development is consistent with the outcomes sought in the 2006 Planning Scheme and 2020 Planning Scheme for the Shire Business Centre Zone Code (at [155]). The Court held that the Proposed Development is not an appropriate land use for the Shire Business Centre Zone for the following reasons:

- The Court held that the Proposed Development is not an appropriate land use under the 2006 Planning Scheme. Overall Outcome 11.7.2(tt)(B) of the Noosaville Locality Code, must be read with Overall Outcomes 117 and 118 which allows for up to 7,000m^2 GFA for a Retail Business Type 4 Showroom (at [191]). The Court held that there is no scope in the 2006 Planning Scheme for the Proposed Development since it does not include any showrooms as per the definition of the term in the 2006 Planning Scheme (see [195] to [196]).
- The Court also had regard to the 2020 Planning Scheme, and held that it afforded limited scope for showroom floorspace as defined (at [194]). Performance Outcome PO66 of the Major Centre Zone Code only permits 3,500m^2 GFA of showroom floorspace, which is less than half of that of the Proposed Development. The Court gave considerable weight to the fact that the 2020 Planning Scheme has retained the importance of the Shire Business Centre Zone being an activity centre that is not exclusively retail (at [248]).
- As accepted by both parties' town planning experts, the Proposed Development is an undefined use and is therefore inconsistent with the 2006 Planning Scheme. Under the definitions of the 2020 Planning Scheme, an inconsistent use "*is strongly inappropriate in the relevant zones because it is incompatible with other uses generally expected in that zone*" (**Inconsistent Use**) (at [185]). The Court gave considerable weight to the 2020 Planning Scheme as it reflects the most recent planning revisions to the Shire Business Centre Zone and is evidence that the Council has made decisions with respect to the availability of retail floor space (at [248]).

Court held that the built form of the Proposed Development was not "Noosa Style"

The Applicant argued that the Proposed Development achieves the built form outcomes of the Noosaville Locality Code of the 2006 Planning Scheme and enhances existing vegetated areas. The issue for the Court was to assess the relationship between the built form and the vegetation and landscaping in Noosa as promoted by the relevant planning documents (at [202]).

The Court held that the visual amenity and built form of the Proposed Development are not acceptable under the provisions of both the 2006 Planning Scheme and 2020 Planning Scheme. The Court's reasons were as follows:

- The Court agreed with the Council that a "*Noosa Style*" is recognisable in both the 2006 Planning Scheme and 2020 Planning Scheme. "*[T]he Noosa Style is a broad concept that requires a design approach that generally responds to Noosa's subtropical environment, lifestyle and regional vernacular; appreciating building typology and complementing the general surrounds*" (at [211]). The Court agreed with the opinions of the Council's visual amenity and landscape expert that the Proposed Development overall cannot be categorised as a "*Noosa Style*" (see [214] to [224]).
- The Proposed Development did not have a high quality landscape design because it failed to reduce the visual impact of the development and did not comply with the identified provisions of the Landscaping Code in the 2006 Planning Scheme (at [232]).

Court finds limited relevant matters support approval

The Applicant argued that other relevant matters support the approval of the Proposed Development, being that it will not disrupt the Shire Business Centre strategy under the 2020 Planning Scheme, it will preserve industrial zoned land for industrial uses, and it can be carried out without any unacceptable impacts.

The Court held that the Proposed Development will disrupt the Shire Business Centre strategy because the 2006 Planning Scheme expressly discourages undefined uses under Overall Outcome 90 of the Noosaville Locality Code (see [181] and [184]) and when it is read as a whole (at [264]). An undefined use is also considered an Inconsistent Use under the 2020 Planning Scheme (see [185] and [264]).

The Court was not satisfied that the Proposed Development would assist in preserving industrial land and even if it was satisfied the Court held that was not a relevant matter which alone would support approval (at [262]).

The Court also held that the Proposed Development does result in an unacceptable impact, being that the Proposed Development puts the Subject Land to a use which is not encouraged and displaces the opportunity in the future for planned and encouraged uses (at [265]).

Conclusion

The appeal was dismissed and the Court confirmed the Council's decision to refuse the development application.

Making decisions for right and good reasons

Ian Wright

This article discusses the matters which are relevant to the deliberations and decisions of Council officers

October 2022

Introduction

> *Live a good life. If there are gods and they are just, then they will not care how devout you have been, but will welcome you based on the virtues you have lived by. If there are gods, but unjust then you should not want to worship them. If there are no gods, then you will be gone, but will have lived a noble life that will live on in the memories of your loved ones.*
>
> Unknown but often attributed to Marcus Aurelius

Council officers and the public good

Council officers are like all other citizens, but for the fact that they are authorised by legislation to fulfil and exercise the responsibilities and rights of the public offices which they hold during the course of their tenure.

Council officers are therefore *first among equals* for the period that they hold their positions. And because they are first among equals, they are required like all other public office holders to pursue a higher ideal, which is the *common good* of the relevant political community, that is called the *public good* of that polity.

Lawyers are also public servants, and thus subject to the higher ideal of the public good of the political community, and in particular the pursuit of *justice according to the Rule of Law*, which forms part of the public good of the polity and the broader common good of all communities.

As the French political scientist Alexis de Tocqueville stated in the context of the United States – whilst public servants belong to the people by birth and interest, and to the government by habit and taste, they prefer neither one to the other, and are required to stand alone.

Council officers and lawyers are alike, in that their deliberations and decisions are judged by their equals, being the members of the public they serve.

Making decisions for right and good reasons

As public servants, Council officers must ensure that their deliberations, judgements, choices, and actions are made for reasons which are both *practically reasonable and thus right* and *humanly good and thus moral*. In short, the deliberations and decisions of Council officers must be morally right.

Structure of presentation

This presentation examines the following matters which are relevant to the deliberations and decisions of Council officers:

- Ethical and moral reasoning (Chapter 2).
- Technical process of strategy (Chapter 3).
- Technical decision-making (Chapter 4).

Ethical and moral reasoning

> *Morality is higher than law! While law is our human attempt somehow to embody in rules a part of that moral sphere which is above us. We try to understand this morality, bring it down to earth and present it in a form of laws. Sometimes we are more successful, sometimes less. Sometimes you actually have a caricature of morality, but morality is always higher than law. This view must never be abandoned. We must accept it with heart and soul. It is almost a joke now in the Western World, in the 20th Century, to use words like "good" and "evil." They have become almost old-fashioned concepts, but they are very real and genuine concepts. These are concepts from a sphere which is higher than us.*
>
> Aleksandr Solzhenitsyn

Council officers are human persons

Council officers are like all other human persons in that they have human integrity, human dignity and human equality.

Human integrity

Council officers, like all other human persons, have an essence or nature comprising a unity of the human mind, body and spirit, which is called *human integrity*. As such, each human person is comprised of the following:

- *Human mind* – A human mind that thinks (and has thoughts), and is rational.
- *Human body* – A human body that feels (and has emotions) and wants (and has interests), and is sub-rational.
- *Human spirit* – A human spirit that has a conscience and a free-will (and has natural inclinations or dispositions), and is non-rational.

Council officers must ensure that their deliberations, judgements, choices, and actions are commanded by the rationality and reasoning of the human mind and the conscience and free-will of the human spirit, and are not deflected by the feelings and wants of the human body.

Human dignity

Council officers, like all other human persons, also have an intrinsic value as an end in themselves, which is called *human dignity*. Human dignity regards a human being as an end, not as a means to achieve the ends of other human persons or communities of human persons such as the political community.

Council officers must not allow themselves to be used as a means to the ends of others, and must not use other human persons as a means to their ends.

Human equality

Council officers, like all other human persons, are also free and equal to all other humans, which is called *human equality*.

Council officers are neither inferior to Councillors or superior to the people of the local government area, and must treat all other human persons as equals.

Council officers seek integral human fulfilment

Rational nature

Council officers, like all other human persons, by their nature have the rational intellect of the human mind and non-rational inclinations or dispositions of the conscience and free-will of the human spirit that incline them to be morally right, albeit that the sub-rational inclinations of the human body can sometimes motivate human persons to make decisions which are wrong or bad, and thus morally wrong.

Human wellbeing and flourishing

The ultimate ideal for each Council officer, like all human persons, is that of integral human fulfilment, which involves the *human wellbeing or human flourishing* of oneself and all other human persons. This is to be distinguished from human happiness or human wellness, which are focussed on the sub-rational feeling and wanting of the human body.

Council officers seek the common good and the public good

Social nature

Council officers, like all other human persons, have a social nature by virtue of their human integrity, dignity and equality, which requires them to have communal relationships with other human persons in communities, beginning with their family and friends, and extending most relevantly to other Council officers and the residents of the Council's local government area.

Natural rights and freedoms

Council officers, like all other human persons, have as a matter of justice (ie fairness and respect) responsibilities to other human persons in the various communities to which the Council officers belong, in particular the Council and the residents of the Council's local government area, that gives rise to rights in favour of those human persons (which are called *natural rights or more simply human rights*).

Common good and public good

Council officers as public servants of a political community must personally and collectively seek to pursue the *public good* of that polity, which is the common good of the residents of the Council's local government area.

The public good of the Council's local government area, includes amongst other matters, the Rule of Law, as well as the respect for the natural rights (or human rights) of all other human persons, and in particular the residents of the Council's local government area.

Council officers may pursue and realise integral human fulfilment and the common good

Ethical and moral reasoning

Council officers, like all other human persons, have a human mind with a rational intellect and a human spirit with a conscience and free-will which are capable of *ethical and moral reasoning* that enable human persons to pursue the ideal of integral human fulfilment of themselves and other human persons as well as the common good of each community of human persons, including the public good of the political community to which they belong.

Ethical and moral reasoning is concerned with the order of a human person's *deliberations, and their decisions in respect of judgements, choices, and actions*.

Deliberations, judgements, choices, and actions

Council officers by virtue of being public servants of a political community, are required to ensure that their ethical and moral reasoning about their deliberations, judgements, choices, and actions are both *reasonable and right*, and *good and moral*, or *morally right*.

Council officers must therefore understand the following important distinctions between human deliberations, judgements, choices, and actions:

- *Deliberations about objects* – A human person's deliberations are their practical understanding and knowledge of the objects and conscientious deliberative reflections on the alternative ways to be chosen to pursue and realise the ends by the means. The objects are the "*what for*" of the human person's actions.
- *Judgements about ends* – A human person's judgements are the ends which are intended to be the point of the means of the human person's actions. The ends are the "*why*" of the human person's actions.
- *Choices about ways and will* – A human person's *choices* are the decisions about the ways and will to do an action rather than not, and rather than any other action to pursue an end.

  The ways are the human opportunities or proposals for the human person's actions, and as such they are the "*how, who, where, and when*" of the human person's actions.

  The *will* is a human person's responsiveness to the opportunities or proposals for action. Will which is based on only the feeling and wanting of the human body is called *self-will*. Will which is based on the prudential thinking of the human mind and the conscience of the human spirit is called *free-will*.

  Choices which are commanded by free-will are called *free choices*, whereas choices which are commanded by self-will are called *personal choices*.
- *Actions about means* – A human person's *actions* are the decisions about the human means (or human actions), and the technical means for the courses of action which are to be performed.

Motives, intentions, circumstances and facts

A Council officer's deliberations (about objects) comprise the *motives* of the officer's actions, whilst a Council officer's judgements (about ends) comprise the *intentions* of the officer's actions. A Council officer's choices (about ways and will) comprise the *circumstances or context* of the officer's actions, whilst the Council officer's actions (about means) comprise the *facts or particulars* of the officer's actions.

It is significant and important to understand that motives, intentions, circumstances and facts are separate, such that a motive or an intention cannot be inferred from only the fact of an action. Therefore an enquiry of a human person's deliberations, judgements and choices is required to determine the motive, intention and circumstances of the fact of an action, before deciding that the fact of the action is intended or is alternatively an unintended side effect.

The relationship between a human person's deliberations, judgements, choices, and actions and their motives, intentions, circumstances and facts, are stated in **Figure 1**.

Figure 1 Elements of ethical and moral reasoning

Elements of reasoning	Prudential thinking of the human mind	Deliberations and decisions of the conscience and free-will of the human spirit	Reasons for action
Objects	Basic human goods and the common good	Deliberations	Motives (What for)
Ends	Basic principles of right and wrong	Judgements	Intentions (Why)

Elements of reasoning	Prudential thinking of the human mind	Deliberations and decisions of the conscience and free-will of the human spirit	Reasons for action
Ways (and the will)	Basic requirements of the virtue of prudence	Choices	Circumstances or context (Who, where, how and when)
Means	General moral standards	Actions	Facts (What)

Council officers are to make decisions for right and good reasons

Right and good (or morally right) decisions

Ethical and moral reasoning involves human deliberations about objects and human decisions in respect of judgements about ends, choices about ways and will, and actions about the means of human persons to determine what is *morally right* in terms of being both *reasonable and right* and *moral and good*, or *morally right*.

Objects – Basic human goods and the common good

The *basic human goods* of all human persons and the *common good of each community* of human persons are the basic constitutive *aspects of personal and collective human flourishing*.

The basic human goods and the common good provide the pre-ethical and moral *objects* for the pursuit of the ultimate ideal of integral human fulfilment.

The basic human goods are:

- Theoretical truth and knowledge.
- Aesthetic experience.
- Bodily life and health.
- Excellence in work and play.
- Proper relationships (ie spirituality or religion).
- Self-integration.
- Practical reasonableness.
- Friendship and goodwill.

Ends – Basic principles of right and wrong

The *basic principles of practical reasonableness (or the basic principles of right and wrong)* are the rational and directive principles of the *natural law and natural rights* which are determined from the objects of the basic human goods and the common good.

The basic principles of natural law and natural rights provide the pre-ethical and moral *ends* that are compatible with the pursuit of and participation in the objects of the basic human goods and the common good.

Examples of the basic principles of right and wrong include the following:

- Theoretical truth and knowledge is to be done and pursued and that which is contrary to that good, such as lies, error, muddle or superstition, are to be avoided.
- Bodily life and health is to be done and pursued and that which is contrary to that good, such as harming, killing and death dealing, are to be avoided.
- Excellence in work and play is to be done and pursued and that which is contrary to that good, such as underperformance or wilful negligence, are to be avoided.

Ways – Basic requirements of the virtue of prudence

The *basic requirements of practical reasonableness* are the rational and reasonable modes of responsibility (or ways) of the intellectual and moral virtue of prudence.

The basic requirements of practical reasonableness of the intellectual and moral virtue of prudence provide the *natural law of method* of determining the fully reasonable and right *ways* of:

- pursuing and realising the ends that are determined by the basic principles of the natural law and natural rights (ie the basic principles of right and wrong); and
- working out the general moral standards of the natural moral law and moral rights (ie the moral precepts of good and bad or evil).

The basic requirements of the virtue of prudence include the following:

- A coherent plan of human life as a whole.
- No arbitrary preference among the basic human goods.
- No arbitrary preference among human persons including one's self, one's family, and one's community as a result of the sub-rational inclinations.
- Detachment.
- Commitment.
- The limited relevance of consequences (ie efficiency within reason).
- Respect for every basic human good in every act.
- The requirements of the common good.
- Following one's conscience.

Means – General moral standards

The *general moral standards* are the moral norms, precepts or rules of the *natural moral law and moral rights* which are determined from the basic principles of the natural law and natural rights by the basic requirements of practical reasonableness of the intellectual and moral virtue of prudence.

The general moral standards of the natural moral law and moral rights provide the good and moral *means* of pursuing and realising the ends determined by the basic principles of the natural law and natural rights.

Examples of the general moral standards include the following moral precepts:

- *Golden Rule of fairness* – Do unto others as you would have them do unto you; and do not impose on others what you would not want to be obliged by them to accept.
- *Pauline Principle* – Do not do evil that good may come of it; do not answer injury with injury even when one can do so fairly; and it is better to suffer wrong than to do it.

Council officers may develop their integrity and character

Council officers whose deliberations and decisions are made for *morally right reasons* will cause:

- *transitive effects*, external to themselves that will create an objective reality for good rather than bad or evil; and
- *intransitive effects*, internal to themselves that will develop for the better their subjective character and identity as a human person of integrity and character.

Alternatively, the deliberations and decisions of human persons which are made for *morally wrong reasons* will cause:

- transitive effects in the objective world that are bad or evil; and
- intransitive effects within those human persons such that they have made themselves as human persons who stand ready to do bad or evil, and thus have changed their character for the worse.

Technical process of strategy

> *It's not getting any easier to win in the real world. The new normal is, to borrow a phrase from the US military, a VUCA environment: volatile, uncertain, complex, and ambiguous. Growth is slowing, and the pace of change is increasing. As the world continues to globalize, companies face more competition for customers and consumers than ever before. Consumers are growing more demanding and more vocal, insisting upon better performance, quality, and service, all at a better price.*
>
> *Even in a VUCA world, strategy can help you win. It isn't a guarantee, but it can shorten your odds considerably. A lack of strategy has a clearer and more obvious result: it will kill you. Maybe not right away, but eventually companies without winning strategies die.*
>
> Alan G. Lafley and Roger L. Martin

Strategy is the bridge between politics and the Council's objects

Strategy provides a theory of success, a solution to a problem, or an explanation of how an obstacle can be overcome.

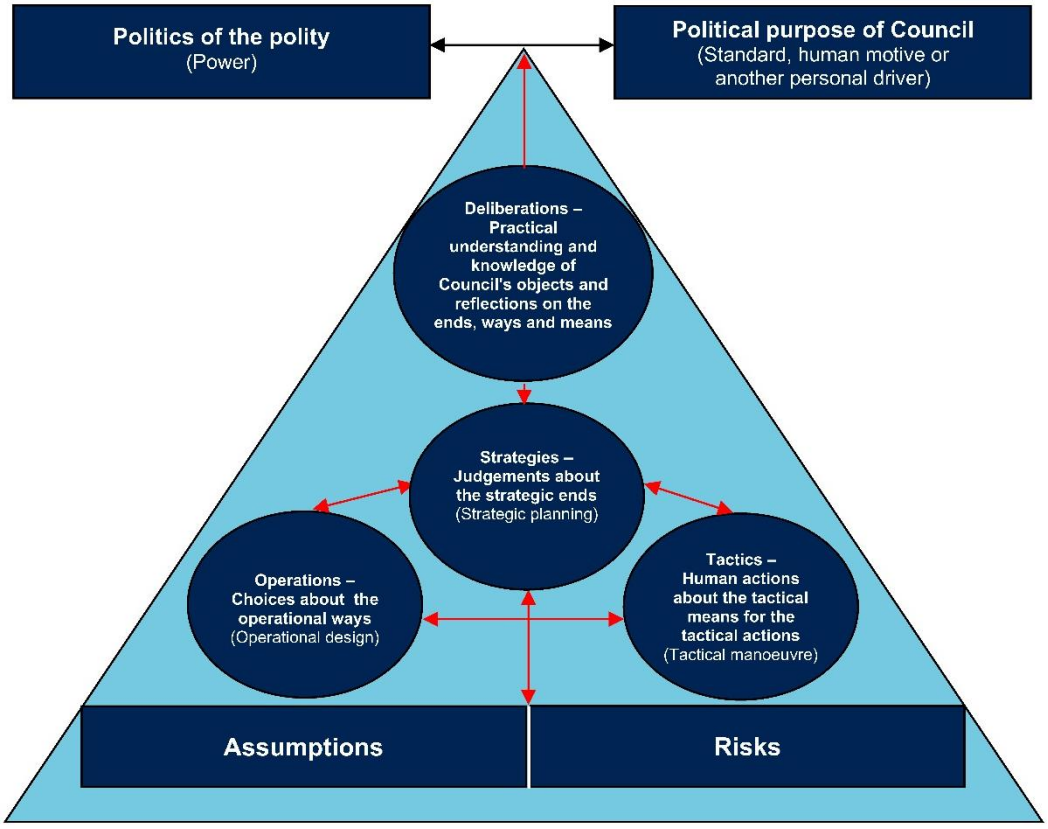
Strategy is the bridge between the politics (which is the power) of the community and the objects (which are the political purpose) of the Council.

Strategy has distinct structural elements

Strategy is therefore the technical process by which Council officers, like all other human persons, use technical reasoning to complement their ethical and moral reasoning to determine deliberations, judgements, choices, and actions about their objects, ends, ways and means.

The elements and levels of strategy are shown in **Figure 2**.

Figure 2 Elements and level of strategy

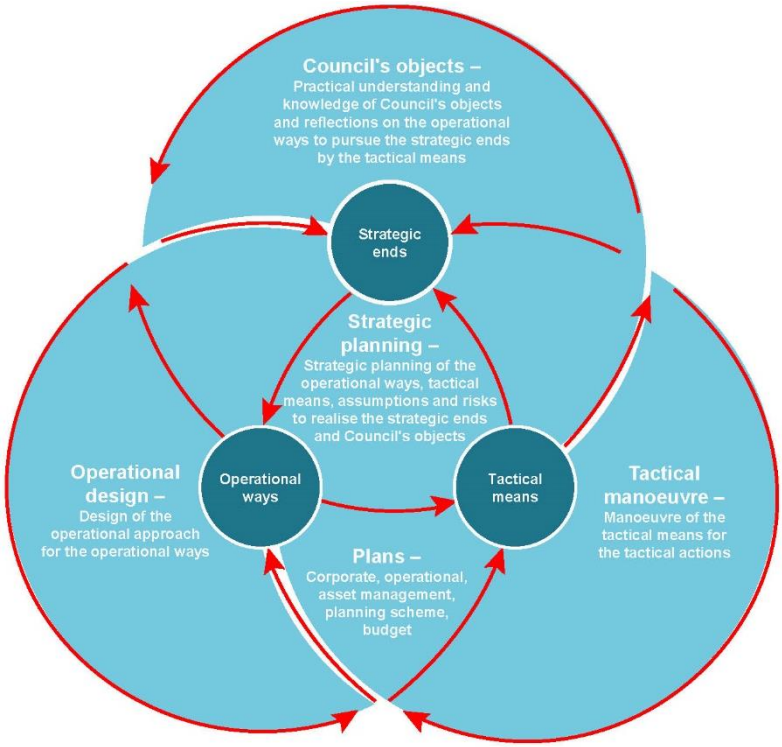


Process of strategy

The technical process of strategy therefore involves *strategic planning*, *operational design* and *tactical manoeuvre*, which take place at the following levels, as shown in **Figure 3**:

- *Strategic level* – This is the level of strategy at which the operational ways, tactical means, assumptions, and risks are planned through *strategic planning* to pursue and realise the strategic ends and the Council's objects.
- *Operational level* – This is the level of strategy at which the operational ways are considered, designed, sustained, and reviewed through *operational design* to pursue and realise the strategic ends and the Council's objects.
- *Tactical level* – This is the level of strategy at which the tactical means are manoeuvred for the tactical actions through *tactical manoeuvre* to pursue and realise the operational objectives for the operational ways.

Figure 3 Strategy in practice



The relationship between the elements, levels and process of strategy, and the respective responsibilities and rights of councillors, chief executive officer, senior executive employees, and officers, is shown in **Figure 4**.

Figure 4 Technical process of strategy

Elements of reasoning	Elements of strategy	Levels of strategy	Process of strategy	Responsible person
Objects	Political purpose	Deliberations	Strategic planning	Councillors
Ends	Strategic ends	Strategies		Councillors/ Chief executive officer/Senior executive employees
Ways (and the will)	Operational ways	Operations	Operational design	Chief executive officer/Senior executive employees/ Officers
Means	Tactical means	Tactics	Tactical manoeuvre	Senior executive employees/Officers

Technical decision-making

> *"You are what you think. Whatever you are doing, whatever you feel, whatever you want – all are determined by the quality of your thinking. If your thinking is unrealistic, your thinking will lead to many disappointments. If your thinking is overly pessimistic, it will squeeze what enjoyment can be found in life and keep you from recognizing what should be properly rejoiced.*
>
> Richard W. Paul and Linda Elder

Conscience and the Rule of Law

The ethical and moral reasoning of Council officers about their objects, ends, ways and means, is binding both in the conscience of Council officers, but also legally by reason of the Rule of Law, which includes the human positive law made by political communities, which in the case of Queensland local governments is most relevantly the *Local Government Act 2009* (Qld).

Accordingly, when Council officers do not make decisions for right and good reasons, they subject themselves to the human suffering of their own personal consciences and the judgements of the consciences of other human persons, but also significantly and importantly to the sanctions of the Rule of Law required for the public good of the political community.

The relationship between the objects, ends, ways and means of Council officers and the requirements of the *Local Government Act 2009* (Qld) applicable to Council officers is stated in **Figure 5**.

Figure 5 Council officer decision-making and the *Local Government Act 2009*

Elements of reasoning	Requirements of the *Local Government Act 2009*
Objects	Implementing the policies and priorities of the local government
Ends	Local government principles
Ways (and the will)	Council officer responsibilities
Means	Personal interests and conflicts of interest

Objects of Council officers – Implementing the policies and priorities of the local government

Council officers primary responsibility under the *Local Government Act 2009* (Qld), is to implement the policies and priorities of the local government.[1] Accordingly all deliberations about Council officer objects or objectives must relate to implementing the policies and priorities of the local government.

Ends of Council officers – Local government principles

Council officers when performing their responsibilities and rights under the *Local Government Act 2009* (Qld) must do so in accordance with the *ends* identified in the *local government principles*.[2]

Council officers must also ensure that any *action* that is taken under the *Local Government Act 2009* (Qld), is to be taken in a *way* that:[3]

- *Consistent actions* – is consistent with the local government principles.
- *Consistent results* – provides results that are consistent with the local government principles, insofar as the results are within the context of the Council officer taking the action.

The local government principles are as follows:[4]

- Transparent and effective processes, and decision-making in the *public interest*.
- *Sustainable* development and management of assets and infrastructure, and delivery of *effective* services.
- *Democratic representation*, social inclusion and meaningful community engagement.

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1 See section 13(2)(a) of the *Local Government Act 2009*.

2 See section 4(1)(a) of the *Local Government Act 2009*.

3 See section 4(1)(b) of the *Local Government Act 2009*.

4 See section 4(2) of the *Local Government Act 2009*.

- *Good governance* of, and by, local government.
- *Ethical and legal behaviour of councillors and local government employees*.

Ways of Council officers – Corporate and professional responsibilities

Council officers have both corporate responsibilities and professional responsibilities.

Council officers' *corporate responsibilities* involve the following:

- *Policies and priorities*[5] – Implementing the policies and priorities of the local government in a way that promotes:
  - the effective, efficient and economical management of public resources;
  - excellence in service delivery; and
  - continual improvement.
- *Legal compliance*[6] – Ensuring the local government:
  - discharges its responsibilities under the *Local Government Act 2009* (Qld);
  - complies with all laws that apply to local governments; and
  - achieves its corporate plan.
- *Advice*[7] – Providing sound and impartial advice to the local government.

Council officers' *professional responsibilities* involve the following:

- *Impartiality and integrity*[8] – The carrying out of their duties with *impartiality and with integrity*.
- *Maintenance of reputation*[9] – Ensuring their personal conduct does not reflect adversely on the reputation of the local government.
- *Work performance*[10] – Improving all aspects of their work performance.
- *Compliance with laws*[11] – *Observing all laws* relating to their employment.
- *Compliance with ethics principles* – Observing the *ethics principles* under section 4 of the *Public Sector Ethics Act 1994*.[12]
- *Code of conduct*[13] – Complying with a code of conduct under the *Public Sector Ethics Act 1994*.

The chief executive officer has *extra corporate responsibilities* which involve the following:[14]

- *Operational management* – The management of the local government in a way that promotes the effective, efficient and economical management of public resources, excellence in service delivery and continual improvement.
- *Workforce management* – The management of the other Council officers through management practices that promote equal employment opportunities and are responsive to the local government's policies and priorities.
- *Goals and practices* – Establishing and implementing goals and practices in accordance with the policies and priorities of the local government.
- *Access and equity* – Establishing and implementing practices about access and equity to ensure that members of the community have access to local government programs and appropriate avenues for reviewing local government decisions.
- *Public records* – Maintaining the safe custody of all records about proceedings, accounts or transactions of the local government or its committees and all documents owned or held by the local government.
- *Councillor requests* – Complying with requests from councillors under section 170A of the *Local Government Act 2009* (Qld) for advice to assist the councillor carry out their role as a councillor, or for information, that the local government has access to, relating to the local government.

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5 See section 13(2)(a) of the *Local Government Act 2009*.
6 See section 13(2)(b) of the *Local Government Act 2009.*
7 See section 13(2)(c) of the *Local Government Act 2009.*
8 See section 13(2)(d) of the *Local Government Act 2009.*
9 See section 13(2)(e) of the *Local Government Act 2009.*
10 See section 13(2)(f) of the *Local Government Act 2009.*
11 See section 13(2)(g) of the *Local Government Act 2009.*
12 See section 13(2)(h) of the *Local Government Act 2009.*
13 See section 13(2)(i) of the *Local Government Act 2009.*
14 See section 13(3) of the *Local Government Act 2009.*

Means of Council officers – Personal interests

Ethics principles

Council officers are required to observe the *ethics principles* in the *Public Sector Ethics Act 1994*.[15]

In observing the ethics principles, Council officers are required to demonstrate:

- *integrity and impartiality*;
- promoting the *public good*;
- commitment to the *system of government*;
- *accountability* and *transparency*.

Personal interests

Council officers when performing their responsibilities are to avoid conflicts of interest and must ensure that their *personal interests* are dealt with in an accountable and transparent way that meets community expectations.

Conflicts of interest

A conflict of interest occurs when private interests interfere, or appear to interfere with the performance of official duties.[16]

There are three categories of conflicts of interest:

- *Actual* – There is a direct conflict between a Council officer's duties and their private interests.
- *Potential* – There is not currently a direct conflict between a Council officer's duties and their private interests but there could be in the future.
- *Perceived* – It could appear that a Council officer's private interests could improperly influence the performance of their duties.

Conflicts of interest may be:

- *Pecuniary* – This is where there is a reasonable likelihood of financial gain or loss.
- *Non-pecuniary* – This is where there is self-interest, personal or family relationships or affiliations.

Council officer actions for a conflict of interest

Whilst it is best to avoid conflicts of interest, this is not always possible.

A Council officer must take the following action in respect of a conflict of interest:

- *Declare the conflict* – The conflict of interest must be identified and declared.
- *Receive a determination* – No action must be taken whilst the conflict of interest is being assessed.
- *Manage the conflict* – The conflict of interest must be managed or resolved in the public interest.

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15 See section 13(2)(h) of the *Local Government Act 2009*.

16 See section 13(2)(i) of the *Local Government Act 2009* and the Code of Conduct for the Queensland Public Service.

No error of law to fuel an application for leave to appeal to the Queensland Court of Appeal

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168 heard before Everson DCJ

October 2022

In brief

The case of *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168 concerned an application for leave to appeal to the Queensland Court of Appeal (**Court of Appeal**) in respect of the dismissal by the Planning and Environment Court of Queensland (**P&E Court**) of an appeal against the refusal by the Cairns Regional Council of a development application for a development permit for a material change of use of land for a service station, shop, and food and drink outlet, and a development permit for reconfiguring a lot (boundary realignment).

The P&E Court relevantly held in the case of *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QPEC 6 that there was a strong planning intent in the *CairnsPlan 2016* (Version 2.1) (**Planning Scheme**) that the subject land is not to be developed as contemplated by the proposed development and that there were no relevant matters or a sufficient level of need for the proposed development to overcome the "*fundamental and serious inconsistencies*" with the Planning Scheme in respect of rural land use, rural and scenic values, and the maintenance of agricultural land. A summary of the P&E Court's decision is available in our July 2022 article.

The Applicant contended that the following errors of law warranted the grant of leave to appeal to the Court of Appeal:

- *Ground 1* – The P&E Court erred in its application of section 45(5)(a) (Categories of assessment) of the *Planning Act 2016* (Qld) (**Planning Act**) because it did not determine whether the proposed development complied with the Service Station and Car Wash Code (**SSCW Code**) in the Planning Scheme.
- *Ground 2* – The P&E Court erred in its interpretation and application of performance outcome PO5 of the Rural Zone Code and the Landscape Values Overlay Code of the Planning Scheme.
- *Ground 3* – The P&E Court erred in its assessment of need for the proposed development.

The Court of Appeal had regard to the following matters and refused to grant leave to appeal because it did not find any error or mistake of law by the P&E Court:

- The process for a decision-maker under section 60 (Deciding development applications) of the Planning Act involves balancing the factors permitted to be considered under section 45(5) and the weight to be given to each factor is a matter for the decision-maker in the circumstances (at [7]).
- The requirement in section 45(5)(a)(i) of the Planning Act that an impact assessment must be carried out "*against the assessment benchmarks in a categorising instrument for the development*" does not require a decision-maker to make an express finding about every assessment benchmark referred to by a party (at [16]).
- Whilst the assessment of need is informed by the following principles stated in [21] in the case of *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414 (***Isgro* case**), it is a flexible process that is not constrained by the principles as if they are a checklist to be ticked off by a decision-maker in every case (at [30]):
  - "*Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community*".
  - "*[N]eed cannot be a contrived one*".
  - "*… [T]he basic assumption is that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met*".
- "*[N]eed is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority was to take into account*" (at [30]).

Ground 1 – Express finding in respect of the SSCW Code was not required

The Applicant alleged that the P&E Court did not expressly determine whether the proposed development complied with the SSCW Code and accordingly could not undertake the balancing exercise required under section 45(5) and section 60 of the Planning Act.

The Court of Appeal did not find an error of law by the P&E Court and held that it was unnecessary for the P&E Court to make an express finding in respect of the SSCW Code in the following circumstances (see [9] to [17]):

- The SSCW Code is at the bottom of the hierarchy of the assessment criteria because it is a use code over which the strategic framework, state-wide codes, overlay codes, local plan codes, and zone codes prevail.
- The parties' town planning experts were of the opinion that the proposed development complied or generally complied with the SSCW Code and it did not assume significance in their evidence.
- The P&E Court accepted that the development application was for three separate uses being a service station, a shop, and a food and drink outlet.

Ground 2 – No misconstruction or misapplication of the Planning Scheme provisions

The Applicant alleged that the P&E Court misconstrued the words "*site coverage*" in performance outcome PO5 of the Rural Zone Code of the Planning Scheme, by taking into account the whole of the proposed development rather than limiting it to the definition of "*site cover*" in the Administrative Definitions in schedule 1.2 of the Planning Scheme, which states as follows:

> *The proportion of the site covered by a building(s), structure(s) attached to the building(s) and carport(s), calculated to the outer most projections of the building(s) and expressed as a percentage.*
>
> *The term does not include:*
>
> - *any structure or part thereof included in a landscaped open space area such as a gazebo or shade structure;*
>
> *basement car parking areas located wholly below ground level*
>
> - *eaves and sun shading devices.*

The Court of Appeal held that the language in performance outcome PO5, which required a qualitative analysis, suggests in that context that the term "*site coverage*" has a broader scope than "*site cover*" and did not find an error of law by the P&E Court (see [24] to [25]).

The Court of Appeal also held that the Applicant's allegation of an error of law in respect of the misapplication of the Landscape Values Overlay Code was not made out (at [26]).

Ground 3 – P&E Court did not err in its assessment of need

The Applicant alleged that the P&E Court erred in its assessment of need in the following respects:

- The P&E Court took into account evidence of development applications for service stations in the northern beaches of Cairns, the lack of evidence that residents of the northern beaches catchment had to queue to obtain fuel or of there being any convenience or lack of choice, and the lack of evidence from people involved in the road transport or tourist industries.
- The P&E Court erred in its assessment of whether there was a latent unsatisfied demand for the proposed development and whether an approval would improve the ease, comfort, convenience, or efficient lifestyle of the community.

The Court of Appeal found no error of law by the P&E Court and held the following (see [28] to [36]):

- Ground 3 went to factual matters and was cloaked as an alleged error of law.
- Whilst "*[i]t may be accepted that development applications, as opposed to approvals, are not a sure guide of what may be expected to occur in the future*", the P&E Court referred to other development applications only in the context of identifying that there are other sites on which need for components of the proposed development, if there was any need, could be met.
- The P&E Court applied the principles relating to need referred to in the *Isgro* case and it was artificial to read the aspects of the P&E Court's reasons relevant to Ground 3 as divorced from other factors considered.

Conclusion

The Court of Appeal held that no error of law had been made out and refused to grant leave to appeal against the decision of the P&E Court.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court of Queensland dismisses a submitter appeal against the approval of a proposed four-storey residential dwelling where the submitter contended the height ought to only be three storeys

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Matthew Lawrence v The City of Gold Coast & Anor* [2022] QPEC 19 heard before Everson DCJ

October 2022

In brief

The case of *Matthew Lawrence v The City of Gold Coast & Anor* [2022] QPEC 19 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the City of Gold Coast (**Council**) to approve a development application for a material change of use for a four-storey residential apartment building in Mermaid Beach on the Gold Coast (**Proposed Development**).

The key issue for the Court to consider was the height of the Proposed Development. The Building Height Overlay Map in the *Gold Coast City Plan 2016* (version 7) (**City Plan**) relevantly maps the site as being in an area requiring no more than three-storeys and 15 metres in height. Section 3.3.2.1(9) of the Strategic Framework in the City Plan, however, permits increases in building height up to a maximum of 50 per cent where all of the following outcomes are satisfied:

> *(a) a reinforced local identity and sense of place;*
>
> *(b) a well managed interface with, relationship to and impact on nearby development, including the reasonable amenity expectations of nearby residents;*
>
> *(c) varied, ordered and interesting local skyline;*
>
> *(d) an excellent standard of appearance of the built form and street edge;*
>
> *(e) housing choice and affordability;*
>
> *(f) protection for important elements of local character or scenic amenity, including views from popular outlooks to the city's significant natural features;*
>
> *(g) deliberate and distinct built form contrast in locations where building heights change abruptly on the Building height overlay map; and*
>
> *(h) the safe, secure and efficient functioning of the Gold Coast Airport or other aeronautical facilities.*

The contentious outcomes in the appeal were those in Items (a), (b), (c), (e), and (f) above, with which the Court found there was compliance and therefore dismissed the appeal.

Court finds that, in accordance with section 3.3.2.1(9)(a), the Proposed Development would reinforce local identity and sense of place

The Court considered the evidence of the parties' visual amenity experts and found that the Proposed Development's inclusion of design elements such as setbacks and architectural treatments to avoid a sense of overbearing would assist it in reinforcing the existing local identity of the area. Furthermore, the Court highlighted that this criterion must be assessed with regard to not only what currently exists in the local area, but also what the City Plan intends, which in this instance is to prioritise greater development intensity. The Court concluded that the Proposed Development is a "*… well-designed, well-articulated and well separated coastal multiple dwelling which is a modern reinforcement of the beachside local identity and sense of place …*" (at [31]).

Court finds that, in accordance with section 3.3.2.1(9)(b), the Proposed Development satisfies the requirement for a well-managed interface with, relationship to, and impact on nearby development

The Court again considered the evidence of the parties' visual amenity experts, but found that the evidence given by the visual amenity expert for the submitter was too narrow as it did not consider what the City Plan intended (at [32]). The visual amenity experts for the Council and Applicant opined that the Proposed Development will achieve a sense of building separation, breathing space around the building and, due to the reduced roof setbacks, will not impact on the existing amenity afforded to the adjoining residential properties (see [32] and [33]). The Court therefore concluded that the requirement was complied with.

Court finds that, in accordance with section 3.3.2.1(9)(c), the Proposed Development will contribute to a varied, ordered, and interesting local skyline

The parties' architects agreed that the general surrounds of the Proposed Development includes an eclectic mix of existing residential buildings, which are diverse in age, style, built form, and materiality. The Court was satisfied that the Proposed Development will contribute to a varied, ordered, and interesting skyline, as required by the City Plan, by providing a flatter roof than the roof formations of adjoining buildings (at [35] and [36]).

Court finds that, in accordance with section 3.3.2.1(9)(e), housing choice and affordability must be considered within the context of the area

In considering this provision, the Court differentiated between "*affordability*" and "*affordable housing*", which is defined in the City Plan as "*[h]ousing that is appropriate to the needs of households with low to moderate incomes*". The Court considered the evidence of the parties' economists and found that, given the high-priced nature of the Mermaid Beach market, the concept of affordability must be "*seen in its context*" (at [38]). The Court concluded that the Proposed Development met the requirement for housing choice and affordability, as it offers a "*… three-bedroom residential option with proximity to public transport at a price point that is lower than a comparable dwelling house, as well as a single bedroom unit*" (at [39]).

Court finds that, in accordance with section 3.3.2.1(9)(f), the Proposed Development protects local character and scenic amenity

Finally, the Court concluded that the Proposed Development met the requirement to protect local character and scenic amenity as it is overall well-articulated, not overbearing, and will protect the elements of local character such as views from the nearby St Johns Park (at [40]).

Conclusion

The Court found that the Proposed Development met the requirements in the Strategic Framework in the City Plan which allow the building height to exceed that on the Building Height Overlay Map, and therefore dismissed the appeal.

Check-in to a recent decision of the Planning and Environment Court of Queensland permitting the removal of a development condition requiring units of a motel to be managed and let by a single operator

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Richardson & Ors v Douglas Shire Council & Ors* [2021] QPEC 80 heard before Fantin DCJ

October 2022

In brief

The case of *Richardson & Ors v Douglas Shire Council & Ors* [2021] QPEC 80 concerned an application to the Planning and Environment Court of Queensland (**Court**) for a minor change to a town planning consent permit for a motel (**Development Approval**) on land located at Warner Street, Port Douglas (**Subject Land**).

The Development Approval was originally granted in 1994 by the Douglas Shire Council (**Council**) under the now repealed *Local Government (Planning and Environment) Act 1990* (Qld) after the Court made orders by consent in respect of conditions of the Development Approval.

The Development Approval was for 21 motel units and one onsite manager's unit, and relevantly included the following condition (**Condition 9**), which the Applicants sought to be removed (underlining added):

> *Each motel room comprised within the motel development hereby approved is to be managed and let for the temporary accommodation of travellers by a single operator to the satisfaction of the Shire Planner.*

The Court held that the proposed change was for a minor change, and allowed the application for the following reasons:

- The deletion of Condition 9 would not affect the level of assessment of the original development application under the *1981 Town Planning Scheme for the whole of the Area of the Shire of Douglas* (**Original Planning Scheme**) and would not affect the physical characteristics of the Subject Land (at [38]).
- There was nothing in the Original Planning Scheme or relevant development control plans requiring that a motel use have an exclusive letting agent (at [40]).
- The deletion of Condition 9 would not have an adverse town planning consequence and would not result in development that does not comply with the Original Planning Scheme (at [43]).
- Condition 9 is not reasonably required for the motel and has no obvious planning purpose for the reason including that "*… online accommodation booking services are ubiquitous*" (at [45]).
- Other conditions of the Development Approval remain which require the motel to only be used for temporary accommodation.

Parties and issues in dispute

The Council and Third Respondent, the body corporate for the community management titles scheme for the motel, consented to the minor change application and did not take an active part in the proceedings (at [2]).

The Second Respondent who was the owner and occupant of the manager's unit opposed the minor change application for the following reasons:

- *Submission 1: Substantially different development* – The deletion of Condition 9 would result in substantially different development because it would remove a component integral to the operation of the motel, which was that there be a single operator for management and lettering services, and would change the way the use operates (see [7] and [33]).
- *Submission 2: No guarantee of temporary nature* – There was no guarantee that the Applicants would comply with conditions prohibiting permanent accommodation (at [58]).

- *Submission 3: Letting agreement* – The removal of Condition 9 would impact the commercial letting arrangement between the Second Respondent and Third Respondent (at [7]).
- *Submission 4: Condition 8* – If Condition 9 is removed, condition 8 will also have to be removed (at [66]).
- *Submission 5: Owner's consent* – The Second Respondent, as the owner of the manager's unit, has not provided consent to the minor change application being made (at [69]).

The Applicants disagreed with the Second Respondent's submissions and relevantly argued that the number of motel units and the use of the motel units would not be changed, and that the onsite manager's unit would still be occupied on a permanent basis by the person carrying out caretaking and management duties in respect of the common property and is therefore not materially affected (see [34] and [71]).

What is "substantially different development"?

The Court considered what is "*substantially different development*" in the context of the definition of "*minor change*" under schedule 2 (Dictionary) of the *Planning Act 2016* (Qld) (**Planning Act**) and the guidance provided in the Development Assessment Rules and held as follows (see [28] to [31]):

> *The applicable principles are well established. The assessment of whether a change would or would not have that effect is a comparative task that involves an evaluation which can be both quantitative and qualitative as may be relevant in the circumstances. Matters of scale and degree are often involved and the particular context and circumstances of the case are important. Whether a proposed change would result in substantially different development is considered broadly and fairly, rather than pedantically.*

The Court held that the starting point for determining whether the change application would result in substantially different development is the ordinary meaning of "*substantial*", which means "*essential, material or important*" (at [52]).

Deletion of Condition 9 will not result in substantially different development

The Court held that the deletion of Condition 9 would not result in substantially different development for the following reasons (see [32], [38] to [45], and [56]):

- The temporary nature of the motel use will remain unchanged, even if there is not a sole agent managing and letting each unit. The deletion of Condition 9 will not result in a new use.
- It will not result in the Development Approval applying to a new parcel of land.
- It will not affect the built form or appearance of the existing motel building, nor will it increase or introduce new impacts on traffic flows or networks or other infrastructure.
- The Original Planning Scheme does not prohibit a motel from being self-contained or strata titled and does not require that a motel be "*managed and let by a single operator*", and town planning evidence supports the premise that the Original Planning Scheme reflected a "*… 'first principles' town planning approach which regulates the ultimate use by class of user, and not by form of development*".
- It will not have an adverse town planning consequence, result in development that does not comply with or changes the level of assessment under the Original Planning Scheme, nor will it change the physical characteristics of the Subject Land or the form of the development.
- The Development Approval was granted "*before the advent of accommodation booking services*" when single operator letting and management was common, but that was not a requirement under the Original Planning Scheme. Condition 9 is not reasonably required by a motel use in 2021 where "*online accommodation booking services are ubiquitous*".

Second Respondent's other submissions unpersuasive

In respect of the Second Respondent's other submissions against the minor change application, the Court held as follows:

- *Submission 2: No guarantee of temporary nature* – The Court held that it proceeds on the premise that conditions will be complied with and is not to assume a party will act in breach of a development condition (at [58]).
- *Submission 3: Letting agreement* – The agreement between the Second and Third Respondents is not relevant to construing a development approval, which "*… is to be construed without reference to extrinsic materials; … A development approval is a formal document that operates in accordance with its own terms. Generally, reference to other documents is not permissible*" (at [61]).
- *Submission 4: Condition 8* – Condition 8 relates to the maintenance by the manager of a room register and does not require that the manager be a letting agent. Therefore, condition 8 can sensibly operate without Condition 9 (at [66]).

- *Submission 5: Owner's consent* – The Court held that the onsite manager's unit was "*excluded premises*" under section 79(1A) (Requirements for change applications) of the Planning Act and therefore the Applicants complied with section 79(1A) because Condition 9 did not materially affect the use or operation of the onsite manager's unit or the common property and the Second Respondent's consent was unreasonably withheld (see [70] to [72]).

Other considerations weighed in favour of approving the minor change application

The Court relevantly considered as required under section 81(2)(b) (Assessing change applications for minor changes) of the Planning Act the two properly made submissions lodged with the Council during the public notification stage of the original development application, which related to the proper characterisation of the use as temporary or permanent accommodation and the impacts of the motel on amenity and infrastructure.

The Court was satisfied that the deletion of Condition 9 would not affect the management of the hotel nor give rise to additional concerns relevant to the properly made submissions (at [48]).

The Court may under section 81(5) of the Planning Act give the weight it considers appropriate to a statutory instrument in effect when the change application is made.

The Court in that regard considered the *Douglas Shire Planning Scheme 2018 Version 1.0* (**Current Planning Scheme**) and held that the removal of Condition 9 would not result in prohibited development, a referral to a referral agency, public notification, nor non-compliance with the assessment benchmarks in the Current Planning Scheme that related to "*short-term accommodation*", which may be applicable to a "*motel*" use.

Conclusion

The Court allowed the minor change application to remove Condition 9 for reasons including that the condition was not reasonably required to ensure the motel operated temporarily and its removal would not result in substantially different development.

Planning and Environment Court of Queensland dismisses an appeal against the decision to refuse a development application for the demolition of a pre-1947 dwelling house

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Law v Brisbane City Council* [2021] QPEC 65 heard before Rackemann DCJ

October 2022

In brief

The case of *Law v Brisbane City Council* [2021] QPEC 65 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse a development application for a development permit for the demolition of a pre-1947 dwelling house in Holland Park (**Proposed Demolition**).

The building the subject of the Proposed Demolition (**Subject Building**) is included in the Traditional Building Character Overlay (**Overlay**). The issue for the Court to determine was whether the Proposed Demolition complied with, in particular, the following provisions of the Traditional Building Character (Demolition) Overlay Code (**Overlay Code**) of the *Brisbane City Plan 2014* (version 20) (**City Plan**):

- *Performance Outcome 5(c)* – Development involves a building which does not contribute to the traditional building character of that part of the street within the Overlay (**PO5(c)**).
- *Acceptable Outcome 5(c)* – Development involves a building which if demolished will not result in the loss of traditional building character (**AO5(c)**).
- *Acceptable Outcome 5(d)* – Development involves a building which is in a section of the street within the Overlay that has no traditional character (**AO5(d)**).

The Court found that the Proposed Demolition did not comply with AO5(c) and AO5(d), and therefore PO5(c), and dismissed the appeal.

Court finds that the Proposed Demolition involved a building which contributes to the traditional building character of the part of the street within the Overlay

The Subject Building is located at the edge of the Overlay boundary and the Overlay does not encompass all of the relevant street. The Applicant argued that the relevant street ought to be separated and, when looked at from that perspective, the Subject Building is in a different section of the street, partly outside the Overlay, to that part of the street containing buildings with a traditional character. The Court found, however, that the Applicant's evidence was erroneously influenced by areas beyond the boundary of the Overlay and that the City Plan focuses on all of the part of the relevant street within the Overlay.

The Court found that the section of the relevant street that is included in the Overlay has 11 houses which, as a collective group, has traditional character and the Subject Building contributes to that traditional character.

The Court therefore found that the Proposed Demolition did not comply with PO5(c) and AO5(d).

Court finds that the Proposed Demolition will result in the loss of traditional building character

The Applicant argued that the Subject Building's contribution to the traditional character of the relevant street was diminished by its location at the edge of the Overlay boundary. The Court did not accept this argument, however, it found that even if this was true, the Subject Building does not have to be as important as more centrally located buildings to be worthy of preservation under the provisions of the Overlay Code. The Court said the following at [22]:

> *Those provisions are not to be read in an absolute way, as if they referred to an immaterial, trivial or insignificant contribution or loss, but neither does the contribution or loss necessarily have to be as great as would be the case for every other house in the relevant part of the street.*

The Court distinguished the Subject Building from the house which was the subject of the case of *Williams v Brisbane City Council* [2021] QPEC 26 (**Williams House**). In that case, the Court found that the Williams House's contribution to traditional building character was so diminished that its loss would not be meaningful or significant as it was set back a great distance on a site which sloped away from the street frontage, screened by long standing vegetation, and obstructed by adjacent houses and garages. The Subject Building, on the other hand, is clearly visible from the street in front of the property and other viewpoints so that it can be readily appreciated for its traditional character and its existence in the context of other houses with traditional character on the street.

Ultimately, the Court found that the Proposed Demolition will result in the loss of traditional building character, contrary to AO5(c), and that the evidence did not establish any matter that would mitigate this loss (at [31]).

Conclusion

The Court was not satisfied that the provisions of the Overlay Code were satisfied or that the development application ought to be approved in the exercise of the Court's discretion. Accordingly, the Court dismissed the appeal.

Reconfiguring a lot into three lots in Brisbane's character residential zone approved on appeal

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *CSR SPV 1 Pty Ltd & Anor v Brisbane City Council* [2021] QPEC 35 heard before Everson DCJ

October 2022

In brief

The case of *CSR SPV 1 Pty Ltd & Anor v Brisbane City Council* [2021] QPEC 35 concerned an appeal to the Planning and Environment Court of Queensland (**P&E Court**) against a decision of the Brisbane City Council (**Council**) to refuse a code assessable development application for a development permit for reconfiguring a lot (one lot into three lots) on land located in Gaythorne, Queensland.

The Court considered the following issues in the context of the Character Residential Zone Code (**Character Code**) and Subdivision Code of the *Brisbane City Plan 2014* version 19 (**Planning Scheme**) (see [15]):

1. *Whether the proposed development provides appropriately sized and configured lots that are consistent with the outcomes intended for the site, the immediate area and the Character residential zoned land in the locality;*
2. *Whether the proposed lots will accommodate dwelling houses that are of an appropriate form, scale and traditional building character, will reinforce the distinctive subtropical character of low rise buildings in green landscaped areas and reinforce and complement the traditional building character of the locality;*
3. *What weight, if any, should be given to the amendment to the planning scheme … in version 20;*
4. *Whether discretionary matters justify approving the proposed development pursuant to section 60(2) of the [Planning Act 2016], in the event of non-compliance with assessment benchmarks.*

The Court allowed the appeal subject to the imposition of lawful conditions for the reasons that the proposed development complies with the relevant assessment benchmarks in that the proposed lots are appropriately sized and configured and able to accommodate dwelling houses of an appropriate form, scale, and traditional building character, which complement the traditional building character of the locality (at [20]).

The Court held that in the circumstances where the proposed development complies with the relevant assessment benchmarks in force at the time the development application was properly made and is consistent with the mixed character of the locality, which includes similarly configured lots to the proposed development, it was inappropriate to give weight to an amendment in version 20 of the Planning Scheme that specified minimum size and dimension requirements for land in the Low Density Residential Zone and Character Residential Zone (at [19]).

Subject Land

The Subject Land is 1,454m^2, regular in shape, and has a 30-metre street frontage to Pendine Street (at [3]). The rear portion of the Subject Land is within the Low Density Residential Zone and the front portion is within the Character Residential Zone (at [4]).

The Subject Land is relevantly surrounded by the following:

- Land in the Low Density Residential Zone, which is subdivided into lots with frontages of approximately 10 metres, three of which have rear boundaries adjoining the Subject Land.
- Land in the Character Residential Zone, which is subdivided into lots that have been developed for pre-1946 dwelling houses that for the most part have a frontage width of 15-metres or greater and in the case of those lots with a frontage of less than 15-metres width are developed for pre-1946 dwelling houses that have the "*distinctive subtropical character*" of a "*Queenslander*" house surrounded by green landscaping (at [5]).

The proposed development is for the creation of three vacant residential lots. One lot is 492m^2 and the other two are each 481m^2 in size. Each of the three lots are proposed with a 10-metre wide frontage to Pendine Street.

Proposed development complies with the Planning Scheme

The Council submitted that the proposed development ought to be refused for the following reasons:

- The surrounding area within the Character Residential Zone comprises lots with 15-metre wide frontages.
- The proposed development does not have the requisite setbacks required under the Queensland Development Code to accommodate a distinctive subtropical character in green landscaped areas.
- In those circumstances, any dwelling house on the Subject Land will not complement land within the Character Residential Zone that seeks to reinforce traditional building character built in 1946 or earlier.

The Court relevantly held as follows in respect of the proposed development (see [16] to [18]):

- The proposed development complies with the quantitative requirements that the proposed lots be a minimum of 450m^2 and the proposed lots "*… maintain a block pattern that accommodates traditional backyards and large trees*".
- The Council's submissions ought not be accepted because there are existing pre-1946 dwelling houses with only a 10-metre wide frontage which appear to satisfy the Character Code, and there are no pre-1946 dwelling houses with primary frontage to Pendine Street.
- The proposed development responds to the pattern of development in the locality.
- The front part of any dwelling house to be built on the Subject Land is required to satisfy the requirements of the Traditional Building Character (Design) Overlay Code, which has the purpose of ensuring development strengthens traditional building character.
- The proposed development complies with the relevant assessment benchmarks in the Planning Scheme and the Applicant has discharged its onus.

Conclusion

The Court held that the proposed development complied with the relevant assessment benchmarks in that it is appropriately sized and configured to accommodate dwelling houses of an appropriate form, scale, and traditional building character and is consistent with the mixed character of the locality.

Queensland Court of Appeal serves up a decision refusing leave to appeal against a refusal to grant a declaration that a proposed restaurant was impact assessable

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Cannon Hill Investments Pty Ltd & Anor v Malt Brewing Company Pty Ltd & Ors* [2021] QCA 281 heard before Morrison and Mullins JJA, and Callaghan J

November 2022

In brief

The case of *Cannon Hill Investments Pty Ltd & Anor v Malt Brewing Company Pty Ltd & Ors* [2021] QCA 281 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the dismissal by the Planning and Environment Court of Queensland (**P&E Court**) in the case of *Cannon Hill Investments Pty Ltd & Anor v Malt Brewing Company Pty Ltd & Ors* [2021] QPEC 30 of an originating application for a declaration that a development application for a development permit for a material change of use for high impact industry and a food and drink outlet (**Development Application**) lodged with the Brisbane City Council (**Council**) was impact assessable rather than code assessable.

A summary of the P&E Court's decision is available in our November 2021 article.

The issue for the Court of Appeal was whether there was any legal error in the P&E Court's determination that the restaurant component of the proposed development was less than 250m^2 gross floor area (**GFA**), and was therefore code assessable under the *Brisbane City Plan 2014* (Version 20) (**City Plan**).

The Court of Appeal observed that under section 63(1) (Who may appeal) of the *Planning and Environment Court Act 2016* (Qld) the findings of fact of the P&E Court could not be challenged on appeal, and that no error or mistake in law or jurisdictional error had been made out so as to warrant a grant of leave to appeal against the P&E Court's decision.

Given the Court of Appeal's dismissal of the application for leave to appeal, it was unnecessary for the Court of Appeal to consider an associated application to adduce further evidence (see [49] to [50]).

Background

The Development Application relevantly stated that the proposed development comprises a brewery with a GFA of 538m^2 and a restaurant with a GFA of 250m^2.

Cannon Hill Investments Pty Ltd operates an abattoir adjacent to the land the subject of the Development Application (**Adjacent Operator**), and before the Development Application was decided, made representations to the Council that the Development Application ought to properly be subject to impact assessment because, relevantly, the restaurant component of the proposed development was not "*less than 250m^2*" as set out in the table of assessment for code assessable development in the industry zone in the City Plan.

Despite the description in the Development Application Form 1 that the restaurant was 250m^2 GFA rather than less than 250m^2 GFA, the Council approved the Development Application subject to conditions, which relevantly included that the development must be maintained and carried out in accordance with the approved drawings and documents, and that the restaurant component "*… must remain less than 250m^2 gross floor area …*" (**Relevant Conditions**) (see [14] to [16]).

P&E Court dismisses the application for a declaration

The P&E Court dismissed the Adjacent Operator's application seeking a declaration that the Development Application was to be subject to impact assessment because the P&E Court found that the restaurant component was for less than 250m^2 GFA and thus did not require impact assessment.

The P&E Court's finding was supported by evidence in respect of the intention of the Applicant that the restaurant be less than 250m^2 GFA, some of the plans of development, the town planning expert reporting, and the Council's decision to accept the Development Application as code assessable and approve the Development Application with the Relevant Conditions (see [8] and [22] to [27]).

Whilst there was some ambiguity in some of the plans of development about the exact area of the restaurant, the P&E Court found at [26] that the error in the description of the GFA for the restaurant was of no material consequence given the Relevant Conditions attaching to the development approval.

Approach to resolve ambiguity in development applications

In respect of the ambiguity of the area of the restaurant component of the proposed development in some of the plans of development, the Court of Appeal found no error in the P&E Court's approach and held that the approach "*… was consistent with authority establishing that the construction of a development approval or consent should not be done in the same way as statute or as a document drafted with legal expertise, but rather liberally and to achieve practical results*" (at [26] citing for example *Matijesevic v Logan City Council* [1984] 1 Qd R 599, 605 and *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2006] NSWCA 245 at [36]).

No failure to take into account relevant evidence

The Court of Appeal rejected the Adjacent Operator's submission that the P&E Court did not take into account additional areas that it alleged were incorrectly omitted from the plans of development for the restaurant (**Additional GFA**) for the following reasons (see [31] to [42]):

- The P&E Court's findings of fact about the total GFA of the restaurant and the Council's acceptance of the Development Application implicitly rejected the contention that the Additional GFA ought to be included.
- The P&E Court expressly stated in [26] of its judgment that the plans of development submitted and approved by the Council appeared "*… to have included a slightly larger area than 250m^2*".
- The P&E Court accepted that the Development Application was advanced as being code assessable, and a planning report stated that the area of the restaurant was no more than 250m^2.
- A response to a query by the Council during the development assessment process confirmed that the restaurant "*does not exceed 250m^2 of gross floor area*", which relevantly excluded the Additional GFA; as did another plan of development which showed the Additional GFA as being included in the area for brewery production purposes, which the P&E Court accepted.

The Court of Appeal also held that how much GFA is occupied by the restaurant component of the proposed development is a question of fact, which cannot be challenged on appeal (at [43]).

No jurisdictional error

The Adjacent Operator relevantly contended that the Council's decision to approve the Development Application was affected by jurisdictional error because "*… the question of whether an application was code assessable admitted of only one correct answer, and that answer constituted a jurisdictional fact which, if answered incorrectly, revealed an excess of jurisdiction*" (at [44]).

The Court of Appeal held that there was no jurisdictional error for reasons, including that the Development Application was intended to be code assessable, the restaurant was intended to be less than 250m^2, and the Council understood, assessed, and decided the Development Application on those bases (see [45] to [47]).

Conclusion

The Court of Appeal found no error or mistake in law or jurisdictional error and dismissed the application seeking leave to appeal against the P&E Court's refusal to grant a declaration that the Development Application was impact assessable.

Compensation determination for resumption of land remitted to Land Court of Queensland to separately determine appropriate rate per hectare and appropriate discount

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Land Appeal Court of Queensland in the matter of *Desbois v Chief Executive, Department of Transport and Main Roads; Chief Executive, Department of Transport and Main Roads v Desbois* [2022] QLAC 1 heard before North J, PG Stilgoe OAM, Member of the Land Court, and Preston J, Acting Member of the Land Court

November 2022

In brief

The case of *Desbois v Chief Executive, Department of Transport and Main Roads; Chief Executive, Department of Transport and Main Roads v Desbois* [2022] QLAC 1 concerned an appeal to the Land Appeal Court of Queensland (**Land Appeal Court**) in respect of the determination of compensation under the *Acquisition of Land Act 1967* (Qld) (**Acquisition Act**) by the Land Court of Queensland (**Land Court**) in the case of *Desbois v Chief Executive, Department of Transport and Main Roads* [2021] QLC 43 (**LC Judgment**) for land resumed (**Resumed Land**) by the Department of Transport and Main Roads (**DTMR**) for the Mackay Ring Road Project.

The grounds of appeal submitted by the Landowner and DTMR related to the following issues:

- *Town Planning Ground* – The likelihood of a development approval for a material change of use for a service station and truck stop (**Proposed Use**) being granted (**Service Station Approval**).
- *Commercial Area Ground* – The area, if any, of the land before resumption (**Subject Land**) that ought to be the subject of the Proposed Use.
- *Acceleration Lane Ground* – The risk of a development condition being imposed on the Service Station Approval, which requires an acceleration lane of a length that would require the widening of a nearby railway bridge (**Acceleration Lane Condition**).
- *Risk Discount Ground* – The appropriate discount to be applied to the appropriate rate per hectare to reflect the risk of the Acceleration Lane Condition being imposed.
- *Land Value Ground* – The method to be used to determine the appropriate rate per hectare.

The Landowner was successful in respect of the Risk Discount Ground and Land Value Ground for the reason that the Land Court erred by conflating the tasks of determining the appropriate rate to be applied per hectare of the Resumed Land and the appropriate discount to be applied to the derived rate per hectare. All the other grounds of appeal were dismissed.

The matter was remitted to the Land Court to correctly determine the compensation in accordance with the Land Appeal Court's reasons.

Background

The Subject Land adjoins the Bruce Highway west of Mackay. Prior to resumption, the Subject Land had a total area of 59.556 hectares. The total area of the Resumed Land was 1.934 hectares.

The Land Court had determined compensation under section 20 (Assessment of compensation) of the Acquisition Act in the total amount of $948,961 (rounded), which comprised $781,355 for the loss in land value, $83,576.08 for the interest on the loss in land value, and $84,000 for disturbance.

Land Court's determination

The Land Court relevantly held the following in respect of the issues the subject of the grounds of appeal:

- *Town Planning Ground* – The Proposed Use of the relevant part of the Subject Land does not conflict with the *Mackay City Planning Scheme 2006* (**Planning Scheme**), and compensation for the Resumed Land should be assessed on the assumption that the Service Station Approval has good prospects of success (see [13] to [82] and [123] of the LC Judgment).

- *Commercial Area Ground* – The area to be assessed for the Proposed Use being the potential highest and best use of the relevant part of the Subject Land, which includes the Resumed Land, is 2.25 hectares (at [128] of the LC Judgment).
- *Acceleration Lane Ground* – A hypothetical developer would be advised that the Service Station Approval would include a condition for a lane of no longer than 315 metres that would not require the widening of the nearby railway bridge (at [123] of the LC Judgment).
- *Risk Discount Ground* – In recognition of the risk that the Acceleration Lane Condition may be imposed and thus require the widening of the railway bridge, a discount of 15% ought to be applied to the derived rate per hectare (at [153] of the LC Judgment).
- *Land Value Ground* – As the rate of $400,000 per hectare is too low because the "*… rate is heavily discounted for the [comparable] sale's un-costed flood mitigation risks and does not reflect the superior locational attributes …*" of the Resumed Land, a 15% discount in respect of the risk of the Acceleration Lane Condition being imposed ought to be applied instead of the 30% discount submitted by DTMR (see [152] and [153] of the LC Judgment).

Town Planning Ground – No material error

DTMR contended that the Land Court erred in finding that the Service Station Approval had good prospects of success because the decision (see [29]):

- incorrectly relied on a superseded version of the Planning Scheme and involved a misdirection or misapplication of the relevant provisions of the Planning Scheme; and
- involved a misapplication of the test under section 326 (Other decision rules) of the *Sustainable Planning Act 2009* (Qld) by failing to be satisfied that there were sufficient grounds to justify the Service Station Approval despite the non-compliance with the Planning Scheme (**Sufficient Grounds Test**).

The Land Appeal Court rejected DTMR's submissions for the following reasons:

- The reliance on an unamended version of the "*… Planning Scheme was not affected legally or factually by [the] reference to the unamended versions of those provisions*" (at [48]) and the Land Court did not misconstrue or misapply the relevant provisions of the Planning Scheme, but even if it did, those errors would not cause the proposed development not to comply with the Planning Scheme (see [64], [68], and [80] to [82]).
- The Land Court did not need to apply the Sufficient Grounds Test because it held that the proposed development did not conflict with the Planning Scheme. In any event, whilst the *Planning Act 2016* (Qld) (**Planning Act**) had not yet commenced it had been assented to, and thus it was reasonable that a hypothetical developer would be advised that the test under the Planning Act would apply instead of the Sufficient Grounds Test (see [94] and [104]).
- The task was not for the Land Court to determine whether it would have granted the Service Station Approval as if it were the assessment manager, "*… but rather to find what advice a hypothetical developer would have been given as to the prospects of approval being granted for the proposed use. That advice would inform the price the hypothetical developer would be prepared to pay to purchase the resumed land at the date of resumption …*" (at [104]).

Commercial Area Ground – No error in fact, law, or discretion

DTMR contended that, if the Service Station Approval had a likelihood of being granted, the Land Court erred in determining that it would be over 2.25 hectares of the Subject Land (see [13] and [108]) and that the Land Court erred in fact by accepting the evidence of the Landowner's town planning expert (at [111]).

The Land Appeal Court held that the Land Court's finding that the area the subject of the Service Station Approval would be 2.25 hectares was open on the expert evidence before it (at [112]).

Acceleration Lane Ground – No error in fact, law, or discretion

DTMR contended that the Land Court erred in finding that there were reasonable prospects that a development condition imposed on the Service Station Approval would require an acceleration lane of no longer than 315 metres because insufficient weight was given to the Austroads Guide to Road Design (**Road Guide**) and the findings in respect of low traffic were incorrect (see [114] to [122]).

The Land Appeal Court held that the Land Court did not misconstrue or misapply the Road Guide, which is not prescriptive and does not have regulatory force, and relevantly permitted an acceleration lane of less than 435 metres in certain circumstances; nor did the Land Court err in accepting the evidence before it (see [131] to [132] and [140] to [142]).

The significance or weight to be afforded by the Land Court to the Road Guide is a question of fact and the submission by DTMR that a different conclusion ought to be drawn "*… does not reveal any error justifying appellate intervention*" (at [139]).

Risk Discount Ground and Land Value Ground – Land Court erred by conflating determination of appropriate rate and appropriate discount

DTMR contended that the Land Court erred by applying a discount of 15%, which was too low for the risk that the Acceleration Lane Condition may necessitate the widening of the railway bridge (at [145]), and by reducing the discount from 30% to counterbalance using a lower rate per hectare (at [24]).

The Landowner contended that the Land Court erred by conflating the determination of the appropriate rate per hectare and the percentage discount for the risk of the Acceleration Lane Condition being imposed (at [21]). The Landowner argued that a discount of 15% was too high and the rate of $400,000 per hectare ought to have been $600,000 per hectare (see [24], [152], and [159]).

The Land Appeal Court held that the Land Court had erroneously conflated the determination of the appropriate rate per hectare and the appropriate discount to apply to that rate for the risk of the Acceleration Lane Condition. The Land Appeal Court noted that the Land Court (see [150] to [161]):

- "*… [D]id not determine what should be the appropriate discount having regard to her assessment of the risk of the condition of approval ... Instead, the primary judge reduced the discount to 15% to counterbalance her assessment that the value derived from the sale of $400,000 per hectare was too low*".
- Erred "*… on a principle of assessment in determining the loss of land value. Once the primary judge had determined that it was appropriate to discount the award for loss of land value to take account of the risk that a condition of approval for the proposed use might require a longer acceleration lane and hence the widening of the railway bridge, the primary judge can be seen to have constructively failed to exercise jurisdiction to determine what was the appropriate discount that reflected that risk*".
- Erred in applying a rate of $400,000 per hectare because it had expressly found that rate to be too low, but counterbalanced the low rate by applying a 15% rather than 30% discount.

The Land Appeal Court dismissed the Landowner's submission that the appropriate rate per hectare was $600,000 because, whilst the Land Court acknowledged that the appropriate rate was higher than $400,000 per hectare, the exact rate had not been determined by the Land Court (at [162]).

Conclusion

The Land Court, in determining compensation for the Resumed Land, failed to separately determine the appropriate rate per hectare and the appropriate discount to be applied to that rate. Thus, the matter was remitted to the Land Court to determine compensation for the Resumed Land in accordance with the Land Appeal Court's reasons.

Planning and Environment Court of Queensland approves a development application for a childcare centre in the low density residential zone

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Griffith Capital Pty Ltd v Redland City Council* [2022] QPEC 21 heard before Kefford DCJ

November 2022

In brief

The case of *Griffith Capital Pty Ltd v Redland City Council* [2022] QPEC 21 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the deemed refusal by the Redland City Council (**Council**) of a development application made by Griffith Capital Pty Ltd (**Applicant**) for a material change of use for a childcare centre.

The development application sought a development permit to facilitate a childcare centre located in the low density residential zone (**Proposed Development**). The relevant planning scheme was the *Redland City Plan 2018* (Version 4) (**City Plan**).

At the time of the hearing of the appeal, the Council opposed the Proposed Development on the grounds that it does not comply with the provisions of the City Plan relevant to built form and scale. The Court considered the issues that were in dispute between the parties and reached the following conclusions:

- The built form and scale of the Proposed Development is appropriate despite minor non-compliances with the assessment benchmarks.
- There is a need for the Proposed Development.

Court finds that the Proposed Development is substantially compliant with the relevant assessment benchmarks

The Council argued that the Proposed Development is inconsistent with section 3.4.1.8(4) of the Strategic Framework and a number of Overall Outcomes and Performance Outcomes in the Low Density Residential Zone Code (**Code**). The Council's reasons were that the Proposed Development is an inappropriate non-residential use because of its built form and scale (at [18]).

The Applicant argued that section 3.4.1.8(4) of the Strategic Framework is not relevant to the Proposed Development because the section only applies to shopping centres. The Court rejected the Applicant's argument and held that the plain meaning of the words and the context of the provision meant that the section is a relevant assessment benchmark for the Proposed Development (see [25] to [27]).

The issues for the Court to determine were as follows:

- Whether the built form is of a house-like or house compatible scale and consistent with the local character as required under Performance Outcome PO30 and Overall Outcome OO6.2.1.2(2)(g) of the Code.
- Whether the Proposed Development is small scale as required under Performance Outcome PO18 and Overall Outcome OO6.2.1.2(2) of the Code, and section 3.4.1.8(4) of the Strategic Framework.

The Court considered both of these issues in turn.

Built form is of a house-like or house compatible scale and consistent with the character of the locality

The Council argued that the Proposed Development would be recognisable as a non-residential development from the street frontages because of its bulk and scale, and therefore is not consistent with the character of the locality (at [41]).

The Applicant's visual amenity expert conceded that the building footprint of the Proposed Development is substantially larger than the low-density residential dwellings found in the locality given that it is twice the size of neighbouring buildings (at [80]). The Court held that the consequence of the building footprint was insignificant because the low density residential zone is intended to include dual occupancy dwellings under the City Plan (at [81]).

The Court held that the Proposed Development was of a house-like or house compatible scale. The Court's decision was relevantly informed by the plans and the visual representation of the Proposed Development, which demonstrated that the Proposed Development integrates into the setting of the locality and has no material visual impacts (at [82]).

The Court also considered whether the Proposed Development is consistent with the character of the locality. The Court agreed with the Council's visual amenity expert's definition of the locality as the area that is inclusive of the primary theoretical visual catchment and beyond to the perimeter roads, which the Court said "*provide relatively robust delineations between the local area and the areas opposite*" (at [56]). The Council's visual amenity expert opined, and the Court agreed, that within that area the character is that of typical suburban residential development, whereas beyond there were schools on large grounds (at [56]).

The Court held that the Proposed Development is consistent with the open and low density character of the local area as defined by the Council's visual amenity expert (at [84]). The Court also held that the Proposed Development is not the most visually prominent building within a context that has a varied and differentiated streetscape character (at [83]).

Proposed Development is not small scale

The phrase "*small scale*" is not defined in the City Plan and the Court held that "*[i]t is a relative phrase that calls for a factual determination having regard to the terms of the assessment benchmarks viewed through the lens of the local context in which the development is proposed*" (at [94]). The Court rejected the Applicant's argument that whether a development is small scale is to be determined by its nature and not by its size, and instead found that scale is to be determined having regard to the built form, proposed use, and the context of the locality (at [94]).

Although the Court had held that the Proposed Development has an acceptable built form and was appropriate to the locality, the Court held that it is not small scale when the operating parameters of the proposed use are considered. The Court held that "*[t]he provision of 23 car parks is demonstrative of a scale of use that could not be fairly regarded as small scale in the context of the Low density residential zone*" (at [101]).

Court finds there is a need for a childcare centre in the locality as the Council and Applicant find common ground

The Council argued that there is not a need for the Proposed Development since, as conceded by the Applicant's economic expert, "*… if [the Proposed Development] wasn't constructed or approved that there would not be any one that could not get a child care place*" (at [106]).

The Court held that "*[a]lthough these concessions are relevant to an assessment of whether there is a need for the proposed development, they are not determinative of the issue*" and went on to consider the Proposed Development against the following general principles that inform and guide an assessment of need (see [106] to [108]):

- "*Need in the town planning sense does not mean a pressing need or a critical need or even a widespread desire but relates to the well-being of the community*" (citing *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414, 417-8 at [20]).
- "*Need is a relative concept to be given a greater or lesser weight depending on all the circumstances which the planning authority is to consider*" (citing *Intrafield Pty Ltd v Redland Shire Council* [2001] QCA 116; (2001) 116 LGERA 350, 354 at [20]).
- "*Whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors*" (citing *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414, 418 at [22]).

Whilst there were some areas of disagreement between the economic experts, the Court found it unnecessary to decide on those matters given the following eight matters about which there was little, or no, disagreement:

- The Proposed Development would be located 500 metres from the existing Bay View State School (at [113]).
- The Proposed Development "*… would provide enhanced choice, competition, and convenience*" (at [114]).
- There are no alternative sites within the local area, or beyond in the broader catchment area, that can accommodate a childcare centre unless an impact assessable development application was made and approved (at [115]).
- The need for the Proposed Development was supported by the evidence of a co-director of the proposed operator, who had a proven "*track record*" (see [116] to [118]).
- The Court accepted evidence that there are difficulties with existing providers in the local area and the broader community in that their facilities are dated or they are not meeting the national quality standards (at [119]).
- There is a lack of availability at the existing centres (at [120]).
- The population in the locality has grown rapidly (at [121]).

- The Court accepted that the Proposed Development will not impact on the centres hierarchy or compromise any neighbourhood centres (at [122]).

The Court was therefore satisfied that there is a need for the Proposed Development (at [123]).

Court finds other relevant matters support the Proposed Development and exercises its planning discretion

The Council conceded and the Court ultimately held that the Proposed Development is a modern, well-designed childcare centre and will provide residents with additional choice (at [127]). The Court was also satisfied that the built form of the Proposed Development represents an appropriate transition between the local area and the schools on the boundary of the local area (at [128]). The Court held that these matters, and that the Proposed Development was well located, were relevant matters that support approval (see [129] and [134]).

Conclusion

The Court allowed the appeal and approved the development application subject to reasonable and relevant conditions.

Failure to lodge a submission on time due to unreasonable reliance on a local government's website was not excused by the Planning and Environment Court of Queensland

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chiodo Corporation Operations Pty Ltd v Graben Pty Ltd; Douglas Shire Sustainability Group & Ors v Douglas Shire Council & Graben Pty Ltd* [2022] QPEC 34 heard before Rackemann DCJ

November 2022

In brief

The case of *Chiodo Corporation Operations Pty Ltd v Graben Pty Ltd; Douglas Shire Sustainability Group & Ors v Douglas Shire Council & Graben Pty Ltd* [2022] QPEC 34 concerned an originating application (**Originating Application**) and an application in pending proceeding (**Application in Pending Proceeding**) by Chiodo Corporation Operations Pty Ltd (**Chiodo Corporation**) in the Planning and Environment Court of Queensland (**Court**) for orders that a submission made after the public notification period for a development application for a development permit for a material change of use for a resort complex, a development permit for reconfiguring a lot, and a preliminary approval for operational works (**Development Application**) had ended be given effect as if it was a properly made submission, or alternatively, that the public notification of the Development Application is declared defective for not being correctly posted on the premises.

It was common ground between the parties that Chiodo Corporation's submission was not properly made because it was not made within the public notification period.

The Originating Application and Application in Pending Proceeding were opposed by the applicant who made the Development Application (**Applicant**) and the Douglas Shire Council (**Council**) which granted a development approval for the Development Application on 29 March 2022.

The Court accepted that its power in section 37 (Discretion to deal with noncompliance) of the *Planning and Environment Court Act 2016* (Qld) (**PECA**) to excuse "*noncompliance with a provision of this Act or an enabling Act*" includes the excusal of non-compliance with the provisions in the definition of "*properly made submission*" in schedule 2 (Dictionary) of the *Planning Act 2016* (Qld) (**Planning Act**) and that any submission about the desirability of certainty in identifying those who have made a properly made submission is a matter that goes to the exercise of the discretion rather than the Court's power (at [12]).

The Court refused to exercise its discretion to excuse the non-compliance and to grant a declaration under section 11 (General declaratory jurisdiction) of the PECA for the following reasons:

- Chiodo Corporation's failure to lodge its submission within the public notification period was primarily due to its failure to have regard to the form of public notification required under section 53(1) (Publicly notifying certain development applications) and section 53(2) of the Planning Act and the *Development Assessment Rules* (**DA Rules**) (see [2], [3], [17] to [19], and [31]).
- Chiodo Corporation's delay in bringing the Originating Application and Application in Pending Proceeding was not explained (see [20] to [22] and [31]).
- Chiodo Corporation's interest in the Development Application or how its interest might be affected if the proposed development proceeds was not explained (see [28] to [31]).
- The interests of justice do not necessitate the excusal of the non-compliance (at [31]).
- The alleged incorrect location of the notice of public notification on the premises was not reliably made out on the evidence (at [45]).

Background

Chiodo Corporation was one of six named appellants in an appeal commenced on 1 June 2022 against the Council's decision to approve the Development Application (**Appeal Proceedings**).

Section 53(6) of the Planning Act relevantly states as follows [our underlining]:

> *Any person, other than the applicant or a referral agency, may make a submission about the application.*
>
> *Notes—*
>
> *1 in order for a submitter to have appeal rights under schedule 1, the submitter's submission must be a properly made submission …*

Chiodo Corporation had monitored the Council's website for the commencement of public notification of the Development Application, and upon making a query on 2 March 2022 was advised by the Council that public notification ended on 13 December 2021.

Chiodo Corporation on 9 March 2022 made a submission to the Council in respect of the Development Application, which was not "*during the fixed period … for making the submission*" and thus was not a "*properly made submission*". Accordingly, Chiodo Corporation did not have appeal rights under section 229 (Appeals to tribunal or P&E Court) and schedule 1 (Appeals) of the Planning Act (see [3] to [4]).

Chiodo Corporation, in order to obtain a right of appeal, filed the Application in Pending Proceeding in the Appeal Proceedings and the Originating Application, which were supported by an affidavit of a paralegal employed by Chiodo Corporation's solicitors (**Affidavit**). It was agreed at the hearing of the matters that the relief sought by Chiodo Corporation ought to be by way of the Originating Application (at [6]).

Excusal of non-compliance not warranted

The Court observed that no evidence was given to the effect that Chiodo Corporation was unaware of the requirements under the DA Rules for public notification or for Chiodo Corporation's failure to monitor that notification and held as follows (see [19], [20], [25] to [27], and [28] to [31]):

- Public notification was not required on the Council's website in this case, and Chiodo Corporation unreasonably relied upon the Council's website in circumstances where it made no enquiry with the Council to confirm that the commencement of public notification would be available on the Council's website.
- The Council has a discretion as to whether it publishes a notice of commencement of public notification on its website, and the Council's decision to publish a notice for some but not all development applications does not alter the Council's discretion.
- Whilst the Council has a responsibility to publish on its website each properly made submission, which under section 38(4) (Reckoning of time) of the *Acts Interpretation Act 1954* (Qld) is to be done "*as soon as possible*", the Council's website is not required to function as a "*live*" update nor or as a "*de-facto fourth form of public notification*".
- Discretionary matters, including Chiodo Corporation's delay in seeking to remedy its failure to make a properly made submission, the lack of practical difference it will make to the determination of the Appeal Proceedings whether or not Chiodo Corporation is a party, and the lack of evidence of an interest in the Development Application or how that interest might be affected if the proposed development proceeds in support of Chiodo Corporation's submission that it will be prejudiced, weighed against an exercise of the Court's discretion.

Public notification was not defective

Schedule 3 (Public notice requirements), section 4 of the DA Rules required the notice of the Development Application on the premises to be "*placed on, or within a reasonable distance of, the road frontage for the premises, ensuring that it is clearly visible from the road*".

The Affidavit sought to establish by relying on Google Earth Pro imagery and Queensland Globe that the public notice on the premises did not comply with the DA Rules because the notice was not placed within a reasonable distance of, and was not clearly visible from, the road.

In circumstances where unchallenged evidence was given as to the compliance of the notice with the proximity and visibility requirements by the person who carried out the public notification on the premises, the Court was not satisfied that the exercise of estimating the distance and number of viewpoints of the notice from the road set out in the Affidavit was reliable (see [36] to [38] and [41] to [43]).

The Court relevantly noted that "*there is no requirement to place the sign on the most visible location from the point of view of road users. It is enough that it is clearly visible to a person on the road in a position in front of the sign*" (at [39] citing *Golder v Maranoa Regional Council* [2014] QPEC 68).

The Court observed that even if the Affidavit was accepted and the notice was 5.2 metres from the premises' boundary, the Court would grant the Applicant relief under section 37 of the PECA to excuse any non-compliance with the DA Rules, because a person viewing the notice from a distance would have been able to see it and read a sufficient amount of it to be on notice about the Development Application and how to make a submission about it (at [44]).

The Court had no evidence before it that anyone was prejudiced by the proximity and visibility of the notice from the road, and refused to grant a declaration that the public notification was defective.

Conclusion

The Court refused to exercise its discretion to excuse the non-compliance with the requirements for a submission to be properly made and to grant a declaration that the public notification was defective.

Planning and Environment Court of Queensland upholds a deemed refusal for development of a large rural holding into a master planned residential community

Pusti Patel | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *E.J. Cooper & Son Pty Ltd v Townsville City Council & Anor* [2021] QPEC 20 heard before Rackemann DCJ

November 2022

In brief

The case of *E.J. Cooper & Son Pty Ltd v Townsville City Council & Anor* [2021] QPEC 20 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the deemed refusal by the Townsville City Council (**Council**) of a development application (**Development Application**) to facilitate the development of a master planned residential community, supported by other uses and facilities (**Proposed Development**). The land is situated at 360 Round Mountain Road, Pinnacles, Townsville (**Land**) and the appeal was the oldest within the Court, commenced in 2013 with respect to the Development Application made in December 2008.

The Development Application was made under the *Integrated Planning Act 1997* (Qld) (**IPA**) and was for a preliminary approval for a material change of use, described as a "*mixed use residential community comprising of residential, commercial, light industrial, community and open space and land uses within 9 separate neighbourhoods, to a maximum building height of 3 storeys or 12m*" (**MCU Preliminary Approval**), and a variation to the planning scheme to change the level of assessment for 45 uses and to nominate applicable codes for uses, and for the assessment of future development applications for reconfiguration, and for operational works (**Variation Approval**) (at [7]).

As the Development Application had been made under the IPA, it was required to be dealt with and decided as if the IPA continued to apply, even though the IPA had been repealed, and the appeal was required to be heard and decided under the IPA because the appeal commenced before the commencement of the *Planning Act 2016* (Qld).

The Court considered the following issues in the appeal:

- Whether the new laws and policies can be applied in deciding the Development Application.
- Whether the Development Application for the MCU Preliminary Approval ought to be approved, particularly considering its contemplated use and need.
- Whether the Development Application for the Variation Approval ought to be approved.

The Court had regard to relevant new laws and policies and held that the Proposed Development ought to be refused because it was inconsistent with the uses contemplated under the relevant planning instruments and there was no evidence of a need for or any other matter which warranted an approval of the Proposed Development.

Court finds that new laws and policies are relevant in deciding the appeal

The Development Application was made under the *City of Thuringowa Town Planning Scheme 2003* (**Thuringowa Planning Scheme**). However, since then, the *Townsville City Plan 2014* (**Townsville City Plan**) and the *North Queensland Regional Plan 2020* (**NQRP**) had taken effect. The Court concluded that the appeal must be decided on the basis of the Thuringowa Planning Scheme, however, it may give such weight as it considers appropriate to any new laws and policies (at [51]). The Court concluded that the provisions of the Townsville City Plan should be given considerable weight because it had been in force for a considerable period of time, and represented the contemporary expression of the planning intent for Townsville particularly in relation to a large, long-term development such as the Proposed Development which would be of significance in relation to the planning strategy for Townsville (at [53]). However, in relation to the NQRP, the Court attached less weight to it as it had only recently taken effect (at [58]).

Court finds that the Proposed Development is inconsistent with the contemplated use

The Court held that the proposed residential development at suburban densities and for other urban uses significantly conflicts with each relevant planning document due to its urban, non-rural nature, and most notably in the following respects:

- Under the Thuringowa Planning Scheme, the Land is outside of the urban growth boundaries and is non-compliant with various Desired Environmental Outcomes in particular, in relation to land use patterns (see [60] to [68]).
- Under the Townsville City Plan, the Land is included in the Grazing Precinct in the Rural Zone and does not support the expansion of urban development into this zone (see [72] to [85]).
- The NQRP provides for an urban consolidation policy to prevent the continuation of an inefficient and expensive development pattern and of the lack of need, based on current supply, for residential development to continue outside of Townsville's existing urban area (see [87] to [88]).

The Court therefore held that the Proposed Development is a stark departure from the planning strategy with respect to land use (at [279]).

Court finds that there is no significant need to justify the Proposed Development

Another central question for the Court was whether a need had been established to support an approval of the Proposed Development, even though it was at odds with each relevant planning document. The Court concluded that there was no significant need for the Proposed Development because the Townsville City Plan and the planning strategy were based on the assumption that those documents set aside sufficient land for housing, businesses, and community uses to meet Townsville's needs for at least 25 years (at [278]). The evidence demonstrated that nothing had occurred which undermines that assumption and that would call for the Land to be approved for the Proposed Development (at [278]).

The Court also found that the Townsville City Plan expressed an intention to monitor the supply of new land for residential development, however, as the next planning scheme review was due in just a few years' time, there was ample opportunity for the Council to respond to any possible future shortage (at [278]).

The Court therefore concluded that the Development Application for the MCU Preliminary Approval ought not be approved, given the significant inconsistency with the planning strategy with respect to land use and the absence of any significant need. Having decided to refuse the Development Application for the MCU Preliminary Approval, the Court held that pursuant to section 3.5.14A(2) of the IPA, it is required to also refuse the Development Application for the Variation Approval (at [291]).

Court assesses other matters for and against the Proposed Development

There were other matters raised against the Proposed Development which served to reinforce the decision to refuse the Development Application, including the following:

- The Proposed Development would detrimentally affect the existing and future rural amenity and landscape character of the Rural Planning Area and the degree of impact on that area would be significant (see [99] to [102]).
- Keeping the Land as a rural holding is a preferable outcome from an ecological perspective than permitting it to be developed as proposed (see [134] to [135]).
- Although the impact of noise in and of itself does not warrant a refusal of the Development Application, it contributes to some extent to the rural character and amenity of the area (at [137]).
- The Proposed Development is inconsistent with the planning instruments with respect to infrastructure and this does not cease to be the case because the developer is prepared to meet the capital, operational, and renewal costs of the required infrastructure (at [159]).
- The extent of erosion on the Land would not prevent the Proposed Development being realised but erosion controls beyond those normally employed in subdivisions would be required. Although the Court accepted that rehabilitation would be a benefit, steps could be taken for a fraction of the cost of rehabilitation by way of responsible and appropriate land management practices in the context of a rural land use to stabilise the Land so as to address the risk of further erosion (at [259]).

There were also grounds in favour of approval, some of which the Court accepted as having some substance, such as the protection of primary industries in adjacent rural land (at [149]), the benefit to be obtained from having a flood refuge on the Land (see [254] to [257]), and that the development was unlikely to have a detrimental effect on the traffic (at [200]). However, none of these grounds, considered individually or collectively, altered the Court's ultimate decision that the Proposed Development ought to be refused.

The Court was also asked to consider approving the Proposed Development in part, but given that relatively little argument was directed to this submission, the Court held that it was difficult to see the rationale for a part approval (see [281] to [282]).

Conclusion

The Court therefore dismissed the appeal and upheld the refusal of the Development Application.

Outcomes of the independent review into the NSW resource recovery framework

Katherine Pickerd | Todd Neal

This article discusses what the recommendations for amendments to the NSW waste and resource recovery framework, with the aim of improving circular economy outcomes, may mean for the waste industry

December 2022

In brief

The recently published report on the Independent Review of the NSW Resource Recovery Framework provides 22 recommendations directed towards improving "the delivery of circular economy outcomes and potential for innovation, as well as ensure growth of the resource recovery industry without compromising human health and the environment". In this article, we provide our high level comments on the Independent Review from a legal perspective.

In November 2021, the NSW Environment Protection Authority (**EPA**) commissioned an independent review of the State's resource recovery framework. The review was commissioned to examine the existing NSW waste and resource recovery framework and to provide recommendations for improvement.

On 30 September 2022, Dr Cathy Wilkinson published her report on the Independent Review of the NSW Resource Recovery Framework. There is a clear focus on amending the existing framework to improve circular economy outcomes. The catalyst for this improvement came from the NSW Government's NSW Waste and Sustainable Materials Strategy 2041, released in 2021, which outlined a framework for moving to a circular economy over the next 20 years.

The following four thematic areas were used to group 22 recommendations:

1. Improved administration and decision making.
2. The definition of waste and enhancing the regulatory framework.
3. Enabling high quality materials to facilitate circularity.
4. Improving approaches to known and merging contaminants.

The Independent Review did not cover the entire resource recovery framework. For example, the waste levy, which encourages material to be recovered rather than sent to landfill, is to be considered separately in 2023 as part of its 5-year review.

Here are our six high level comments on the Independent Review:

1. Improved trust in resource recovery order and exemption framework

A number of the recommendations appear to be driven by the erosion of the waste industry's trust in the resource recovery order and exemption framework as a result of the overnight revocation of the mixed waste organic outputs order. The proposed changes, which are directed to providing transparency and additional consultation to the public, will go some way toward improving the relationship.

2. Publishing of resource recovery orders

The Independent Review reported tension between stakeholders as to whether site specific resource recovery orders should be publicly available. Publishing all resource recovery orders and exemptions would encourage resources to be recovered as competitors would be able to see how other sites are operating and potentially operate in the same way to increase recovery. However, those with currently confidential resource recovery orders would prefer to maintain that competitive advantage and avoid a 'free-rider effect'.

As resource recovery orders are legally enforceable documents, similar to development consents and Environment Protection Licences which are publicly available instruments, it is unclear why they would not be published on the EPA's public register (apart from commercially sensitive information). An application under the *Government Information (Public Access) Act 2009* (NSW) may provide an avenue for these documents to be released if amendments are not made to make the orders publicly available.

3. Addressing issues with making applications for orders and exemptions

The Independent Review has identified the difficulties that industry experiences when making applications for orders and exemptions. Lessons could be learned from the NSW planning portal, which has been drastically improved in recent years to increase accessibility and transparency to the public for development applications. However, in our experience it still has its own teething problems.

4. No recommendation for merit review appeals for resource recovery orders

Applications for Environment Protection Licences need to be determined within 60 days otherwise a merit appeal may be made to the NSW Land and Environment Court. This is not the case for applications for resource recovery orders and has been the subject of criticism. There is no specific recommendation for a merit review appeal right to be created which would (if given) provide recyclers with an avenue to pursue a determination of their application within a certain time frame instead of waiting, for some of our clients, over a year.

5. EPA investigates waste classification scheme

The EPA is investigating the establishment of a scheme for accredited waste assessors to assist with waste classification. A reformed scheme would potentially assist with reducing the cost to businesses associated with false waste classification reports. It may also assist consumers. We have experienced a number of situations where waste operators fall foul of the resource recovery exemption regime in that they have received material either on the promise of it being 'clean fill' or with paperwork that was deficient.

6. Asbestos contamination in waste

The Independent Review reported that stakeholders were concerned about the zero-tolerance approach to the presence of asbestos within other waste types which presently leads to all of the impacted waste being classified as asbestos waste. This was the consequence of the Court of Criminal Appeal's findings in *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2019] NSWCCA 174.

Recommendations have been made that are directed to reviewing how asbestos contamination in waste and recovered materials can be improved.

Timing of possible changes

Given there are multiple parts of the recommendations which integrate across different areas, including the review of the waste levy and the potential need for legislative amendments to be made, we expect it will be some time before we see the full suite of changes implemented.

The EPA is currently considering the Independent Review.

Determination that native title does not exist in relation to land in rural Queensland

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Federal Court of Australia in the matter of *James Speed Company Pty Ltd v State of Queensland* [2022] FCA 626 heard before Burley J

December 2022

In brief

The case of *James Speed Company Pty Ltd v State of Queensland* [2022] FCA 626 concerned an application under section 13(1)(a) (Approved determinations of native title) and section 61(1) (Native title and compensation applications) of the *Native Title Act 1993* (Cth) (**NT Act**) in the Federal Court of Australia (**Court**) for a determination that native title does not exist (**Determination Application**) in relation to land of approximately 30,900 hectares and described as "*North Delta*" located south-east of Barcaldine, Queensland (**Subject Land**).

The Applicant is the lessee of a registered rolling term lease (**Rolling Term Lease**) as defined under section 164 (What is a *rolling term lease*) of the *Land Act 1994* (Qld) and thus has an "*interest*" as defined in subsection (a) of the definition under section 253 (Other definitions) of the NT Act in the Subject Land as a leaseholder (at [28]).

The application was "*unopposed*" in that the only other party, being the State of Queensland (**State**), had filed a notice stating that it does not oppose the order sought by the Applicant (see [3], [19], [20], and section 86G(2) (Unopposed applications) of the NT Act).

The Court considered whether the Applicant had established, on the balance of probabilities, that no native title exists in relation to the Subject Land having regard to the facts of the case, including the nature of the Subject Land and the tenure of the Applicant's interest in the Subject Land, whether any present or previous native title claim exists, and the evidence adduced by the parties, as well as the gravity of a negative determination, which has a permanent effect on native title rights and interests (at [22]).

The Court was satisfied that the Applicant had discharged its onus and held that native title does not exist in relation to the Subject Land.

Background

The Rolling Term Lease was initially granted for a term of 30 years on 1 April 1963, but was later extended to expire on 31 March 2056 (at [6]).

In June 2022, the Applicant applied to the Queensland Department of Resources to convert the Rolling Term Lease to freehold title. To address any matters relating to native title, the Applicant filed the Determination Application (at [7]).

The Determination Application was publicly notified by the National Native Title Tribunal in April 2021 and identified a public notification period from 5 May 2021 to 4 August 2021 (at [8]).

A search of the Native Title Claims Register (**NT Register**) in August and September 2021 indicated that the Subject Land had been the subject of five previous native title claims on behalf of the Bidjara People, all of which had either been withdrawn, discontinued, or dismissed (see [10] and [13]).

Principles for determining native title claims

The Court observed at [23] the following principles having regard to the case of *Mace v State of Queensland* [2019] FCAFC 223; 274 FCR 41 (***Mace* Decision**):

- "*At one end of the evidentiary scale, there may be no need to go beyond proof of an extinguishing grant of freehold title*" (see also [49] of the *Mace* Decision).
- "*At the other end are contested cases in which an Indigenous respondent gives evidence about that person's connection, under traditional law and custom, to the land in question*" (see also [51] of the *Mace* Decision).
- "*Where there is no evidence of claims of connection arising from traditional law and custom to the land in question, then there may be little which could 'cast doubt' on the case brought by the applicant that no native title exists*" (see also [51] of the *Mace* Decision).

- "*The Court must act on evidence and does not speculate about the possibility of the existence of native title rights and interests … As such, an application for a negative determination does not involve any general enquiry into what native title rights and interests may have existed at the time of sovereignty, or effective sovereignty; nor any general inquiry into how those rights and interests may or may not have continued*" (see also [52] to [55] of the *Mace* Decision).

No native title exists in respect of the Subject Land

The Determination Application was unopposed and accordingly the Court was permitted, under section 86G(1) of the NT Act, to make an order on the papers that no native title exists because it was satisfied of the following:

- *Notice requirement* – The notice period under section 66 (Notice of application) of the NT Act expired on 4 August 2021 (at [27]).
- *Power requirement* – The Court has the power to make a determination because it is within the meaning of "*determination of native title*" under section 13(1)(a) of the NT Act, there is no "*approved determination of native title*" in relation to the Subject Land as required under section 13(1)(a) and section 61A(1) (Restrictions on making of certain applications) of the NT Act, the Applicant has an interest in the Subject Land, and the Court has jurisdiction under section 81 of the NT Act to determine applications filed in the Court that relate to native title (at [28]).
- *Appropriateness requirement* – The Court held that it is appropriate to make an order that no native title exists in relation to the Subject Land because "*… there is no native title that continues to exist in respect of the determination area*", which was evidenced by no response to the public notification of the Determination Application, no entry of native title in the NT Register, no one joining as a respondent to the proceeding to assert that native title exists, and the previous findings in the case of Wyman on behalf of the *Bidjara People v State of Queensland (No. 2)* [2013] FCA 1229 and in the *Mace* Decision that no native title exists in relation to the Subject Land (see [29] to [34]).

In the context of the appropriateness requirement, the Court observed that it can reasonably expect a representative Aboriginal and Torres Strait Islander body for a particular area with knowledge or information about potential native title holders to come forward and provide that information to the Court (at [31], see also [94] of the *Mace* Decision).

Conclusion

The Court was satisfied, on the balance of probabilities, that native title does not exist in relation to the Subject Land.

Planning and Environment Court of Queensland upholds submitter appeal and refuses a development application for a multiple dwelling in a medium density residential zone

Pusti Patel | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bell Co Pty Ltd & Ors v Council of the City of Gold Coast & Anor* [2022] QPEC 32 heard before Williamson KC DCJ

December 2022

In brief

The case of *Bell Co Pty Ltd & Ors v Council of the City of Gold Coast & Anor* [2022] QPEC 32 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) on 6 December 2021 to grant a development approval for a material change of use for a multiple dwelling comprising four units in a four-storey building that is 16.3 metres high (**Proposed Development**) at 111 Hedges Avenue, Mermaid Beach (**Land**).

A development approval for a material change of use for a multiple dwelling comprising three units had previously been given on 24 March 2021 (**Initial Approval**).

The Court considered the following issues in the appeal:

- Whether the Proposed Development complies with the building height provisions in the *Gold Coast City Plan 2016* (version 8) (**City Plan**), and the weight to be attached to any compliance or non-compliance.
- Whether the Proposed Development complies with the relevant Specific Outcomes in the Strategic Framework in the City Plan (**Strategic Framework**), in particular Specific Outcome 9 (being the building height uplift provision) in section 3.3.2.1 of the Strategic Framework.
- Whether the planning discretion ought to be exercised.

The Court concluded that the Proposed Development did not comply with the City Plan and the nature of the non-compliance was serious, given it manifests in adverse amenity and character impacts. The Court found that the matters in favour of approval did not attract significant weight in the exercise of the planning discretion. For these reasons, the Court held that the development application ought to be refused.

Court finds non-compliance with building height and uplift provisions in the City Plan

The Land is located in the Medium Density Residential Zone (**MDR Zone**). The Land can be identified on Building Height Overlay Map 18 (**Overlay Map**), which stipulates a building height of three storeys and 15 metres in this area. Overall Outcome 2(d) and Performance Outcome PO3 of the Medium Density Residential Zone Code (**MDR Zone Code**) are both directed to built form in the MDR Zone and require that the building height does not exceed that indicated on the Overlay Map.

As the Proposed Development is four storeys and 16.3 metres high, there was non-compliance with Overall Outcome 2(d)(i) and Performance Outcome PO3 of the MDR Zone Code (see [35] to [38]). The Court found the nature of the non-compliance to be significant for the following reasons:

- A reading of the Overlay Map with Specific Outcome 8 in section 3.3.2.1 of the Strategic Framework suggests that "*non-compliant development is regarded as inconsistent with the 'desired future appearance' for a local area within an urban neighbourhood*" (at [56]).
- Specific Outcomes 9 and 10 in section 3.3.2.1 of the Strategic Framework confirm that exceedances of the building height standard, and the extent of the exceedance, are regarded as matters of significance. In particular, that "*[W]here the exceedance is greater than 50%, City Plan admits no flexibility. An exceedance of this kind is not supported; it is inconsistent with City Plan*" (see [57] to [61]).

Court finds non-compliance with Specific Outcome 9 in section 3.3.2.1 of the Strategic Framework

Specific Outcome 9 in section 3.3.2.1 of the Strategic Framework provides flexibility to depart from the quantitative building height standard when eight cumulative outcomes are satisfied. The Appellants submitted that the Proposed Development did not meet five of the eight outcomes. The Court dealt with each of these in turn as follows:

- *A reinforced local identity and sense of place* – The Court held that the Proposed Development would not reinforce the local identity and sense of place as required by Specific Outcome 9(a) due to adverse impacts on the character and amenity of the local area. The Court found that this was evidenced by the non-compliances relating to built form and amenity with Overall Outcomes 2(b)(v), 2(b)(vii), and 2(b)(viii) and Performance Outcome PO1(a) of the MDR Zone Code and Overall Outcomes 2(a) and 2(f) and Performance Outcomes PO3(a), PO3(c), and PO3(e) of the Multiple Accommodation Code (see [95] to [98]). Further, the Court held as follows:
  - Built form is a significant contributor to local identity and sense of place and the built form of the Proposed Development will present as a large bulky building, which is visually overbearing for the neighbouring and nearby properties (see [87] to [88]). Furthermore, this will not be relieved by the setbacks or landscaping provided.
  - "*[T]he visual dominance of the built form and its relationship with its neighbour and nearby development to the south manifests adverse impacts*" (at [91]).
  - "*[T]he adverse impact on the existing character and amenity of the immediate locality is not the same, or similar to, the impact that could reasonably be expected from the [Initial Approval]*" (at [92]).
  - "*[T]he adverse character and amenity impacts of the [Proposed Development] are not rendered acceptable because the built form proposed is compatible in its height, bulk and scale … with other buildings exceeding three storeys in the northern part of the local area*" (at [93]).
  - The built form is not consistent with the intended built form character of the local area (at [94]).
- *Interface with nearby development* – The Court found that due to the height of the Proposed Development its impact will be overbearing on neighbouring properties to the south, which is a clear indicator that the interface with nearby development will not be managed in the way required by Specific Outcome 9(b) (at [103]). Whilst the Court noted that the impacts on privacy, acoustic amenity, and access to sunlight can be addressed through development conditions, the Proposed Development is contrary to reasonable community expectations as evidenced by lay witness statements before the Court and submissions made during the public notification process (see [104] and [116] to [117]).
- *Standard of appearance of built form and street edge* – The Court found that whilst the Proposed Development is visually interesting and has a number of attractive components, the features of its design are not up to the standard anticipated by the City Plan due to the character and amenity impacts which "*sound in non-compliances with [the] City Plan*" (at [128]). The extent of the non-compliance is indicative that the design of the Proposed Development is not of the kind required to satisfy Specific Outcome 9(d), that the non-compliance cannot be alleviated by the design changes suggested during expert evidence, and that the changes proposed amount to an admission that the design required improvement (see [128] to [130]).
- *Housing choice and affordability and important elements of local character or scenic amenity* – The Court found it unnecessary to decide whether compliance has been demonstrated with Specific Outcomes 9(e) and 9(f) because non-compliance had already been established with Specific Outcomes 9(a), 9(b), and 9(d), which will manifest in adverse impacts that attract significant weight in the exercise of the planning discretion. The Court held that the weight to be given to the non-compliance with Specific Outcome 9 is not likely to be materially increased or decreased by an assessment of the Proposed Development against these outcomes (see [133] and [135]).

Ultimately, the Court found that the Proposed Development does not comply with Specific Outcome 9, which is serious in nature, entitled to significant weight, and points clearly towards the refusal of the Proposed Development (see [136] to [138]).

Court assesses other matters for and against the Proposed Development

The central issue was whether the non-compliance with the City Plan ought to be decisive in the exercise of the planning discretion. Whilst the Appellants submitted additional reasons for refusal, including site cover, setbacks, roof design, service vehicle requirements, and refuse disposal arrangements, the Court held that it was unnecessary to give these issues detailed consideration because they do not influence the balance to be struck for the exercise of the planning discretion (see [139] to [140]). Further, there was evidence that Council had resolved to amend the City Plan and the Court found that the existence of these amendments and the assessment against those should be taken into account as a fact and circumstance informing the exercise of the planning discretion. However, they are not to be given weight as a reason for refusal (see [150] to [154]).

The Court held that the draft amendments, and inconsistency with them, do not warrant refusal of the Proposed Development in their own right and, rather, regarded these matters as neutral in the balancing exercise required by section 60(3) of the *Planning Act 2016* (Qld) in the exercise of the planning discretion (at [155]).

Factors in favour of approval that the Court accepted were that the Land is well located, well serviced by public transport, is in close proximity to services which are essential to residential living, and the design of the Proposed Development is a contemporary one, with parts that are attractive and deserving of recognition (see [158] to [162]).

Ultimately, the Court held that the non-compliance with the City Plan is serious and entitled to significant weight as it manifests in adverse amenity and character impacts, and it is not suggested that the City Plan has been overtaken by events, is unsoundly based, or has been applied inconsistently by the Council (at [169]). On the other hand, whilst there are two matters in favour of approval, they do not attract significant weight in the exercise of the discretion as they do not directly address the main issues in relation to the height of the Proposed Development (see [170] to [172]). On balance, the Court held that the planning discretion ought not be exercised and the approval ought not be granted (at [173]).

Conclusion

The Court allowed the appeal and refused the application for the Proposed Development.

Planning and Environment Court of Queensland exercises discretion to approve a childcare centre despite non-compliance with the planning scheme

Pusti Patel | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wu & Kuo Childcare Pty Ltd & Anor v Brisbane City Council & Anor* [2022] QPEC 27 heard before Williamson QC DCJ

December 2022

In brief

The case of *Wu & Kuo Childcare Pty Ltd & Anor v Brisbane City Council & Anor* [2022] QPEC 27 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to approve a development application for a childcare centre servicing 70 children on land (**Subject Land**) located in Lister Street, Sunnybank (**Proposed Development**).

The Subject Land is in the Low Density Residential Zone (**LDRZ**) under the *Brisbane City Plan 2014* (version 19) (**City Plan**). The Court considered the following issues in deciding the appeal (at [6]):

- *Compliance* – Whether the Proposed Development complies with Overall Outcome 4(k) of the Low Density Residential Zone Code (**LDRZ Code**).
- *Economic Impacts* – Whether an approval would have an adverse effect on the extent and adequacy of childcare centres available to the community, and make good any adverse economic impacts.
- *Discretion* – Whether the planning discretion ought to be exercised in favour of approval in light of the findings made in relation to Compliance and the Economic Impacts.

Ultimately, the Court upheld the Council's decision and approved the development application subject to conditions, because the Court found that although the Proposed Development did not comply with the LDRZ Code, the planning discretion ought to be exercised as the Proposed Development struck an appropriate balance between meeting an identified need as against protecting the character and amenity of the LDRZ.

Court finds that the Proposed Development does not comply with the LDRZ Code

Overall Outcome 4(k) of the LDRZ Code requires a consideration of the following two issues:

- *First issue* – Whether the Proposed Development will serve a local community facility need only.
- *Second issue* – Whether the Proposed Development is of a bulk and scale that is compatible and integrates with the built form intent for the zone.

With respect to the first issue, the Court found that a need had been established for an additional childcare centre approval (at [59]), and that the Subject Land is very well located and parents may regard the relevant part of Sunnybank as attractive and convenient for a multi-purpose trip (at [53]). However, the Court found that this need is one for a wider community, and thus there is non-compliance with the requirement in Overall Outcome 4(k) of the LDRZ Code that the Proposed Development "*only*" serve a local community facility need (at [59]). The Court found the nature of this non-compliance to be serious, but held that it could be mitigated for the following reasons (at [60]):

- The Proposed Development will support the needs of the local community in terms of convenient access to important social infrastructure.
- The Proposed Development can be conditioned to ensure that there will be no unacceptable impacts on the character and amenity of the local community and to strike a balance between need and residential amenity.

With respect to the second issue, the built form intent anticipated by the LDRZ Code is that of "*low rise, low density buildings in green landscaped areas*". The Court found that whilst landscaping will be provided, to say that the carpark proposed as part of the Proposed Development and in front of the structure will present as a green landscaped setting "*is to employ exaggeration*" (at [38]).

Further, the Court found that the proposed car park is not "*small-scale*" and therefore did not comply with the purpose of the LDRZ Code (at [39]). However, the Court concluded that this was a minor non-compliance because the LDRZ has mixed character and amenity which is more resilient to impacts from non-residential uses (at [41]). Therefore, the Court held that the Proposed Development would be consistent with and would support the existing mixed character and amenity of the area, and could be conditioned to appropriately manage adverse impacts on character and amenity.

Court finds that approval will not have any adverse economic impact

The Appellants argued that the Proposed Development would have an adverse economic impact on existing and approved childcare facilities in Sunnybank. In considering the economic impact, the Court held that "*[c]ompetition will be relevant where it has the potential to have an adverse effect on the extent and adequacy of facilities available to the public, which would not be made good by the development seeking approval*" (at [72]). The Court held that competition is meant to be examined from the public perspective and approvals of nearby facilities are relevant to this assessment (at [72]).

The evidence established that the economic impacts of the Proposed Development would not result in a diminution of services available to the public because impediments to the activation of nearby approved facilities were already facing other difficulties. The Court found that the market was supply constrained and in need of further long day care facilities, which the Proposed Development is well located to meet and where it can be conditioned to ensure it will have no unacceptable impacts on the character and amenity of the area (at [76]).

Court finds that the planning discretion ought to be exercised

The Court observed that "*[t]he planning discretion to be exercised is a 'broad evaluative judgment' where non-compliance with an adopted planning control is a relevant fact and circumstance, but does not mandate refusal*" (at [7]).

The Court commenced its consideration of whether it ought to exercise the planning discretion by observing the way in which childcare centres are recognised in the City Plan. The Court observed that the City Plan "*recognises there is a legitimate community need for childcare centres*" and that they are relevantly anticipated in residential zones, but not without qualification.

The Court observed that for development in the LDRZ, the LDRZ Code identifies the issues to consider as being accessibility and locational factors, traffic impacts, character and amenity impacts, and a zone specific control intended to limit the form and function of non-residential uses to protect the integrity of the zone, which is set out in Overall Outcome 4(k) (at [78]). Here, all of the factors were uncontroversial, apart from the zone specific control stated in Overall Outcome 4(k) of the LDRZ Code.

The Court accepted that the zone specific control stated in Overall Outcome 4(k) of the LDRZ Code is not complied with because the Proposed Development is not consistent with the scale of development anticipated in the LDRZ, and will serve a need that goes beyond that anticipated for the use in the LDRZ (at [80]). However, the Court held that although non-compliance with the City Plan is a reason deserving significant weight, it was to be balanced against the following four countervailing considerations pointing in favour of approval (see [82] to [88]):

- The Proposed Development has a high degree of compliance with the City Plan, particularly given that it is located and designed to be conveniently accessible to users, maintains traffic safety, and is compatible with the existing residential character and amenity of the area.
- The Proposed Development can be conditioned to ensure that it will not have an unacceptable impact on the amenity and character of the area.
- The non-compliance with the LDRZ Code does not create any unacceptable planning consequences and does not undermine the underlying planning purpose for Overall Outcome 4(k) of the LDRZ Code. The Proposed Development does not compromise or adversely affect the amenity of the relevant part of the LDRZ.
- The Proposed Development is in the public interest, especially where the evidence suggested that the community has an inadequate supply of long day care facilities to meet its needs.

Ultimately, the Court held that the planning discretion ought to be exercised because the Proposed Developed struck an appropriate balance between meeting an identified need in a highly accessible and convenient location against protecting the character and amenity of the applicable zone.

Conclusion

The Court dismissed the appeal and upheld the Council's decision to approve the development application. The parties were ordered to prepare conditions that reflect the changes recommended in the joint reports prepared for the appeal.

Planning and Environment Court of Queensland rejects appeals made under the Planning Act 2016 (Qld) in respect of development applications made over a decade ago under the Integrated Planning Act 1997 (Qld)

Jessica Forbes | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council (No. 3)* [2021] QPEC 8 heard before Kefford DCJ

December 2022

In brief

The case of *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council (No. 3)* [2021] QPEC 8 concerned two appeals to the Planning and Environment Court of Queensland (**Court**) that were heard together, each against the decision of the Moreton Bay Regional Council (**Council**) to refuse a development application for reconfiguring a lot. One development application sought to reconfigure one lot into 14 lots, and the other development application sought to reconfigure one lot into five lots (**Development Applications**).

The Development Applications were made under the *Integrated Planning Act 1997* (Qld) (**IPA**) in December 2009, but the Council did not decide the Development Applications until May 2018, after the repeal of both the IPA and the *Sustainable Planning Act 2009* (Qld) (**SPA**).

The Court considered the following legal questions:

- Did the Council have authority to decide the Development Applications?
- Does section 311(1)(c) of the *Planning Act 2016* (Qld) (**Planning Act**) confer a right of appeal?
- Does the Planning Act provide for an appeal against a deemed refusal of a development application made under the IPA?
- Does the *Acts Interpretation Act 1954* (Qld) (**AI Act**) preserve a right of appeal?

The Court held that a right to appeal is preserved under the AI Act, and went on to consider the merits of the Development Applications. The Court found that each proposed development did not comply with the relevant planning provisions and therefore ordered that both Development Applications be refused and the appeals be dismissed.

Court finds the decision notices are not decision notices for the purposes of the IPA or the SPA, and there is no appeal right under the Planning Act

Each Development Application was made under the IPA. The transitional provisions in section 802 of the SPA preserved each Development Application under the IPA as an "*existing application*" and stipulated that such existing development applications would continue to be dealt with under the IPA.

Immediately prior to the SPA being repealed, the Council had not decided the Development Applications. The Applicant did not adduce evidence that the Development Applications were accepted as properly made or establish that the Development Applications had not lapsed, and the Court therefore found that it was unclear whether the Development Applications were legitimate and capable of being progressed (at [13]).

The Court went on to assume that the Development Applications had not lapsed, in which event the Applicant acknowledged that there is no transitional provision under the Planning Act in respect of the continued assessment of a development application made under the IPA (see [14] to [15]). The Court held that upon the repeal of the SPA the Council's authority to decide the Development Applications was no longer extant and therefore the decision notices issued by the Council on 11 May 2018 are not decision notices under the IPA or under the SPA (at [16]). The Court therefore concluded that the Applicant did not have an appeal right under section 289 of the Planning Act (at [16]).

Court finds that section 311(1)(c) of the Planning Act does not confer a right of appeal

The Applicant submitted that the appeals were legitimately commenced under section 311(1)(c) of the Planning Act, for the following reasons:

- "*[T]here is a clear legislative intent that appeals commenced during the currency of the Planning Act 2016 should be heard and determined having regard to the assessment framework (and associated matters) in the Planning Act 2016*" (at [18]).
- "*[T]here is no legislative provision under any other Act or regime, other than the Planning Act 2016 or the Planning and Environment Court Act 2016, that would provide it with an appeal right with respect to the development applications*" (at [20]).
- "*[T]he relevant explanatory notes do not indicate an intention to treat applications made under the Integrated Planning Act 1997 differently to those made under the Sustainable Planning Act 2009*" (at [22]).
- Section 285 of the Planning Act, which deals with the transition of the SPA to the Planning Act, when read in context, "*… acts to extend the transitional appeal arrangements found in s 311 of the Planning Act 2016 to applications made under the Integrated Planning Act 1997*" (at [30]).

The Court ultimately disagreed with the Applicant, finding that these submissions were "*not persuasive*" (see [21] and [28]). The Court held that the Applicant did not properly demonstrate the assertions made in the first or second submissions, and that the explanatory notes and section 285 of the Planning Act relied upon in the third and fourth submissions did not confer the rights that the Applicant claimed.

Court finds that the Planning Act does not provide for an appeal against a deemed refusal of a development application made under the IPA

Assuming the Development Applications were properly made and had not lapsed at the time of the commencement of the Planning Act, it is likely that the decision-making period would have ended such that the Applicant may have had a right to commence an appeal in the Court, at any time, against the Council's deemed refusal of the development applications (at [14]). The Applicant therefore argued an alternative position, being that the Applicant had a right under the Planning Act to appeal against the deemed refusal of the Development Applications.

The Court considered the categories of appeal that may be commenced in the Court, in accordance with section 229 and schedule 1, table 1, item 1 of the Planning Act, and found that the Planning Act does not provide a right of appeal against a deemed refusal of a development application made under the IPA (at [38]).

Court finds that a right to appeal could exist under the AI Act

The Court found that if the Applicant's Development Applications were properly made and had not lapsed at the time that the SPA was repealed, a right to commence the appeals against the deemed refusal of the Development Applications exists under the AI Act (at [47]).

The AI Act provides in section 20(2) that the repeal of an Act does not "*affect a right, privilege or liability acquired, accrued or incurred under the Act*" or "*affect … a remedy in relation to a right, privilege, liability or penalty …*" under the Act. Whilst the Court found that the Applicant had not clearly demonstrated that its Development Applications were valid and effective at the time that the SPA was repealed, the Court did find that a possibility existed to appeal against the deemed refusal of the Development Applications under section 20 of the AI Act.

The Court relevantly concluded as follows (at [48]):

> *Were the only obstacle to [the Applicant's] success its ability to demonstrate that its development applications were still on foot at the time the Sustainable Planning Act 2009 was repealed, I would have permitted [the Applicant] the opportunity to file an amended notice of appeal and adduce evidence about the progress of the development application. However, for reasons that follow, such a course is pointless.*

Court finds that the merits of the Development Applications do not justify approval

Having established that a right of appeal may exist under the AI Act, the Court went on to consider the merits of each proposed development and the compliance with the relevant planning instruments. The Court considered whether there was compliance with the planning scheme in effect at the time the Development Applications were made, being the *Redcliffe City Planning Scheme 2005* (**2005 Planning Scheme**), and also decided to give weight to the later planning scheme being the *Moreton Bay Planning Scheme 2016* (**2016 Planning Scheme**).

The Court first considered compliance with the 2005 Planning Scheme, in respect of which the Council argued that it ought to be assumed that vegetation will be cleared for houses if the Development Applications are approved, and therefore the provisions in respect of ecology are relevant. The Applicant argued that the assumption ought not be made and that any future house would be subject to impact assessment, and therefore the provisions with respect to ecology are irrelevant for the Development Applications which are for reconfiguring a lot.

The Court did not accept the Applicant's submissions given that clearing for a boundary fence can occur without a development permit, and there is a prohibition under section 43(5)(b) of the Planning Act and section 16 and schedule 6 of the *Planning Regulation 2017* (Qld) against a planning scheme stating particular forms of development are assessable development (at [72]). In particular, the Court stated as follows (at [73]):

> *[The Applicant's] submissions assume that the only relevant issue when considering a proposed reconfiguration of lots is that the approval authorises the creation of lots of particular dimensions for disposition on separate titles. That approach is artificially constrained.*

The Court went on to consider how it ought to construct the 2005 Planning Scheme with respect to the ecological issues. The Court relevantly stated as follows (at [89]):

> *… I do not accept [the Applicant's] submissions about the approach to be taken to the construction of the [2005 Planning Scheme]. That is not to say that an absolute approach is appropriate, such that the loss of a single tree would sound in conflict warranting refusal. Rather, whether there is compliance is a question of fact and degree to be determined by reference to the circumstances of the case.*

The Court found that there are ecological values present on the site which align with the values ascribed by the Natural Features or Resources Overlay, which are intended to be protected by the provisions of the corresponding Natural Features or Resources Overlay Code, as well as the described environmental outcomes under the 2005 Planning Scheme (at [120]). The Court found that the extent of clearing did not comply with those provisions, and "*… will sound in unacceptable ecological impacts and an appreciable adverse planning consequence*" and "*… will unacceptably compromise the ecological and biodiversity value of the area*" (at [120]). The Court concluded that "*[t]he non-compliance warrants refusal of the applications*" (at [120]).

In respect of the 2016 Planning Scheme, the Court found that "*[t]he contents of the 2016 Planning Scheme do not suggest a different result should follow*" and that "*the 2016 Planning Scheme only serves to reinforce my view that the applications should be refused*" (at [134]).

Conclusion

The Court found that the Applicant had not demonstrated a legitimate right to appeal as it had not demonstrated that the Development Applications were valid at the time the SPA was repealed. Furthermore, and in any event, the Court found that the Development Applications ought not be approved having assessed their merits. The Court therefore ordered that the Development Applications be refused, and the appeals be dismissed.

The year in review: A look at the NSW waste industry in 2022

Jeremy Kuan | Katherine Pickerd | Todd Neal

This article discusses the events of 2022 which will likely impact the New South Wales waste industry in coming years

December 2022

In brief

2022 has unsurprisingly shown us that a number of policy and legislative changes directed towards better environmental outcomes are likely to impact the NSW waste industry in the coming years. Also, a recent decision from the NSW Court of Criminal Appeal demonstrates the NSW Environment Protection Authority's (**EPA**) willingness to ensure that the waste industry is appropriately deterred from unlawful conduct.

A snapshot of the key 2022 events impacting the waste industry is below:

Draft Climate Change Policy and Action Plan

In 2021, in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, the Land and Environment Court (**LEC**) found that the NSW EPA had a statutory duty to develop guidelines and policies to protect the environment from climate change. In response, the NSW EPA has released a draft Climate Change Policy and Climate Change Action Plan for 2022-2025 for consultation.

There are three key pillars that guide the draft policy and plan:

- **Inform and plan**.
- **Mitigate**.
- **Adapt**.

If implemented, the plan will see the introduction of new requirements for licensees as part of the first key pillar, such as requiring licensees to actively consider how to reduce emissions and their exposure to climate risks. Consideration will also need to be given to updating Pollution Incident Response Management Plans having regard to how a changing climate may increase the risk of pollution.

Additionally, new emission reduction targets will be developed and new emissions limits will be progressively introduced as part of the second key pillar. The plan has identified the waste sector as a potential sector for emissions regulation. This means that waste facilities could be faced with new licence conditions requiring them to monitor and report emissions and carryout pollution reduction studies. New emissions limits for licensees could come in the form of emission intensity limits (CO2-equivalent emissions per tonne of production) or load limits (total CO2-equivalent emissions per year).

As part of the third key pillar, the EPA will commission research into the impacts of climate change on waste transportation, storage, processing, disposal and legacy sites, as well as prepare climate change adaptation guides for key industry sectors they licence. The findings will help them develop contingency waste capacity and improve climate preparedness as the waste sector builds resilience to climate change.

New decision from the Court of Criminal Appeal in Grafil

There has been a recent development in the longstanding Grafil series of cases.

To briefly recap, in 2020, Grafil Pty Ltd (**Grafil**) and its director were found guilty of using land as a waste facility without an environment protection licence. When imposing a sentence, the LEC in *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie (No. 4)* [2021] NSWLEC 123 did not impose any penalty on Grafil in addition to its liability for legal and investigation costs.

The EPA appealed that decision to the NSW Court of Criminal Appeal (**CCA**) and were successful. In *Environment Protection Authority v Grafil Pty Limited Environment Protection Authority v Mackenzie* [2022] NSWCCA 268, the CCA imposed a $100,000 fine on Grafil.

The first ground of appeal was that the LEC erred in finding that there was no failure of moral culpability. In other words, the LEC did not find that the respondents were 'blameworthy'. However, the CCA found that using land as a waste facility without a licence and depositing between 24,000 and 44,000 tonnes of waste is a substantial offence and the respondents were 'blameworthy'.

The EPA's second ground was that the LEC erred in finding that general deterrence had no role to play in determining sentence, and that neither respondent was an appropriate vehicle for general deterrence. In other words, the LEC found that penalising the respondents would not discourage other people from committing the same offence. The CCA found that general deterrence does form an important aspect of sentencing in environmental crime.

The EPA also argued that the sentence was manifestly inadequate. However, this third ground was not dealt with by the Court because re-sentencing was required as a result of the findings in grounds 1 and 2.

The next question considered by the CCA was whether it should exercise its residual discretion and decline to intervene and re-sentence the respondents. The CCA decided that there was no reason why it should not intervene particularly where the sentence was so manifestly inadequate and that absent intervention, there was a risk that public confidence in the criminal justice system would be undermined. Consequently, on re-sentencing the CCA imposed a $100,000 fine.

Grounds 1 and 2 were successfully argued against the director of Grafil. However, on re-sentencing, the CCA reached the same conclusion as the LEC that the charge against the director should be dismissed pursuant to section 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

This case serves as a reminder of the serious consequences that might arise from non-compliance with legislative requirements, with the CCA disagreeing with the LEC's findings about the substantiality of the breaches made out against the defendants.

While the EPA does not regularly challenge the severity of court decisions, this case could signal an increased focus on deterrence.

What will 2023 bring for the NSW waste industry?

- The EPA is currently considering the recommendations made in the Independent Review of the Resource Recovery Framework. We expect to see the changes that will be made (if any) following that review in 2023. We have provided our high level comments on the Independent Review from a legal perspective in our recent article *Outcomes of the independent review into the NSW resource recovery framework*.
- The EPA's review of comments following public consultation on the draft Climate Change Policy and Climate Change Action Plan for 2022-2025 should be completed and the final versions of the documents potentially published.
- If not in 2023, possibly soon thereafter, new conditions may be introduced to environment protection licences relating to climate change and resulting in greater regulation of the waste sector.
- In addition, the potential introduction of a federal environmental protection agency could see changes to how new waste facilities are approved and how waste facilities operate once it is operational.
- While the policy arm of the EPA will be kept busy, we expect so too will the compliance arm of the EPA with licence holder premises being regularly inspected and inevitable regulatory action following where it is deemed appropriate.
- The EPA's 2021-2022 Annual Report publishes the number of prosecutions commenced and completed for the financial year. The numbers have remained fairly consistent with 100 prosecutions commenced and 65 completed in 2021-22 compared to 101 commenced and 66 completed in 2020-21.
- Fines and other financial penalties have also risen, totalling $2,339,602 in 2021-2022, which is up from $1,612,028 in 2020-2021.
- The EPA's recent success in the Court of Criminal Appeal challenging the severity of sentence issued by the NSW Land and Environment Court also demonstrates the regulatory authority's willingness to invest resources in ensuring the waste industry is deterred from unlawful conduct, which we expect will be carried on into the new year.

COLIN BIGGERS & PAISLEY LAWYERS

The year in review: A look at NSW planning and environment law in 2022

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This article is a review of New South Wales planning and environment law in 2022 and also a summary of expectations for 2023

December 2022

In brief

In this article, we look at a number of court decisions involving the merit review of planning decisions of consent authorities, criminal enforcement decisions, compulsory acquisitions and an Aboriginal land rights claim. The year also saw a Full Federal Court decision, *Minister for the Environment v Sharma* [2022] FCAFC 35, involving second wave climate change litigation. We also outline some of the practical developments during 2022.

Part 1: Merit appeal issues

1. Modification applications

There has been a continuation of case law on the modification power.

In *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council* [2022] NSWLEC 64, the applicant appealed the deemed refusal of its modification application made pursuant to section 4.56 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) in which it sought to modify an existing consent to permit biomass to be utilised as a fuel source in an existing power plant. The key question before the Land and Environment Court (**LEC**) was whether the proposed development was substantially the same as the development for which the consent was originally granted.

In dismissing the appeal, the Court reiterated well known case law setting out the relevant test set by the statutory language. The Court explained that the exercise of determining whether proposed development is substantially the same as the development for which the consent was originally granted:

> *cannot be undertaken in a numeric "tick a box" approach. The significance of a particular feature or set of features may alone or in combination be so significant that the alteration is such that an essential or material component of the development is so altered that it can no longer be said to be substantially the same development – this determination will be a matter of fact and degree depending upon the facts and circumstances in each particular case.*

The test was also considered by the New South Wales Court of Appeal (**CoA**) in *Feldkirchen Pty Ltd v Development Implementation Pty Ltd* [2022] NSWCA 227, where the CoA considered whether Wingecarribee Shire Council (as the consent authority) failed to consider the reasons given by that Council for the grant of an original consent when determining an application to modify that consent as required by section 4.55(3) of the EP&A Act. The CoA found that the Council did not give any reasons when it originally granted the consent. Therefore, the Council could not be in breach of the requirement in section 4.55(3) to take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

The CoA also considered whether the Council failed to form the requisite opinion of satisfaction that the development to which the consent as modified relates is substantially the same development as the development for which consent was granted: section 4.55(2)(a) of the EP&A Act. The Court found that while "*explicit reference was not made in the modification assessment report considered by the Council or in the debate at the Council meeting to the terms of the precondition in section 4.55(2)(a) of the EP&A Act, there were other indicators that the Council did address the question posed by the precondition in section 4.55(2)(a)*". The Court noted that power to modify a consent and the precondition to the exercise of that power (ie the substantially the same development test) "*are long established and commonly invoked by consent authorities*" and that "***an inference would not readily be drawn that the Council was not aware either of the precondition*** *in section 4.55(2)(a) or the need to fulfill the precondition before the Council could exercise the power under section 4.55(2) to approve the application to modify the consent.*" (emphasis added) The Court concluded that "*so long as the Council did address the substance of the question raised by section 4.55(2)(a), it did not have to refer to the precise terms of section 4.55(2)(a) or the ways in which courts have suggested that the question raised by section 4.55(2)(a) might be addressed.*"

2. Development standards

There was also a continuation of the case law on development standards in 2022.

In *Canterbury Bankstown Council v Dib* [2022] NSWLEC 79, Canterbury Bankstown Council unsuccessfully appealed under section 56A(1) of the *Land and Environment Court Act 1979* (NSW) against the decision of Commissioner Pullinger in Class 1 proceedings. Commissioner Pullinger upheld Dib's appeal to construct a 20-room boarding house in Punchbowl on land zoned R2 Low Density Residential under the *Bankstown Local Environmental Plan 2015* (**BLEP**). The proposed development was also regulated by clause 30AA of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (NSW) (**SEPP (ARH)**), which precluded a consent authority from granting consent to boarding houses in the R2 zone unless satisfied that it had no more than 12 rooms.

There were two grounds of appeal. Firstly, that Commissioner Pullinger had erred in finding that clause 30AA of the SEPP (ARH) was a development standard for the purposes of section 1.4(1) of the EP&A Act (where the term is defined), and secondly, that Commissioner Pullinger had erred by granting consent to the development application without having formed the opinion of satisfaction specified in clause 30AA that a boarding house must not have more than 12-rooms.

The Chief Judge of the LEC delivered the judgment and rejected the first ground of appeal. The Court found that clause 30AA was a 'development standard'. This was because it regulated the circumstances under which development consent to boarding houses could be granted by specifying a requirement that the number of boarding rooms cannot be more than 1 for the purposes of section 1.4(1) of the EP&A Act. The Court noted that whilst the number of boarding rooms was not expressly identified in the definition of 'development standards', in paragraphs (a) to (n) under section 1.4(1), it would nevertheless influence the size or density of the boarding house so as to fall indirectly within paragraph (c).

With respect to the second ground of appeal, the Court accepted Council's submission that clause 30AA established a precondition which must be established before the Council's power to grant development consent was enlivened, being that Council must first be satisfied that the boarding house does not have more than 12 boarding rooms. However, the Court found that Council's exercise of power under cl 4.6(2) of the BLEP overcame both the development standard and the jurisdictional fact which were one and the same, causing this ground of appeal to ultimately fail.

The upshot of the decision with respect to development standards is that one needs to simply look at the definition of development standard and its two elements:

- whether the provision is in relation to the carrying out of development, and
- whether the provision by or under which requirements are specified or standards are fixed in respect of any aspect of that development.

In this case both elements were satisfied. One needs to look beyond any omission of the phrase development standards in the heading or the clause itself and look to the substance as to whether the provision meets the definition of 'development standards'.

3. Environment principles and intergenerational equity

***Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99 (*Stannards Marine*)**

The importance of preserving natural heritage landscapes for existing and future generations was highlighted in the Chief Judge of the LEC's decision in *Stannards Marine*, which provides an extensive discussion about the scenic values and heritage of Sydney Harbour.

The LEC explored the principle of intergenerational equity when considering whether development consent should be approved to use a relocatable shed to perform repairs and maintenance on smaller marine vessels situated in the water lease area of Berrys Bay in Sydney Harbour (water lease area); and to install and use a floating dry dock to perform repairs and maintenance on larger marine vessels in the water lease area.

The Court acknowledged that the principle of intergenerational equity is based on three factors, namely requiring each generation to firstly conserve the diversity of resources to ensure that options are available to future generations and secondly, to maintain the quality of the earth so that it is not passed on in a worse condition and thirdly, to give its members equitable rights of access to resources, access of which should be conserved for future generations.

An issue the Court had to address was the fact that the floating dry dock needed to be slewed out of its mooring position closer to the wharf and jetties of the boatyard to load or unload a boat which required to be repaired and maintained.

The Court found that the mooring and use of the floating dry dock in a "*confined, natural waterway of Berrys Bay*" could not protect or maintain the water lease area as an "*outstanding natural asset*" and "*would alienate an area of the public resource of Sydney Harbour for private good, instead of protecting it for public good*". Thus, it would be inconsistent with the views of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (NSW) and *Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005* (NSW), which are "*statutory recognitions of the principle of intergenerational equity*".

Part 2: Enforcement of planning and environmental law

1. Enforceable undertakings

Enforceable undertakings were introduced in the reforms to the EP&A Act in 2017, and have not yet gained any great momentum given the enforcement activity carried out in NSW.

During 2022, only four enforceable undertakings (**EU**) were published on the NSW Department of Planning and Environment's (**DPE**) EU public register. This is, nevertheless, an increase from the previous four years where only one EU was submitted for each respective year.

The EUs published in 2022 included offences relating to damage caused by unauthorised clearing of native vegetation, by means of:

- Machinery and burning:
  - The landholder of a property in Moree Plains Local Government Area (**LGA**) undertook to enter into a Conservation Agreement comprising 636 hectares of land, along with a financial contribution of $1,010,000 to the DPE to benefit the environment and the community.
  - The landholder of a property in Bogan LGA undertook to enter into a Conservation Agreement comprising 1000 hectares of land, along with a financial contribution of $500,000 to the DPE to benefit the environment and the community.
- Cleaning up after bush fires:
  - The landholder of a property in Eurobodalla LGA undertook to remediate a portion of the land that was cleared.
- Picking plants that were of a threatened species:
  - The landholder of a property in the City of Penrith LGA undertook to remedy damage caused to individuals and the habitat of three threatened plant species and endangered ecological community. The EU included payment of $100,000 to contribute to projects to benefit the three species of threatened plants that were damaged.

Our experience with EUs has been mixed. Some authorities more readily accept them being used. Others appear to have rigid policy positions against their utilisation, and approach EUs cautiously. However, as the Department of Planning notes on its website they are "*a faster and cheaper regulatory option than prosecuting the original breach of the consent …*".

2. EPA prosecutions

Environment Protection Authority v Cleanaway Equipment Services Pty Ltd [2022] NSWLEC 40

This case demonstrates how prosecutions are used by the NSW Environmental Protection Authority's (**EPA**) to deter incidents that can cause environmental harm.

The case involved two water pollution offences and one offence for failing to notify the EPA of a pollution incident.

On 14 May 2020, the solvent Vivasol 2046 leaked from a pipe into the stormwater system located at a storage facility in Queanbeyan NSW (**the premises**) and flowed into the Molonglo River. The premises was owned by Cleanaway Equipment Services Pty Ltd (**Cleanaway**). It took Cleanaway more than four hours to report the incident to the EPA.

On 15 May 2020, water containing Vivasol 2046 was pumped from the Molonglo River into a truck and the polluted water was brought back to the premises for disposal. The polluted water was poured into a containment pit on the premises. Some of the contaminated water escaped from the containment pit into the stormwater system, which connects to the stormwater outlet on the Molonglo River.

In its consideration, the Court recognised that water pollution is an offence under section 120 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), potentially attracting fines up to $1 million for corporations. Under section 152 of the POEO Act, the maximum penalty for failing to notify the EPA of a pollution incident is $2 million.

The Court considered that both incidents caused significant "*environmental harm*" to the aquatic habitat downstream of the premises by affecting the chemical composition of the waters in the stormwater system and resulting in a decline in certain species.

Accordingly, the Court imposed fines of $280,000 and $150,000 against Cleanaway for both incidents and $187,500 for failure to notify the incidents to the EPA. Cleanaway was also ordered to pay the EPA's legal and investigation costs in the amount of $305,778.

3. Civil enforcement and jurisdictional facts

In *Ross v Lane* [2022] NSWCA 235, the CoA held that where the application of a provision within an environmental planning instrument to a proposed development depends on the formation of an opinion or state of satisfaction, it is the consent authority, rather than the Court which conclusively determines whether the provision is engaged. Such decisions by consent authorities are challengeable only via judicial review, and not merits review.

In the case, the Respondent originally obtained development consent from the Council of the City of Sydney for modifications and extensions to his apartment on the top floor of a building, including the construction of an additional storey. However, the construction of this additional storey substantially affected the Appellant's views, as he resided in the neighbouring apartment. The Appellant then applied to the LEC for a declaration that the development consent was invalid, contending that the development application was governed by the *State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development* (**SEPP 65**) and that Council failed to refer the development application to a design review panel for assessment before granting consent, contrary to clause 28(1) of SEPP 65. In making the original decision to approve of the development application, the Council found that SEPP 65 was not applicable, since it was not satisfied under clause 4(1)(a)(ii) that the proposed development consisted of a "*substantial redevelopment*" or "*substantial refurbishment of an existing building*".

At first instance in the LEC, Moore J dismissed the appeal by finding that the proposed development did not constitute either a substantial redevelopment nor a substantial refurbishment of an existing building.

There were two grounds of appeal. Firstly, whether a determination that clause 4(1)(a)(ii) of SEPP 65 was satisfied was a matter for the Court or the consent authority to authoritatively determine. Secondly, if the determination of whether clause 4(1)(a)(ii) was satisfied was for the Court to authoritatively determine, whether the primary judge had erred by concluding that the proposed development was not a 'substantial redevelopment' or 'refurbishment' of an existing building.

The CoA dismissed the appeal. In relation to the first ground, Basten AJA (with Macfarlan JA agreeing), found that as a matter of construing the statutory language of section 4.15 of the EP&A Act, the application of environmental planning instruments such as SEPP 65 in a particular case where development was permissible with consent was a matter of consideration by the consent authority in the first instance, subject to judicial review and did not require determination by the Court. His Honour emphasised that there was nothing in the language of the EP&A Act which stated or necessarily implied that the application of a particular environmental planning instrument was a matter which could only be determined authoritatively by the Court. Instead, the appropriate implication to be drawn from the Act is that the consent authority is both empowered and required to determine which matters are relevant, and how they are engaged, in relation to a particular development.

Basten AJA noted that since the present case concerned development which may be carried out with consent, unlike in *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 which concerned prohibited developments, the provision in question could be more readily described as part of the process of determination by the Council of the development application, rather than a determination that was "*extrinsic or preliminary or ancillary to the exercise of the power to grant consent*". Furthermore, the legislature would ordinarily intend for a decision-maker to determine issues requiring **evaluative judgment** so that any error would be an error within jurisdiction.

Thus, in circumstances where it may be difficult to characterise matters such as under section 4.15 of the EP&A Act, which includes some criteria which are precisely defined and other criteria involving matters of degree, it is unlikely that the legislature intended some to be jurisdictional facts, but not others. Requiring some matters to only be authoritatively decided by a court would also generate inconvenience for applicants, being another reason which militated against it being a jurisdictional criterion.

Beech-Jones JA in his minority judgment provided interesting reasoning contrasting with the above, but in the end reached the same result by holding that the proposed development did not consist of a substantial redevelopment or substantial refurbishment of an existing building.

Part 3: Climate change developments

Concerns over climate change continue to drive legal challenges and policy reform that has implications for NSW planning and environmental law. In 2022 there have been some interesting developments in the NSW and Federal jurisdictions. We provide an example of each below.

1. NSW Environment Protection Agency's 'Draft Climate Change Policy and Action Plan'

In 2021, the LEC ordered the EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change in the case of *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.

On 8 September 2022, the EPA released its 'Draft Climate Change Policy and Action Plan' in accordance with the Court's orders. Of particular interest are the following proposed actions:

- **Action C4**: Develop and implement programs to reduce greenhouse gas emissions from the waste sector, including our emissions target of net zero emissions from organic waste from landfills by 2030.
- **Action C5**: Support the whole-of-government approach to streamlining project approvals in renewable energy zones.
- **Action C6**: Develop and implement tailored behavioural change programs to encourage and enable greenhouse gas emission reduction.

The EPA is aiming to adopt the policy and action plan by the end of this year. How the EPA implements this instrument in practice will no doubt be developed in 2023.

2. *Minister for the Environment v Sharma* [2022] FCAFC 35

In *Sharma v Minister for the Environment* [2021] FCA 560 (**2021 Decision**), Bromberg J found there was a novel duty of care to protect children from personal injury resulting from the emission of greenhouse gases (**GHG**) contributing to climate change when determining whether to grant approval of a controlled action under sections 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

The Minister appealed in *Minister for the Environment v Sharma* [2022] FCAFC 35, and the Full Federal Court overturned the 2021 Decision and held unanimously that there was no such duty of care. Despite the unanimous decision, each of the three judges delivered separate judgments with different reasoning. However, the Court also dismissed the Minister's challenge to the factual findings of the primary judge, on the basis that the evidence on climate impacts was not challenged in the Court below and the findings were reasonably open on that evidence.

Part 4: Compulsory acquisitions and Class 3 of the Land and Environment Court

The large number of infrastructure projects in NSW have contributed to new compulsory acquisition issues. In addition, the Class 3 jurisdiction in the LEC has seen some novel issues litigated which we also explore below.

1. General statistics

FY22 saw a large increase in the total number of Valuer-General determinations on compensation (excluding substratum). The total number of determinations in FY22 was 247, up from 88 in FY21 and 128 in FY20 (see the Valuer-General's Annual Report). The largest contributor was the Sydney Metro West project, with 94 determinations.

Based on the data reported in the Valuer-General's Annual Report, work commenced in FY22 on 749 matters following the issue of a proposed acquisition notice (**PAN**). This means that 33% of matters proceeded to determination. In FY21, this figure was 568 (meaning that 15.5% proceeded to determination). The trend in this data is that a lower percentage of matters in the last year are being resolved by agreement with the acquiring authority.

The statistics also record the Valuer-General is in many cases not meeting the 45 day statutory timeframe in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) for determinations. In FY22, the average determination time was 189 days. This is an increase to FY21 (81 days) and FY20 (171 days).

With a new Valuer-General to take over the office, it will be interesting to see whether the delays in determinations will be brought back into conformity with the timeframes set out in the Just Terms Act.

We expect 2023 will see the implications from the recent CoA decisions (*Roads and Maritime Services v United Petroleum Pty Ltd* (2019) 99 NSWLR 279, *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* [2017] NSWCA 73, *Eureka* and *Olde English Tiles*) filtering through into new and unique circumstances thrown up by the various resumptions being carried out by local Councils, utility providers such as Sydney Water, and the NSW Government. Whilst many of the contentious acquisitions have involved urban lands, or land on the urban fringe, 2023 will see a large number of rural acquisitions for infrastructure projects such as the HumeLink, which involves 360 km of proposed new transmission lines connecting Wagga Wagga, Bannaby and Maragle, dissecting large tracts of agricultural land.

2. Cultural loss: Native title

Last year, we wrote about the Valuer-General's draft paper titled: '*Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition*'. This document was finalised in January 2022 and can be accessed here. Four preliminary determinations were made in FY22 for cultural loss. These are the first of their kind in NSW.

3. The Parliamentary Inquiry

In August 2022, the Legislative Council's Portfolio Committee handed down its Report on the acquisition of land in relation to major transport projects. The Committee was comprised of members of all the major political parties.

Three findings emerged from the Report, all of which were critical of the NSW Government.

Ten recommendations were made by the Committee. The NSW Government provided a response in November 2022 supporting these recommendations outright or in principle. How that acceptance bears out in practice without amendments to the legislation remains to be seen.

4. Acquisition of leasehold interests and business claims

2022 saw two important cases handed down by the CoA in the area of leasehold interests and business claims, namely, *Transport for NSW v Eureka Operations Pty Ltd* [2022] NSWCA 56 (***Eureka***) and *Olde English Tiles Australia Pty Ltd v Transport for New South Wales* [2022] NSWCA 108 (***Olde English Tiles***).

These cases continue the trend practitioners have observed over the last five years, which has seen a more restrictive assessment of claims involving businesses with leases. The most important takeaway is that based on *Olde English Tiles*, no market value means no compensable interest. The dispossessed company has sought special leave from the High Court, which will be an interesting decision to watch in 2023. We will be writing about those two cases in more detail early in the new year.

5. Substratum acquisitions

Another important judgment which demonstrates mechanisms for the assessment of compensation over substratum interests is the decision of Moore J in *Expandamesh Pty Ltd v Sydney Metro (No. 3)* [2022] NSWLEC 137.

Expandamesh Pty Ltd (**the Company**) was the owner of property at Waterloo. The substratum of the site was acquired by Sydney Metro for railway tunnels associated with the Sydney Metro City and Southwest Project in October 2017. The Valuer-General had determined compensation to be $nil.

The Company sought compensation on two bases. The first was the value of the substratum that had been taken from the company in the amount of $20,000. The second was the reduction in value of the future development of the site, because of the additional restrictions that would apply given the railway tunnels below (some 19 metres below). The company contended that the redevelopment of the site would incur additional development costs, and the value of that impact was $405,000. The total claim for compensation was $425,000.

Similar to section 62 of the Just Terms Act, clause 2 Schedule 6B of the *Transport Administration Act 1988* (NSW) sets out certain restrictions on potential claims for compensation in a substratum acquisition. In essence, that provision limits the award of compensation to situations where the surface of the overlying soil is disturbed, or the support of that surface is destroyed or injuriously affected.

The issues for determination by the Court were:

- Whether the construction of the railway tunnels had impacted the site in a fashion that satisfied clause 2 Schedule 6B of the *Transport Administration Act 1988* (NSW)?
- If so, what compensation should be paid to the Company?

In relation to the first issue, the Court found that on the balance of probabilities, there had been a disturbance of the surface of the site of at least 1.5 millimetres, and that this was sufficient to trigger the ability of the Company to make a claim for compensation.

The resolution of the second issue was more complicated. Ultimately, the Court only awarded the Company compensation for market value of the substratum in the amount of $20,000, plus the Company's legal costs pursuant to section 59(1)(a) of the Just Terms Act.

The Court's findings on the town planning evidence created difficulties for the Company's claim. The Court found that that the increase in development potential for the site was to be regarded as arising solely as a consequence of the public purpose. This finding meant that the Court needed to address the requirements of section 55(f) of the Just Terms Act and consider the valuation question of whether or not there had been an increase in the value of the residue land as a consequence of the public purpose.

Whilst the Court found that the hypothetical prudent purchaser would reduce the maximum amount offered to acquire the site by $140,000 to allow for the required future geotechnical monitoring (note that this lower than the $405,000 claimed by the Company) based on Sydney Metro's evidence, the Court found that a 10% premium would be paid by the hypothetical purchaser to reflect the value of the future development potential for the site.

The consequence of this was that the 10% value uplift associated with the public purpose (in the order of $1 million) exceeded the determined allowance for the future costs associated with the required geotechnical monitoring to permit redevelopment of the site.

The Expandamesh decision demonstrates a rare example of compensation being awarded for substratum acquisitions. To do this, evidence is required to show that statutory limitations have been overcome. The threshold issue is to demonstrate that the surface of the overlying soil is disturbed, or the support of that surface is destroyed or injuriously affected.

The decision also shows the difficulties landowners can face when affected by a partial acquisition, in circumstances where the residue land has experienced town planning changes associated with the infrastructure project behind the acquisition.

6. Joinder applications in Class 3 of the LEC

Tahmoor Coal Pty Ltd v Visser [2022] NSWCA 35 (*Tahmoor Coal*)

Third party motions to be joined to proceedings have been frequent this year in the LEC, but one of the more unusual cases involved a joinder application by Tahmoor Coal. The company sought to join Class 3 proceedings regarding a claim arising from subsidence caused by Tahmoor Coal's coal mining operations near Picton. Whilst DCS were named as the respondent, Tahmoor Coal were not.

The question before the Court was whether the primary judge erred in not joining the Appellant as party.

The grounds for appeal were firstly whether leave to appeal should be granted given the appeal related to an interlocutory decision in the LEC not to join the company. The second ground was whether the primary judged erred in not joining the Appellant as a party.

On the first ground, the Court found leave should be granted as the person who would be required to pay compensation was not a party to the proceeding and could not be considered bound by the judgment. The Court found this was a substantial injustice.

In relation to the second ground, the Court relied upon rules 6.24(1) and 6.27 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) regarding joinder. It further applied the settled principle in *Ross v Lane Cove Council* (2014) 86 NSWLR 34 that:

> *a person who is directly affected by the orders sought in a proceeding is a necessary party, and that the obligation to join that person rests upon the plaintiff or applicant or person applying for those orders.*

The Court held that "*the nature of the applicant's interest in this case is not equivocal or uncertain*" and the "*judgment of the Court can create a new legal liability on the part of the company*", ultimately finding that the Company should have been joined to the proceedings.

7. Aboriginal Land Claims

In October and November 2022, there were two claims under the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) heard in the LEC: *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act – Waverton Bowling Club* [2022] NSWLEC 130; and *Worimi Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016* [2022] NSWLEC 126.

The first appeal succeeded, and the second was refused.

We deal below with the appeal that was upheld.

New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act – Waverton Bowling Club [2022] NSWLEC 130 (*NSW Aboriginal Land Council*)

In *NSW Aboriginal Land Council*, the LEC ordered for the land owned by the former Waverton Bowling Club (**the Land**) to be transferred to the Metropolitan Local Aboriginal Land Council in early 2023.

During 2013 to 2019, North Sydney Club (**the Club**) had a licence to operate a bowling club on the Land. However, this licence was revoked upon the Club's liquidation.

During 2019 and 2020, North Sydney Council had three licences to access and perform site risk assessments and reviews of the Waverton Bowling Club's Land.

On 30 April 2020 and 6 November 2020, the New South Wales Aboriginal Land Council lodged two Aboriginal Land Claims for the Land (**the Claims**). The Claims were lodged under the ALR Act.

The Crown Lands Minister then refused the Claims on the basis that the Land was not claimable Crown land.

Following this decision, the New South Wales Aboriginal Land Council appealed to the LEC.

An issue before the Court was whether the Land was 'claimable Crown land' within the meaning of section 36(1) of the ALR Act. It also had to decide whether the Land was "*not lawfully used or occupied*" under section 36(1)(b), or "*was not needed, nor likely to be needed, for an essential public purpose*" under section 36(1)(c).

The Minister Administering the *Crown Land Management Act 2016* (NSW) argued that section 36(1) of the ALR Act was satisfied as Council had used and occupied the Land under the licences and had performed general maintenance duties of the land. However, the Court rejected this, noting that the licences granted during 2019 and 2020 related to site investigation, and maintenance works were completed before the Claims were made.

The Minister also unsuccessfully argued that the Land was likely needed for open space and public recreation, which was an essential public purpose for the purposes of section 36(1)(c) of the ALR Act. The Court found that although the Council did intend for the Land to be used for open space, it could not be satisfied that this could occur based on the evidence which indicated that the State Government was only in the preliminary stages of considering appropriate uses for the Land.

Ultimately, the Court was not satisfied that either sections 36(1)(b) or 36(1)(c) were met, meaning that the Land was deemed claimable Crown land under section 36(1) of the ALR Act and needed to be transferred to the Metropolitan Local Aboriginal Land Council.

Expect new general legal developments in planning and environmental laws in 2023

Based on the comments of Chief Justice Preston at the 2022 LEC Anniversary Conference earlier this year, caseloads across all classes of jurisdiction in the LEC have increased, and are not expected to change. As a result, those operating under NSW planning and environmental laws can expect new legal developments of general importance during 2023 as jurisprudence expands to new and unique issues in the growth of NSW, which will need to be factored into decision making.

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